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Race, Educational Loans & Bankruptcy

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RACE, EDUCATIONAL LOANS, & BANKRUPTCY

Abbye Atkinson*

This Article reports new data from the 2007 Consumer Bankruptcy Project revealing that college graduates and specifically White graduates are less likely to file for bankruptcy than their counterparts without a college degree. Although these observations suggest that a college degree helps graduates to weather the setbacks that sometimes lead to financial hardship as measured by bankruptcy, they also indicate that a college degree may not help everyone equally. African American college graduates are equally likely to file for bankruptcy as African Americans without a college degree. Thus, a college education may not confer the same protective benefit against financial hardship for African Americans that it does for their White counterparts.

These observations draw attention to the tension between two federal policies with respect to educational attainment: educational lending policy that encourages Americans to take on debt to finance their educations and bankruptcy policy that makes discharge of educational debt practically impossible. Given preexisting wealth, educational loan borrowing, and post-graduate income data concerning African Americans, these data suggest that African Americans may experience Congress's restrictive educational loan discharge policy more acutely than Whites. Indeed, African Americans are more likely to borrow money for college, earn less after graduation, and yet are bound by the same duty to repay educational loans. Ultimately, these educational loan policies may reveal who, as a practical matter, should and who should not be going to college. More troubling is that this division seems to track socioeconomic and racial lines. Accordingly, this Article considers whether these findings should persuade Congress to reformulate its policy on the discharge of educational loans in bankruptcy or alternatively, to change the manner in which it supports educational attainment.

INTRODUCTION.....	2
I. FINDINGS.....	6
A. Research Design	7
B. Having a College Degree Is Associated with Lower Bankruptcy Filing Rates	9
C. African Americans with a College Degree Are Not Less Likely to File for Bankruptcy than African Americans Without a College Degree	11

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- II. THESE FINDINGS SUGGEST THAT CURRENT BANKRUPTCY POLICY REGARDING THE DISCHARGE OF EDUCATIONAL LOANS IS MORE BURDENSOME TO AFRICAN AMERICANS 12
 - A. *Federal Education Policy Supports Education for All Through the Appropriation of Funds for Educational Loans* 13
 - B. *Federal Bankruptcy Policy Restricts Education for All By Treating Educational Loans Exceptionally* 16
 - C. *The Rationale for the Nondischargeability of Educational Debt in Bankruptcy Is Based on a Questionable Premise* 22
 - D. *The Data Undercut the Rationale for the Nondischargeability of Educational Loans in Bankruptcy* 25
- III. WHY AFRICAN AMERICANS MAY NOT EXPERIENCE THE PROTECTIVE BENEFITS OF A COLLEGE DEGREE AS COMPARED TO WHITES 26
 - A. *African Americans Earn Less than Whites After Graduating from College* 27
 - B. *African Americans Are More Likely to Borrow Money for School* 28
 - C. *African Americans Are Less Likely to Have Family Resources to Support Educational Costs*..... 28
 - D. *African American Bankruptcy Filers Are More Likely to Be Financially Responsible for Both Legal and Other Dependents*..... 30
 - E. *African Americans Pay More for Credit* 31
- IV. THE POLICY CHANGES THAT CONGRESS MIGHT CONSIDER TO BEGIN TO HELP ALL AMERICANS REALIZE THE BENEFIT OF AN EDUCATION 33
 - A. *Congress Could Make Educational Loans Fully Dischargeable in Bankruptcy*..... 34
 - B. *Congress Could Return to the Time-Lapse Discharge Policy*..... 36
 - C. *Congress Could Define Undue Hardship in the Bankruptcy Code* 37
 - D. *Congress Could Create and/or Fund Programs That Will Make College More Affordable*..... 40
- CONCLUSION 42

INTRODUCTION

The benefits of a college diploma can be measured in several ways, including by the increased economic security that comes with higher education. This security is suggested by bankruptcy filing patterns. New data from the Consumer Bankruptcy Project reveal that as a group, college graduates are less likely to file for bankruptcy than their counterparts

without a diploma.¹ So it appears that a college education acts as an economic insurance policy of sorts, that perhaps mitigates the setbacks that sometimes lead to financial hardship as measured by bankruptcy. Bankruptcy is a reliable measure of financial hardship,² as it is often the last lifeline for an individual overwhelmed with debt.³

But these data also indicate that a college education may not confer the same protective benefit against financial hardship for African Americans

1. The 2007 Consumer Bankruptcy Project is a collaborative research project. The co-principal investigators were David Himmelstein, Melissa Jacoby, Robert Lawless, Angela Littwin, Katherine Porter, John Pottow, Deborah Thorne, Elizabeth Warren, and Steffie Woolhandler. I thank them for access to the extraordinary database they built. The 2007 Consumer Bankruptcy Project received funding from the Robert Wood Johnson Foundation, The American Association of Retired Persons, the Federal Deposit Insurance Corporation, the University of Michigan and the Harvard Law School. Any opinions expressed herein are the views of the author and not those of the funders. For a detailed description of the 2007 Consumer Bankruptcy Project, and a complete set of acknowledgements for assistance with the compilation of the database, see Robert Lawless et al., *Did Bankruptcy Reform Fail?*, 82 AM. BANKR. L.J. 349 (2008). See also *infra*, notes 21–26 and the accompanying text.

2. See Katherine Porter, *The Debt Dilemma*, 106 MICH. L. REV. 1167, 1175 (2008) (“[B]ankruptcy is the best available public, tangible way to quantify financial distress.”). But see Ronald Mann & Katherine Porter, *Saving Up For Bankruptcy*, 98 GEO. L. REV. 289, 294–96 (2010) (questioning whether those who choose to file for bankruptcy truly represent the population of people who are experiencing “financial distress.”).

3. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 8 (1989) (stating that “consumer bankruptcy is an economic and social safety valve that permits debtors to function in an economic system even after their financial collapse.”). While bankruptcy is not necessarily the default plan of action for all Americans who are experiencing economic hard times, bankruptcy filings have steadily increased over time suggesting that more and more Americans may perceive bankruptcy as an appropriate option in the face of economic hardship. *Id.* at 7 (“Being in financial trouble does not always lead to bankruptcy.”); Bankruptcy filings increased six fold between 1980 and 2004 per the Administrative Office of the U.S. Courts. See Elizabeth Warren, *A New Conversation About the Middle Class*, 44 HARV. J. ON LEGIS. 119, n.4 (2007). Although some might characterize the increase in bankruptcy filings over time as more a function of opportunistic behavior than financial ruin, it is important to note that it has been well documented that the majority of bankruptcy filers do so in the wake of high levels of debt, limited income, and the onset of dire circumstances. See Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 216–17 (2006). (The authors cite the erroneous conventional wisdom espoused by judges, Congress, and credit card issuers prior to the passage of the sweeping and restrictive 2005 Bankruptcy Amendments, that more Americans were filing for bankruptcy opportunistically as opposed to doing so out of legitimate financial need.); see *AS WE FORGIVE OUR DEBTORS*, at 63 (describing the typical debtor in bankruptcy as being in “deep financial trouble.”); see also TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS* (2000) (describing medical problems, family dissolution, and “income interruption” as the three primary causes of consumer bankruptcy filings).

that it does for their White counterparts.⁴ Unlike White college graduates, who are underrepresented in bankruptcy relative to their proportion in the general population, African American college graduates are equally likely to file for bankruptcy as African Americans without a college diploma.⁵

The data highlight the tension between two federal policies with respect to educational attainment: educational lending policy that encourages Americans to take on debt to finance an education and bankruptcy policy that makes discharge of such loans practically impossible.⁶ Some members of Congress have trumpeted the benefits of education, legitimizing the appropriation of federal funds for educational loans.⁷ Others have justified a restrictive and exceptional⁸ bankruptcy policy regarding educational loans by concluding that the benefits that accompany an education are significant enough to impose an almost absolute duty to repay educational loans even in bankruptcy.⁹ Yet, despite the claim that a college education will improve financial stability by adding to earning power and job security,¹⁰ the data reported here suggest that education

4. See Rafael I. Pardo & Michelle Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005). Pardo and Lacey conducted an empirical analysis of 261 undue hardship cases, and they reported evidence that suggests that “postsecondary education has not translated into financial success for all.” *Id.* at 451–61.

5. See *infra* Part I and accompanying footnotes.

6. See THE FRAGILE MIDDLE CLASS, *supra* note 3, at 251–52. For more than fifty years, Congress has encouraged all Americans to invest in their own human capital through higher education. Although it has never taken the step of making college free, Congress through the years has supported higher education, largely through expanded support for educational loans. The National Defense Act of 1958, the Higher Education Act of 1965, and the William D. Ford Direct Loan Program are examples of how Congress has supported the attainment of higher education through the appropriation of federal funds for educational loans. This access to loans for college is pivotal for Americans who lack the means to pay for school outright.

7. See Statement of Sen. Biden, *infra* note 55.

8. See John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 250 (2007). Professor Pottow describes the treatment of educational loans in bankruptcy as “exceptional” because unlike other unsecured loans, they are functionally non-dischargeable in bankruptcy.

9. “The purpose . . . is to keep our student loan programs intact . . . Some people have said, ‘Why should student loans be treated differently than any other loans?’ Well, I would suggest that when one gets a business loan, one has collateral or something to justify that loan. But, on student loans the only thing one can put up for collateral is the ability he will have to make a better living after he has gotten that education.” 124 CONG. REC. 1791–92 (1978). Representative Ertel introduced the amendment to make educational loans nondischargeable. See Robert C. Cloud, *When Does Repaying a Student Loan Constitute an Undue Hardship*, 185 ED. LAW REP. 783 (2004); see also Pottow, *supra* note 8, at 253.

10. According to College Board, college graduates earn more money than high school graduates, are less likely to be unemployed, and are less likely to live in poverty.

does not help everyone equally.¹¹ In fact, these data suggest that African Americans may experience Congress's restrictive educational loan discharge policy more acutely than Whites because African Americans are more likely to borrow money for college, do not experience the same benefits of the education, and yet are bound by the same duty to repay educational loans.

In addition, perhaps these findings have something to say about the current regime of education finance. Indeed, in coming to a national policy regarding the support of education, Congress might have decided to fund education directly instead of indirectly through loans. Instead, Congress has largely placed the burden and risk of paying for college firmly on the shoulders of the student and the student's family by choosing to support education primarily through the appropriation of funding for educational loans.¹² While the availability of this funding has made education more accessible, it has also increased the personal risk involved by encouraging the acquisition of educational loan debt.¹³ Congress's particular willingness to facilitate higher education borrowing through the continuous appropriation of federal funds and resources for prospective students has resulted in more Americans pursuing post-secondary education, and it has meant a steep increase in student debt.¹⁴ Ultimately, these

See SUSAN BAUM & JENNIFER MA, COLLEGE BOARD, EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY—2007, 8 (2007), available at http://www.collegeboard.com/prod_downloads/about/news_info/trends/ed_pays_2007.pdf.

11. See Elizabeth Warren, *The Economics of Race: When Making it to the Middle is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1778–79 (2004); see also A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 956 (2006) (“BAPCPA’s restriction on the types of debts that can be discharged is also likely to have a larger, negative effect on minority debtors. The racial income and wealth gaps cause minorities to incur significantly higher student loan debt.”).

12. This choice reflects the perception of education as a private benefit, whose attendant burden should be borne solely by the beneficiary, namely the student and her family. This as opposed to a vision of education as a public good that justifies direct public support because it helps to reinforce democratic values such as equal opportunity. See Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 128–30 (2003).

13. See Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 74 J. OF COLL. & UNIV. L. 79, 101 (2007) (“Student loans can have both positive and negative consequences. The most obvious positive consequence is that federal loans have enabled millions of Americans to complete a college or university education, practice their chosen profession, rear their families, and enjoy a quality of life that would have been impossible without an education. On the other hand, there are negative consequences related to heavy student loan debt. Students with excessive debt cannot pay for necessary living expenses or save a reasonable amount of monthly income for unforeseen emergencies.”).

14. See Cloud, *supra* note 9, at 789, (“Student indebtedness quadrupled from 1990 to 2000. . . . Approximately one in twelve Americans now owes money on a federal student loan.”).

educational loan policies may reveal a judgment, however inadvertent, about who, as a practical matter, should and who should not be going to college. More troubling is that this judgment seems to track racial divisions. Although the findings may be explained as an economic matter as opposed to as a racial matter, focusing exclusively on the economic nature of the findings is perhaps somewhat problematic. Doing so obscures the reality that the data tell a story about how relatively poorly African Americans continue to do economically, gains in educational attainment notwithstanding.

Accordingly, this Article considers whether these findings should persuade Congress to consider reformulating its policy on the discharge of educational loans in bankruptcy or alternatively, to consider changing the manner in which it supports educational attainment. This Article proceeds in four parts. Part I presents the findings from the 2007 Consumer Bankruptcy Project and the 2007 Census Current Population Survey which show that African Americans with a college diploma are just as likely to file for bankruptcy as African Americans without a college diploma. By contrast, Whites with a college diploma are less likely to file for bankruptcy than Whites without a college diploma. Part II considers what these findings suggest about federal educational loan discharge policy and its particular impact on African Americans. Part III explores reasons why African Americans may not experience the protective benefits of a college degree as compared to their White counterparts, and Part IV concludes with suggestions for addressing the apparent disparate impact of federal educational loan discharge policy.

I. FINDINGS

In this part, I describe the samples from which the data in this Article are derived, and I present new data suggesting two aspects of educational attainment and bankruptcy. First, as a general matter, having a college degree is associated with a lower bankruptcy filing rate.¹⁵ Second, for African Americans specifically, having a college degree does not seem to be associated with a lower filing rate.¹⁶ I suggest that these observations

15. See *infra* Table 1.

16. In this Article I focus on the differences between African Americans and Whites although the CBP includes data for Asian American and Hispanic debtors as well. I do this because African Americans and Whites represent the majority of debtors in bankruptcy. By making this choice, it is not my intention to ignore the circumstances of debtors of other races and ethnicities. On the contrary, I believe that the negative impact of the nondischargeability of educational loans in bankruptcy may be felt by individuals of all races, ethnicities, and national origins who face the same or similar challenges vis-à-vis inequality in society as do African Americans as a group. It might very well be that African Americans in this context are the “miner’s canary” in terms of federal educational lending and loan discharge policy. See generally LANI GUINIER & GERALD TORRES, *THE*

raise concerns about congressional bankruptcy policy regarding the discharge of student loans vis-à-vis congressional educational lending policy.

Congress supports educational attainment primarily by appropriating funds for educational loans. Taking on educational loans often means taking on greater risk and financial vulnerability, but there is likely no attendant safety net¹⁷ in bankruptcy because educational loans are practically nondischargeable.¹⁸ Educational loans are treated this way in bankruptcy because Congress believes that making them dischargeable would jeopardize the integrity and sustainability of the educational loan program.¹⁹ Moreover, Congress believes that the duty to repay educational loans is justified by the financial benefits that education brings.²⁰ However, given these new data suggesting that not all groups experience the same prophylactic benefits of a college education, how might federal educational loan discharge policy reflect the fact that a one-size-fits-all approach may not work?

A. Research Design

In this Article, I compare education data on debtors sampled in the 2007 Consumer Bankruptcy Project (CBP)²¹ with similar data on the general population taken from the 2007 Census Current Population Survey Educational Attainment tables. Using both datasets, I calculated the percentage of adults generally who earned a bachelor's degree,²² and I

MINER'S CANARY (2002). That is to say that African Americans' experiences here may help to reveal something important about how education finance and bankruptcy policy affect a larger, and perhaps less readily measurable, swath of the American public. See Guinier, *supra* note 12. In the context of affirmative action vis-à-vis the *Gratz* and *Grutter* decisions, Professor Guinier states that "race is . . . a formidable diagnostic and sociological tool. Used as a lens to peer beyond the pretense of the debate, race helps detect the deeper issues confronting public institutions of higher education . . . Race is the thin but highly visible edge of the wedge at the intersection of the value and scarcity of educational opportunity." *Id.* at 120-21. Thus, Professor Guinier suggests that focusing on race is useful to the extent that doing so reveals larger issues of "class and geography," as they pertain to educational attainment, that actually cut across racial boundaries. *Id.* at 122.

17. See Elizabeth Warren, *What is a Women's Issue?: Bankruptcy, Commercial Law, and Other Gender Neutral Topics*, 25 HARV. WOMEN'S L.J. 54 (2002) (describing bankruptcy as "America's social safety net.").

18. In bankruptcy, educational loans may only be discharged if they are deemed to constitute an "undue burden" on the debtor. See 11 U.S.C. § 523(a)(8) (1978).

19. See 124 CONG. REC. 1791-92 (1978).

20. *Id.*

21. See Robert Lawless et al., *Did Bankruptcy Reform Fail?: An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 387-98 (2008) (showing a detailed account of the Consumer Bankruptcy Project).

22. The 2007 CBP asked respondent debtors to indicate what level of education they have achieved. There were nine options that ranged from less than a high school diploma or GED to a doctorate or professional degree. For each case, I coded a dummy

repeated the procedure for the subgroups of White men, White women, African American men, and African American women.²³

The CBP is a random national sample of consumer bankruptcy filings in 2007 and represents court-record and questionnaire data drawn from approximately 2500 consumer Chapter 7 and Chapter 13 bankruptcy cases.²⁴ The questionnaire sought demographic information from each debtor, including information on race, educational attainment, and student loan debt.²⁵ Approximately 50.7 percent of the randomly selected debtors returned questionnaires.²⁶ Within the CBP, single questionnaires often became multiple cases for my analysis, which focuses on individuals rather than families: if a husband and wife filed jointly, each person's educational attainment and other data were coded as separate cases.²⁷ This

variable that represented whether the individual had earned a bachelor's degree. I exclude adults who earned an advanced degree in order to isolate the effect of a college diploma. Most Americans who get a post-secondary education stop after a bachelor's degree (as of 2007, 19% had earned a bachelor's degree and an additional 9.8% had earned an advanced degree, such as a Master's degree or a Ph.D.) Generally and for Whites, this is good enough, but for African Americans it is not. To consider an advanced degree, then, in order to find a benefit in terms of bankruptcy filings would mean to require greater educational debt and a greater burden for African Americans. By excluding adults who had also earned an advanced degree, I am able to eliminate the effect that the advanced degree may have on financial stability. *See id.*

23. Each racial subgroup is coded using a dummy variable. All respondents in each category either identified themselves as either African American or not, White or not. Accordingly I created a variable for each debtor in Person 1 and Person 2 who responded as either man or woman as well as African American or White. Whether an individual earned a bachelor's degree is also coded with a dummy variable. I excluded cases in which respondents indicated "other." In Person 1, 40 debtors responded in this way and in Person 2, nine debtors indicated "other". Respondents who indicated "other" were given a space in which to write how they identified themselves. Debtors input such responses as "Native American," "mixed," "Indian," and other categories reflecting national origin.

24. For five consecutive weeks starting in February of 2007 and ending in March of 2007, a random sampling of cases was chosen from all bankruptcy filings commenced during that time. Approximately 12,500 to 15,000 cases were filed each week and from this number, 1000 cases were randomly selected each week. This resulted in a total initial sample of 5000 court filings, and for each of these cases, a questionnaire was mailed shortly after the initial filing.

Because a certain number of addresses for debtors were invalid and the questionnaires in those cases were returned as undeliverable, 255 more cases were randomly selected from all bankruptcy petitions filed in the last week of March 2007 and the first week of April 2007 in order to replace those initially returned as undeliverable.

Questionnaires were then promptly sent to those 255 debtors. A total of 5251 questionnaires were mailed to debtors.

25. *Id.* at 392. The questionnaire is reproduced in full at *id.* at 399–402.

26. *Id.* at 392. Of the 5251 questionnaires mailed, 275 (or 5.2 percent) were returned as undeliverable, leaving a total of 4976 delivered questionnaires. *Id.* at 393. Of those delivered, 2521 responses (or 50.7 percent) were received while 2455 questionnaires mailed (or 49.3 percent) did not result in any response. *Id.*

27. The 2007 CBP uses a bankruptcy case or filing as its unit of analysis. This study disaggregates the joint filings and counts each individual listed as a separate case. As a

Article analyzes data from 2314 completed questionnaires, which represent 91.8 percent of all returned questionnaires.²⁸

The Current Population Survey (CPS), generated by the Bureau of Labor Statistics and the Census Bureau, is a scientifically selected sample of the general population. The survey information is collected from approximately 50,000 households.²⁹ The data from the CPS represent estimates of the national population for the given year and serve as “indicators of our nation’s economic situation and for planning and evaluating many government programs.”³⁰ Three specific tables from the CPS were used in this Article: “Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2007” for “White Alone,” for “Black Alone,” and for “All Races.”³¹ The Educational Attainment data in these tables are reported each year in the Annual Social and Economic Supplement (ASEC).³²

B. *Having a College Degree Is Associated with
Lower Bankruptcy Filing Rates*

The following table of descriptive statistics reflects the total number of individuals within each sample, their racial and gender breakdowns, and the differing levels of educational attainment.

result, my dataset included 3212 cases—more than the 2314 completed questionnaires. Treating joint filings as one case would be practically difficult for this analysis—it would require arbitrary choices about which filer’s race, gender, and educational information to use. Instead, each individual is counted separately, whether the 2007 CBP coded them as Person 1 or Person 2 on the petition. In the case of educational debt, the questionnaire only permitted one respondent to mark the question to the inquiry regarding student loan debt. Consequently, when calculating student loan debt, I count each filing as one case, and I determined race by the response in Person 1. Debtors in 2233 of the 2314 cases responded, and I dropped the 81 remaining cases for which a response was missing.

28. *Id.* Additionally, of the 2521 returned questionnaires, 124 (or 4.9 percent) were incomplete and 83 (or 3.3 percent) were returned by debtors who indicated that they did not wish to participate in the survey. *Id.* Because the CBP IV had court records for both respondents and non-respondents, it was possible to test for response bias along a number of dimensions. All tests were negative. *Id.* at 396.

29. See U.S. Census Bureau, Current Population Survey, <http://www.census.gov/cps/>.

30. *Id.*

31. Tables are available as part of the 2007 CPS at <http://www.census.gov/population/www/socdemo/education/cps2007.html>.

32. These data are available at <http://www.census.gov/population/www/socdemo/educ-attn.html>.

TABLE 1: 2007 CBP AND GENERAL POPULATION—TOTAL NUMBERS OF FILERS WITH BACHELOR'S DEGREES

	Number in Bankruptcy Sample	Percent with a Bachelor's Degree	Number in General Population	Percent with a Bachelor's Degree
All adults ³³	3255	12	194,318,000	19
White men ³⁴	976	13	77,501,000	19
White women ³⁵	1122	11	81,761,000	19
Afr. Am. men ³⁶	238	11	9,686,000	13
Afr. Am. women ³⁷	364	14	12,238,000	13

These data suggest that higher education is associated with a lower bankruptcy filing rate. While 19 percent of adults³⁸ in the general population in 2007 had earned a college degree, only 12 percent of adults in bankruptcy had similarly earned a college degree. The difference is statistically significant ($p < 0.001$). Thus, for adults generally, earning a college

33. These totals include all filers in the survey, regardless of racial identification. In addition to African American and White, respondent debtors were able to identify themselves as Asian American, Hispanic/Latino, Other or None. In some cases, respondent debtors did not choose any of the options and race was coded as missing. I excluded those debtors who identified as none or who did not respond at all to the race identification question. This resulted in 76 debtors being excluded from Person 1 and 150 debtors from Person 2.

34. Ninety out of 606 White men in the person 1 category identified themselves as college graduates and 36 out of 370 White men in person 2 similarly responded. These totals are inclusive only of those debtors who responded to the race, sex and educational attainment questions in the survey. Therefore the total numbers represented here vary slightly from the total numbers of each group.

35. Seventy-five out of 803 White women in the person 1 category identified themselves as college graduates, and 44 out of 319 White women in the person 2 category similarly responded. Once more, these totals are inclusive only of those debtors who responded to both the race, sex, and educational attainment questions in the survey.

36. Fifteen out of 136 African American men in the person 1 category identified themselves as college graduates, and 12 out of 102 African American men in the person 2 category identified themselves as college graduates. Once more, these totals are inclusive only of those debtors who responded to both the race, sex, and educational questions in the survey.

37. Forty-one out of 311 African American women in the person 1 category identified themselves as college graduates and 10 out of 53 African American women in the person 2 category similarly responded. Once more, these totals are inclusive only of those debtors who responded to the race, sex, and educational attainment questions in the survey.

38. The Census Bureau categorizes individuals into age groupings which include both "18 years and older" and "25 years and older." See *supra* note 29. Because I am measuring the attainment of a college diploma, and because the vast majority of eighteen-year-olds have not completed college, I chose to define "adults" as individuals aged twenty-five years and older. Consequently, in the CBP, I counted as "adults" only those debtors who identified themselves as being twenty-five years of age or older.

degree is associated with a decreased likelihood of filing for bankruptcy. See *Figure 1*.

Perhaps, for those people who attained a higher level of education, the degree and its attendant benefits were able to mitigate the onset of financial ruin. This finding is hardly surprising. In fact, it has been well documented that Americans with college diplomas generally fare better than their counterparts who do not have a degree.³⁹ These data confirm the economic benefits associated with a college diploma, particularly the ability of a degree to provide some insulation against economic collapse.

C. African Americans with a College Degree Are Not Less Likely to File for Bankruptcy than African Americans Without a College Degree

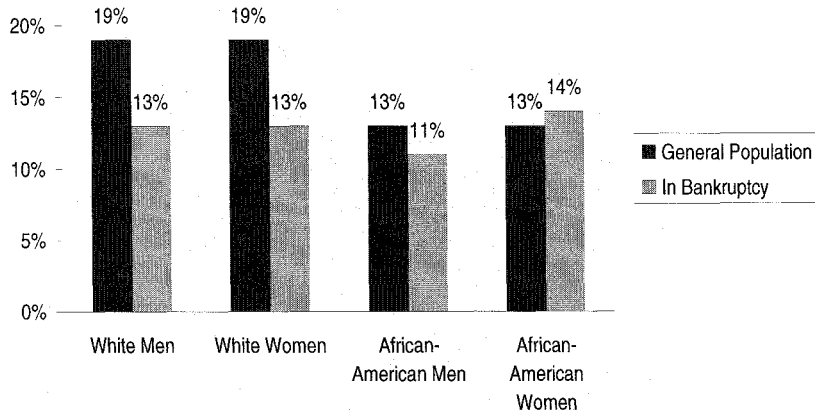
The data show that African Americans in bankruptcy are just as likely to have earned a college degree as African Americans in the general population. Thus for African Americans the financial protection associated with a college education is not as readily measurable. As *Figure 1* illustrates, White men and women in bankruptcy are significantly less likely to hold a college degree than their counterparts in the general population. Nineteen percent of adult White men in the general population had earned a college degree as compared with 13 percent of the adult White men who filed for bankruptcy in 2007 ($p < 0.001$). Similarly, 19 percent of adult White women in the general population had earned a college degree as compared to 11 percent of the adult White women bankruptcy filers in 2007.⁴⁰ The data suggest that for Whites, having an education is a meaningful barrier against financial hardship.

By contrast, for African American men and women, the positive correlation between education and financial stability was absent. There was no statistically significant difference between the percentage of African American men and women in the general population who had earned a college degree and those who had filed for bankruptcy in 2007. Thus, attaining a higher level of education does not appear to shield African Americans against financial ruin.

39. For example, the College Board reports that higher levels of education correlate with higher income across race, ethnicity, and gender, with higher healthcare insurance rates, with lower unemployment and poverty rates, and with higher levels of civic participation. See BAUM & MA, *supra* note 10.

40. The differences are statistically significant ($p < .001$).

FIGURE 1: BACHELOR'S DEGREE ATTAINMENT AMONG ADULTS BY RACE AND GENDER, AGES 25 YEARS AND OLDER, 2007



The conclusion seems to be that while a college diploma may help to insulate college graduates in general and White graduates specifically from financial challenges as represented by bankruptcy filings, for African Americans, a college diploma provides little economic insulation from bankruptcy.

II. THESE FINDINGS SUGGEST THAT CURRENT BANKRUPTCY POLICY REGARDING THE DISCHARGE OF EDUCATIONAL LOANS IS MORE BURDENSOME TO AFRICAN AMERICANS

In this part, I explain Congress's support of education through federal funding of educational loans as well as its policy of making those loans practically nondischargeable in bankruptcy. Together, these policies may impose a greater burden on African Americans, or other similarly situated borrowers, if these borrowers are less likely to realize the protective benefits of a college education. Indeed, these borrowers may be more financially vulnerable because they are more likely to borrow money to get a college diploma and more likely to file for bankruptcy with that college diploma in hand. Given the practical nondischargeability of educational loans in bankruptcy, this may mean that they must bear the burden of educational debt with little hope for relief. For potential borrowers, this burden may deter members of this group from seeking an education if, in so doing, they must make themselves more vulnerable financially. Perhaps the continuation of these dual policies reflects an implicit judgment about who, as a practical matter, should pursue an education and who should think twice about doing so.

A. *Federal Education Policy Supports Education for All Through the Appropriation of Funds for Educational Loans*

Congress understands that becoming educated is often a critical step toward the realization of the American Dream, just as a highly educated populace is vital to the health and well-being of the nation.⁴¹ As a historical matter, however, education has not always been financially viable for all Americans. In fact, education had previously been a practical option primarily for the wealthy.⁴² Over time, however, Congress expressed its interest in promoting education on a more egalitarian basis through the enactment of various statutes whose purpose was to make education more financially accessible to the masses through the appropriation of federal resources.⁴³ Over the last 50 years, Congress has pursued a relatively pro-student policy through the federal funding of higher education. Recognizing education as a national priority and determining that making higher education less cost-prohibitive, and thus more accessible, would yield national benefits, Congress first made federal funds generally available for higher education with the passage of the National Defense Education Act of 1958. The National Defense Education Act authorized

41. "Learning, pursuing knowledge for its own sake as well as for its practical applications, continues to be one of the best means of improving the quality of our lives and those of generations to come." 132 CONG. REC. 12,228 (1991).

42. See Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J.L. & PUB. POL'Y 367, 372 (1991) ("From the beginning of our country, however, education has not been an equal-opportunity endeavor. As had been the case in the European countries of the founding fathers, education was primarily available as an opportunity only for the children of wealthy landowners."); see also Grace Lee Boggs, *Education: The Great Obsession*, in EDUCATION AND BLACK STRUGGLE 61 (1974) ("In nineteenth-century America (and in Western Europe until the end of the Second World War), the school system was organized to prepare the children of the wellborn and well-to-do to govern over the less wellborn and not so well-to-do. Thus, at the turn of the century only six percent of U.S. youth graduated from high school."); Guinier, *supra* note 12, at 127 ("Although education has been linked to opportunity since the early days of the republic, higher education was originally a province for wealthy white men.").

43. For example, Congress passed the Morrill Act of 1862 (ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301–08 (1988))), which authorized federal land grants to the states for the creation of agricultural and technical colleges and the Serviceman's Readjustment Act of 1944 (popularly known as the G.I. Bill of Rights) (ch. 268, 58 Stat. 284 (codified as amended in scattered sections of United States Code)), which appropriated educational loan funding for war veterans. See Hawkins, *supra* note 42, at 373–74. The NDSL, which would later be known as the Perkins Loan, was a low interest loan that was available based strictly on student need. It represented Congress's first foray into the subsidization of higher education through educational loans. See Cloud, *supra* note 9, at 787, ("Also known as the Perkins Loan Program, NDSL was the first federally funded loan program, establishing a precedent for federal involvement in higher education that continues to this day."). Qualified students were eligible to receive loans at 5 percent interest.

the National Defense Student Loan (NDSL) as part of a larger program to encourage the pursuit of higher education.⁴⁴

Since this time, Congress has simplified educational borrowing through the introduction of additional federal debt-based programs. For example, with the passage of the Higher Education Act of 1965 (HEA), Congress broadened the scope of federal educational lending.⁴⁵ The HEA included the Guaranteed Student Loan Program (GSLP) that created what would come to be known as the Stafford Loan, a low-interest post-secondary educational loan made available to “only the most needy of students” and without regard to traditional standards of creditworthiness.⁴⁶

Because the Stafford Loan was initially directed toward the most financially needy students, middle-income students, who presumably did not qualify for other educational funding, continued to face challenges in paying for a postsecondary education.⁴⁷ Accordingly, Congress passed the Middle Income Student Assistance Act in 1978, which made federal edu-

44. National Defense Education Act of 1958, Pub.L. No. 85-864, 72 Stat. 1580 (1958). (“The Congress hereby finds and declares that the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women. The present emergency demands that additional and more adequate educational opportunities be made available. The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles. It depends as well upon the discovery and development of new principles, new techniques, and new knowledge. We must increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need; will correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics, and modern foreign languages and trained in technology. The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education. The national interest requires, however, that the Federal Government give assistance to education for programs which are important to our defense. To meet the present educational emergency requires additional effort at all levels of government. It is therefore the purpose of this Act to provide substantial assistance in various forms to individuals, and to States and their subdivisions, in order to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States.”). With the launch of Sputnik and the beginning of the space race, Congress began to consider higher education, especially in the sciences, as an important element of national defense. See Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 Sw. U. L. REV. 501, 504 (2000) (“The first federal student loan program was enacted as a national defense measure.”).

45. See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

46. See Cloud, *supra* note 9, at 787; see also *Stafford Loan Information*, STAFFORD-LOAN.COM, <http://www.staffordloan.com/stafford-loan-info> (last visited Jan. 17, 2009) (“Stafford Loans are federal student loans made available to college and university students to supplement personal and family resources, scholarships, grants, and work-study. Nearly all students are eligible to receive Stafford loans regardless of credit. Stafford loans may be subsidized by the U.S. Government or unsubsidized depending on the student’s need.”).

47. See *Stafford Loan Information*, STAFFORDLOAN.COM, <http://www.staffordloan.com/stafford-loan-info> (last visited Jan. 17, 2009).

cational funding almost universally accessible.⁴⁸ In 1993, President Clinton signed into law the Student Loan Reform Act, which created the William D. Ford Direct Loan Program.⁴⁹ With this legislation, Congress was particularly interested in streamlining the lending process, and in so doing, reducing costs to taxpayers as well as relaxing the burden of educational borrowing on students.⁵⁰ Employing a simplified application process, the Direct Loan program allowed students to borrow money for postsecondary education directly from the federal government.⁵¹ The Direct Loan Program also included the Income Contingent Repayment Program (ICRP) that facilitates repayment over time based on the income of the borrower.⁵² 2007 saw the passage of the College Cost Reduction and Access Act, which includes the income-based repayment (IBR) program as well as a loan forgiveness program for eligible college graduates who take jobs in the public sector.⁵³ Most recently, President Obama signed into

48. The Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978). See Cloud, *supra* note 9, at 787 (“[T]he Middle Income Student Assistance Act made federal loans available to virtually all students without significant regard to need.”). See also 137 CONG. REC. 9187 (1991).

49. The Student Loan Reform Act of 1993, Pub. L. No. 103-66, Title IV, Subtitle A, 107 Stat. 341 (1993).

50. 139 CONG. REC. 10,486 (1993) (“Direct lending is based on the current direct student loan pilot program, and by eliminating subsidies to private lenders and making loans directly to students, we will save taxpayers billions of dollars, reduce interest rates and fees for students, and simplify the financial aid system . . . This issue is not about banks, guaranty agencies, and secondary markets. It is about students and families and the best deal we can give them to help pay for their educations.”). 139 CONG. REC. 9,441 (1993) (“Under the direct lending bill, student loans for education will be cheaper and simpler to obtain, and easier to repay.”).

51. See Richard Riley, *The Role of the Federal Government in Education – Supporting a National Desire for Support for State and Local Education*, 17 ST. LOUIS U. PUB. L. REV. 29, 49–50 (1997). This new borrowing option added an element of competition to the student lending market not previously present as private lenders now had to compete with the U.S. Department of Education for customers. *Id.*

52. See 20 U.S.C. § 1087(d)(1)(D)(e) (1993). Accordingly, post-graduation income would not necessarily limit certain borrowers whose employment prospects suggested the likelihood of a limited income. “Under the program, students who choose to take low-paying community service jobs, whether as part of the President’s national service program or not, will be able to repay their loans as a small percentage of their income so that they will not be overburdened by debt.” 139 CONG. REC. 10,486 (1993) (“Under the program, students who choose to take low-paying community service jobs, whether as part of the President’s national service program or not, will be able to repay their loans as a small percentage of their income so that they will not be overburdened by debt.”).

53. College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007); see also Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007). In his first State of the Union Address, President Obama suggested changes to the IBR program that would further ease the burden of repaying federal student loans:

law the Health Care and Education Reconciliation Act of 2010 under which all new educational lending will be originated by the federal government via the Direct Loan Program.⁵⁴

*B. Federal Bankruptcy Policy Restricts Education for All By
Treating Educational Loans Exceptionally*

In contrast to federal educational lending policy, federal bankruptcy policy regarding educational loans is rather restrictive. Some in Congress tout the benefits of education, imply that the risk is worth the return,⁵⁵ but acknowledge that those who take out educational loans subject themselves to elevated and sometimes unmanageable levels of debt and greater financial risk and vulnerability.⁵⁶ However, Congress has been reluctant to offer relief in bankruptcy to students who find themselves struggling under the weight of unmanageable educational debt.⁵⁷ On the contrary, for

And let's tell another one million students that when they graduate, they will be required to pay only 10 percent of their income on student loans, and all of their debt will be forgiven after 20 years—and forgiven after 10 years if they choose a career in public service, because in the United States of America, no one should go broke because they chose to go to college.

President Barack Obama, State of the Union Address (January 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

54. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

55. *E.g.*, 154 CONG. REC. S9799 (daily ed. July 24, 2007) (statement of Sen. Biden) (“Our current higher education system is riddled with barriers that students must overcome to obtain the keys to their future—a college education. This program will break down some of those very barriers by making an early promise of Federal aid to students early enough in their academic careers so that the reality of a college education is firmly in their grasp. How we choose to support our students today will have broad ramifications for not only them but for our country 10, 20, and 30 years down the road. The consequences are dire if we do not take a more aggressive approach to make sure the doors to a college education are open wide enough so every student that wants to pursue a college education can do so regardless of their family income. If we maintain the status quo, the outlook for too many students is grim. Take, for example, the fact that over the next decade 2 million college-ready students from households with an income below \$50,000 will not attend college because they cannot afford the costs. Every door we fail to open for our students is a door closed—a missed opportunity—for our country down the road.”).

56. *E.g.*, “[The Higher Education Act Amendments of 2007] opens the door to those previously denied educational opportunity due to a lack of adequate financial resources or who could not carry the burden of excessive student loan obligations.” 154 CONG. REC. S9799 (daily ed. July 24, 2007) (statement of Sen. Levin).

57. This is exemplified by the fact that educational loans are included in Section 523(a) of the Bankruptcy Code which lists the types of debt that are not subject to discharge in bankruptcy. As it stands, the Bankruptcy Code requires that the repayment of educational loans be judicially deemed an undue hardship before they may be eligible for discharge in bankruptcy. 11 U.S.C. § 523(a)(8) (2000). Congress, however, offers relief

those struggling with educational loans, a discharge in bankruptcy is unlikely because bankruptcy law only authorizes the discharge of educational loans in extraordinary circumstances, even though it generously countenances the discharge of credit card debt, medical debt, and other unsecured debts.⁵⁸

Prior to 1976, educational loans were fully dischargeable in bankruptcy.⁵⁹ However, influenced by a 1973 Congressional Commission on Bankruptcy Laws report⁶⁰ citing a largely unsubstantiated concern that students would abuse bankruptcy to discharge educational debt on “the eve of a lucrative career,”⁶¹ Congress made educational loans that first became due within five years of a bankruptcy filing nondischargeable unless repayment imposed an undue hardship upon the debtor,⁶² a standard that, as discussed below, most debtors have difficulty satisfying.

Over the last thirty years, Congress has made the discharge of educational loans increasingly difficult by amending the Bankruptcy Code

for those with unmanageable general debt including credit card bills, car loans, payday loans, home equity lines of credit, medical debts, or unpaid utility bills.

58. Even federal tax debts are dischargeable beyond three years of their accrual. 11 U.S.C. § 523(a)(1)(1978).

59. This provision making educational loans nondischargeable was originally included in the Education Amendments Act of 1976, Pub. L. No. 94-482, and subsequently was enacted as § 523(a)(8) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. For a detailed history of the nondischargeability of student loans, see Pardo & Lacey, *supra* note 4, at 419–28.

60. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137 (1973) (hereinafter COMMISSION REPORT).

61. Pardo & Lacey, *supra* note 4, at 406; see also *In re Johnson*, 218 B.R. 449, 451 (BAP 8th Cir.) (“Stories proliferated of students discharging their educational obligations on the eve of lucrative careers”). Interestingly enough, in the report the commissioners acknowledge the fact that there was little evidence that abuse of dischargeability was a problem in regard to educational loans. “The Commission is not unmindful, however, of the possibility that the right to a discharge may be abused. Considerable concern has been expressed to the Commission about consumer credit buying sprees followed by bankruptcy and the use of bankruptcy to avoid payment of an educational loan without any real attempt to repay the loan. *The Commission is not aware of any evidence that suggests that these are significant problems numerically*, but such abuses discredit the system and cause disrespect for the law and those charged with its administration.” COMMISSION REPORT, *supra* note 60, at 170 (emphasis added).

62. See Leland J. Murphree, *The Solomonic Choice: Sixth Circuit Developments on the Role of Partial Discharge of Student Loans in Bankruptcy and the Beginning of the End of the Full Discharge of Student Loans under the Undue Hardship Standard*, 37 U. MEM. L. REV. 351, 359 (2007); see also 11 U.S.C. § 523(a)(8) (1978).

Of primary congressional concern was maintenance of the integrity and the existence of the federal student loan program. See Pardo & Lacey, *supra* note 4, at 419–20 (stating that although empirical evidence suggested that less than one percent of federally insured loans had been discharged in bankruptcy, the Bankruptcy Commission, convened in 1973 to re-evaluate the nation’s bankruptcy laws, recommended that limited discharge would help to ensure, “continued existence of the student loan program”).

five times.⁶³ With each amendment, either the variety of loans that are nondischargeable has expanded or the debtor's ability to discharge educational loans has contracted. Currently, educational loans, including those that are privately originated, are nondischargeable in bankruptcy absent a finding that the repayment of the loan would constitute an "undue hardship" upon the debtor.⁶⁴ Yet Congress has left the term undue hardship

63. See *In re Lewis*, 506 F.3d 927, 929 (9th Cir. 2007) (stating that "Congress has sought progressively to limit the instances in which student loan debts may be discharged in bankruptcy"); *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003) (stating that "Considering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness.").

64. As originally passed, Section 523(a)(8) applied only to loans made by a "governmental unit" or by "a nonprofit institution of higher learning." 11 U.S.C. § 523(a)(8) (1978). In 1979, less than a year after the passage of the Bankruptcy Code, Congress amended the section to deny a discharge of all loans "made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit." 11 U.S.C. § 523(a)(8) (1978), amended by Pub. L. No. 96-56, § 3(1) (1979). This amendment gave for-profit education lenders the same protection from discharge that earlier had been enjoyed by not-for-profit lenders. See S. Rep. 96-230 at 1-2 (1979). The original wording of § 523(a)(8) seemed to include only non-profit institutions of higher learning. See also *In re Renshaw*, 222 F.3d 82, 87 (2d Cir. 2000) (stating that "[i]n 1979, to avoid disparities in the treatment of loans from different sources (i.e., for-profit as opposed to non-profit lenders) with respect to their dischargeability in bankruptcy, it broadened the subsection to cover 'any educational loan made, insured, or guaranteed by a governmental unit, or made under any program . . . funded by a governmental unit or nonprofit institution of higher learning.'"). In 1984, Congress removed the phrase, "of higher learning," from the language of 523(a)(8), once again broadening the scope of loans to which the provision would apply by including loans originated by *any* not-for-profit institution as opposed to only those originated by not-for-profit institutions of higher learning. 11 U.S.C. § 523(a)(8), as amended by Pub. L. No. 98-353, § 454 (a)(2) (1984); see also *In re Renshaw*, 222 F.3d at 87. This change insulated lenders other than colleges and schools themselves from discharge of their loans in bankruptcy. In 1990, Section 523(a)(8) was once again amended, this time reducing the debtor's ability to receive a discharge of an educational loan as well as broadening the scope of loans to which the provision would apply. 11 U.S.C. § 523(a)(8), as amended by Pub. L. No. 101-647, § 362(1)-(2) (1990). Prior to this change, applicable loans which had first become due more than five years prior to the date of filing were eligible for discharge. The 1990 amendments increased the requirement so that debtors would have to wait beyond seven years after their loans first became due in order to qualify for a discharge. *Id.* Additionally, the provision would now also apply to "an educational benefit overpayment or loan made . . ." as well as to any "obligation to repay funds received as an educational benefit, scholarship or stipend." *Id.* Lastly, Section 523(a)(8) now applied to Chapter 13 filings as well as Chapter 7 filings. *Id.* See also COLLIER ON BANKRUPTCY 523.14[3]. Thus creditors were given greater coverage under 523(a)(8) even as debtors saw their ability to discharge educational loans diminished even further.

Congress once again adjusted Section 523(a)(8) in 1998. This time it amended the provision to completely eliminate the time element and to foreclose upon the debtor's ability to discharge those educational loans that first became due more than seven years prior to a debtor's date of filing. 11 U.S.C. § 523(a)(8), as amended by Pub. L. No. 105-244, § 971(a) (1998). "Former section 523(a)(8)(A) reflected a legislative judgment that after a seven-year repayment period has expired, the public policy concerns about poten-

undefined. Moreover, because courts disagree about the term's meaning and often interpret undue hardship quite stringently, debtors are left without much hope of finding relief from burdensome educational loans in bankruptcy.

Indeed, because undue hardship remains undefined in the Bankruptcy Code, courts have had to develop their own mechanisms for determining its meaning. The result is a variety of tests that provide little consistency in application.⁶⁵ Of particular note are the *Brunner* test, first articulated by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*,⁶⁶ and the totality-of-the-circumstances test, first employed by the Eighth Circuit Court of Appeals in *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews)*.⁶⁷ While bankruptcy courts have fashioned other means of determining undue hardship relating to the discharge of educational loans, a recent empirical study suggests that most bankruptcy courts use either the *Brunner* test or the totality-of-the-circumstances test.⁶⁸ Moreover,

tial abuse of the educational loan system and the risks to the system's fiscal integrity are outweighed by the fresh start policy of the [Bankruptcy] Code." COLLIER ON BANKRUPTCY 523.14[6]. Instead, all loans regardless of date of origination were subject to the undue hardship standard of discharge. *Id.* Consequently, debtors were left to rely completely on the judicial interpretation of these two simple, yet congressionally undefined words in the Code. Congress's final assault on Section 523(a)(8) came wrapped up in the sweeping and largely creditor friendly amendments in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. 11 U.S.C. § 523(a)(8) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [hereinafter BAPCPA], Pub. L. No. 109-8, § 220 (2005). Privately-originated loans were now added to the list of those loans ineligible for discharge, leaving debtors at the mercy of all comers. *Id.*

65. See Pardo & Lacey, *supra* note 4, at 411 ("Bemoaning the fact that Congress did not define undue hardship, courts have devised a variety of tests aimed at implementing the standard in a more 'rule-like' fashion. Because these tests do not mirror one another, however, the natural result has been disparity in approaches to the same legal issue, which has caused concern by courts. The question arises whether such disparity undermines the cohesiveness of the federal bankruptcy system by producing inconsistent results.").

66. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

67. *Andrews v. S.D. Student Loan Assistance Corp.*, 661 F.2d 702, 704 (8th Cir. 1981).

68. See Pardo & Lacey, *supra* note 4, at 487. Of the sampled cases, 86 percent were decided by application of either the *Brunner* test or the totality of the circumstances tests. The majority of bankruptcy courts have adopted the three-pronged test first employed by the Second Circuit in *In re Brunner* in 1987. See COLLIER ON BANKRUPTCY § 523.14[2]. The *Brunner* test bases a finding of undue hardship on three factors: (1) whether the debtor can presently maintain a "minimal" standard of living for herself and dependents if required to repay the loan, (2) whether other circumstances make this inability to maintain a minimal standard of living persistent over the repayment period, and (3) whether the debtor has made "good faith" efforts to repay the loan. *Brunner*, 831 F.2d at 396. All three factors must be proven in order to substantiate a finding of undue hardship. See Pardo & Lacey, *supra* note 4 at 488. The totality-of-the-circumstances test, first articulated in the Eighth Circuit Court of Appeals in 1981 in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, places greater emphasis on individual debtor circumstances instead of

evidence from this ground-breaking study suggests that judges apply these versions of undue hardship inconsistently.⁶⁹ Consequently, those Americans who seek to improve their circumstances by advancing their educations are left to act out their dreams of upward mobility without the backdrop of a fresh start.⁷⁰ The data suggest that this dependence on inconsistent judicial notions of undue hardship may leave those struggling with higher educational debt at a substantial disadvantage relative to those

reliance on the mechanical implementation of specific criteria, as in the *Brunner* test. See *Andrews*, 661 F.2d at 706; see Woodcock, *infra* note 75, at 448 (stating that the first two elements of the *Brunner* test incorporate the mechanical portions of the *Johnson* test). In *Andrews*, the South Dakota Student Loan Assistance Corporation appealed the Bankruptcy Court for the District of South Dakota's judgment granting the debtor's (who had previously been diagnosed with Hodgkin's Lymphoma) request for an undue hardship discharge of her educational loan. In deciding that a discharge was merited, the bankruptcy court considered the "debtor's present employment and the lack of any accumulated wealth or . . . other income," as well as the debtor's medical history. See *Andrews*, 661 F.2d at 704. The court did not consider information regarding the debtor's "reasonable living expenses" nor whether repayment of the student loan would be feasible in light of those living expenses. *Id.* at 704. The Eighth Circuit panel vacated the bankruptcy court's decision and remanded the case to the bankruptcy court for "further factfinding," instructing the court to consider "the facts and circumstances" surrounding *Andrews*' bankruptcy case before making a finding of undue hardship. *Id.* Thus, the Eighth Circuit implicitly advocated a more expansive and less regimented inquiry into the each debtor's particular circumstances when considering undue hardship discharges. This approach came to be known as the totality-of-the-circumstances test and was officially adopted by the Eighth Circuit as the appropriate standard for undue hardship discharge determination in *Long v. Educational Credit Management Corporation* in 2003. *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549, 554 (8th Cir. 2003) (stating that, in regard to choice of the totality-of-the-circumstances test over the *Brunner* test, "We prefer a less restrictive approach to the 'undue hardship' inquiry," and that, "We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B)."). Other less prevalent tests for undue hardship include the *Johnson* tri-partite test and the *Bryant* test. The *Johnson* test is a "complicated" three part test that includes a "mechanical" inquiry into the debtor's ability to repay the debt, a "good faith" inquiry and a "policy test." See Woodcock, *infra* note 75, at 443-44. The *Bryant* test uses the poverty line as a threshold below which discharge is granted unless the creditor can show why it should not be and above which courts must "review the customary 'myriad of facts and circumstances' in search of 'extraordinary' or 'unique' factors justifying a discharge." *Id.* at 444-45.

69. See Pardo & Lacey, *supra* note 4, at 411 ("A concern arises that Congress's failure to define undue hardship, the requisite condition for discharge of educational debt, has resulted in a fragmentation of debtor relief—that is, inconsistent and unprincipled application of the standard by bankruptcy courts.").

70. See Jennifer L. Frattini, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537, 537-38 (2001) (stating that the fact that undue hardship remains congressionally undefined has resulted in "the formation of various stringent judicial interpretations . . . which have the effect of undermining the first goal of bankruptcy—providing the honest, overburdened debtor with a fresh start.").

who are in financial trouble in the wake of excessive credit card spending or overwhelming medical debt.⁷¹

In addition to the challenges that the undue hardship standard imposes upon debtors, the procedures required to obtain a discharge of a student loan pose yet another obstacle for debtors seeking relief from burdensome educational loans.⁷² The Federal Rules of Bankruptcy Procedure require that a debtor bring an adversarial proceeding in order to receive a discharge of educational debt.⁷³ This necessarily requires additional resources that a debtor, in the midst of the ultimate financial crisis, is unlikely to possess.⁷⁴ Certainly the cost of attempting to discharge educational loans is likely to erect a barrier so great that most debtors in need of financial relief are functionally excluded from even attempting to do so.⁷⁵ Thus, over time, Congress has succeeded in making the discharge of educational loans in bankruptcy functionally unlikely both substantively and procedurally, significantly limiting bankruptcy as an option for Americans burdened by this kind of unsecured debt.

Ultimately, the treatment of educational debt in bankruptcy is contrary to bankruptcy's general promise of a "fresh start,"⁷⁶ and complicates

71. See Pardo & Lacey, *supra* note 4. In its attempt to preclude the fraudulent discharge of educational loans, Congress has exposed legitimately struggling debtors to the challenges of the undue hardship standard; see also Deanne Loonin, *Guest Post: A Bankrupt Policy*, THE HIGHER ED WATCH BLOG (Dec. 3, 2008, 11:45 AM), <http://www.newamerica.net/blog/higher-ed-watch/2008/bankrupt-policy-8753>.

72. See generally Raphael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009).

73. See FED. R. BANKR. P. 7001(6); see also DEANNE LOONIN, NAT'L CONSUMER L. CTR, *STUDENT LOAN LAW: COLLECTIONS, INTERCEPTS, DEFERMENTS, DISCHARGES, REPAYMENT PLANS, AND TRADE SCHOOL ABUSES* 127 (3d ed. 2006). The Supreme Court recently held that in the context of a Chapter 13 filing, "to comply with § 523(a)(8)'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1381 (2010).

74. See *An Undue Hardship? Discharging Educational Debt in Bankruptcy: Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111 Cong. (2009) (written testimony of Raphael I. Pardo) ("Because bringing such a proceeding requires substantial monetary resources, debtors in bankruptcy, already in financial distress, face additional hurdles in obtaining a discharge of their student loans."); see also Pardo & Lacey, *supra* note 72, at 188-89.

75. See Raymond L. Woodcock, *Burden of Proof, Undue Hardship, and Other Arguments for the Student Debtor Under 11 U.S.C. § 523(a)(8)(B)*, 24 J.C. & U.L. 377, 387 (1998) ("The debtor may also fail to file a complaint to determine dischargeability . . . because s/he lacks the ability to represent him/herself, the money with which to hire an attorney and pay the court fees, the desire to commence an action that may seem to have factual merit but little likelihood of winning, or the nerve to risk being held liable, upon losing, for the creditor's attorney fees and costs.").

76. See SULLIVAN, ET AL., *supra* note 3, at 20 ("At the heart of all bankruptcy law, for individuals and for businesses, is the discharge of debts and other legal obligations, the 'fresh start.'").

congressional encouragement of education and educational borrowing. With one hand Congress giveth, encouraging students to borrow for school, yet with the other hand Congress taketh away, not mitigating the financial vulnerability and risks involved with this sort of borrowing with the safety net of bankruptcy.

*C. The Rationale for the Nondischargeability of Educational Debt in
Bankruptcy Is Based on a Questionable Premise*

There are various justifications for the nondischargeability of educational loans in bankruptcy. One account identifies “soft fraud” as the most likely rationale for why it may be appropriate for educational loans to be singled out among other unsecured debts for unfavorable treatment in bankruptcy.⁷⁷ “Soft fraud” refers to the behavior of the graduate who, in good faith, incurs a large educational loan debt only to realize upon graduation that “she faces the prospect of amortizing a multi-decade loan, when she has few personal assets to her name other than well-highlighted books.”⁷⁸ This realization in turn prompts the present exchange of non-exempt personal assets (of which the newly graduated debtor likely has so few as to make their surrender inconsequential) for release from the future burden of repaying inconvenient educational loans.⁷⁹ The prevention of “soft fraud” is a plausible justification for the nondischargeability of educational loans in part because “students will be able to realize the benefit of education and translate that benefit into financial payoff.”⁸⁰ The

77. See Pottow, *supra* note 8. Professor Pottow identifies the risk of “soft fraud” as a “more likely” justification for the nondischargeability of educational loans in bankruptcy. See *id.* at 252. He states that because nondischargeability “is an extraordinary rule” vis-à-vis the Bankruptcy Code’s general mandate of dischargeability for unsecured debts, any feasible rationale “should make a case for treating student debt not just harshly, but exceptionally.” See *id.* at 250. Accordingly, in addition to the notion of “soft fraud,” he explores fraud, internalization, shaming, protecting the public purse (“public fisc”), and the cost of private loans as alternate reasons for the nondischargeability of educational loans in bankruptcy. See *id.* at 251-63. But, he identifies “soft fraud” as “com[ing] closest to persuasion as to why student loans should have restricted dischargeability in bankruptcy.” See *id.* at 276. Ultimately, Professor Pottow expresses some skepticism as to whether any of these rationales are able to justify the exceptional treatment of educational loans. *Id.*

78. *Id.* at 253.

79. Of the debtor engaged in “soft fraud,” Professor Pottow writes, “she happily trades in the car for unfettered access to that high [post-graduate] income stream” that no longer must be used to pay down the discharged educational debt. See *id.*

80. See *id.* at 254. Professor Pottow also cites two additional reasons why the prevention of “soft fraud” may be an appropriate justification of the nondischargeability of educational loans in bankruptcy. First, he says that these debtors are usually young people who will have “more earning years to repay their debts than the median consumer debtor.” See *id.* He also cites “inalienability” as a reason. *Id.* at 255. That is to say that the student has irrevocably earned the degree and may not be divested of its purported benefit. Thus the student may have her cake and eat it too, earning the prized diploma and

suggestion is that because higher education correlates with higher incomes for the population generally, the duty to repay educational loans in bankruptcy is appropriate, although contrary, to the spirit of a fresh start.

Another account understands the propriety of the nondischargeability of educational loans in bankruptcy as a function of the level of “reflection and deliberation” in which the college student presumptively engages before borrowing money for school.⁸¹ In this account, pre-bankruptcy contractual waivers of dischargeability are appropriately unrecognized in bankruptcy because generally debtors are unlikely to appreciate the right they are surrendering when forming such contracts.⁸² By contrast, in terms of educational loans for a college degree, the pre-bankruptcy waiver of dischargeability may be appropriate because these students are better able to “reflect on what they are doing” before they agree to accept a nondischargeable student loan to pay for college.⁸³ This deliberation may justify the deprivation of the fresh start with regard to educational debt.⁸⁴

If this account is correct, prospective college students who want to borrow money should reflect upon and consider all information that will help them to predict whether they will be able to repay their educational loans post-graduation. If the prospects for repayment seem slim, then a prospective and sufficiently reflective and deliberative student should

dumping the educational debt in bankruptcy. It seems, however, that missing from these accounts is some empirical evidence that given the opportunity to act opportunistically, graduates in large numbers do actually choose to shirk the duty to repay.

81. See Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI. L. REV. 17, 28 (2006) (“One can, however, reconcile the special status of education loans with the general idea that decisions that compromise the right to a discharge or to exempt property must be made with sufficient reflection and deliberation. Unlike ordinary extensions of consumer credit, someone who takes an education loan before going away to college is not making a decision casually. The decision to the loan is part of a larger decision (leaving or not entering the workforce and moving) that is made only after considerable thought and care.”) It is an interesting question whether the typical seventeen or eighteen year old prospective college student is truly capable of making her college decision at this level of care. Although not seeming entirely convinced by this account, Professor Baird seems to suggest that setting up procedures outside of bankruptcy that would facilitate this type of thought and care in the decision-making process would be useful. See *id.*

82. See *id.* at 26 (“If insurance were our sole rationale for the bankruptcy discharge, we would expect the right to be one that is waivable. But the modern conception of the discharge rests on the idea that honest debtors can make bad judgments when they borrow. The same bad judgment that leads to incurring the debt may lead to waiving the right to a discharge. For this reason, we may want to prevent waivers altogether or at least ensure that the waivers are done with sufficient deliberation. Allowing waivers makes sense only if we can expect reasoned and deliberate decisionmaking to overcome the cognitive biases embedded in the modern conception of the fresh start.”).

83. See *id.* at 28.

84. “The more we ensure that students who enroll in such programs reflect on what they are doing, the less problematic the exception to discharge becomes.” *Id.*

not—indeed would not—borrow money for school. Statistically speaking, this means that African Americans who take out educational loans fall into the category of poor decision-makers unworthy of a fresh start. In fact, based on factors such as post-graduate earning potential, the likelihood of having to support dependents, legal and otherwise, the likelihood of having a partner with whom to share financial burdens, and the amount of unmanageable educational debt upon graduation, Whites, as a statistical matter, may make good decisions to borrow money for school and African Americans may not. The suggestion seems to be that if African Americans are unlikely to be able to repay unmanageable loans for *any* reason, including disparate socio-economic circumstances, they should not pursue higher education because the risks associated with student loan repayment are perhaps significant enough to render the decision irresponsible. And, the Bankruptcy Code, having adjudged them as insufficiently deliberative and reflective for choosing the rock instead of the hard place, will offer no relief.⁸⁵

In the congressional version, the sustainability and integrity of the federal student loan program is the main justification for the practical nondischargeability of educational loans.⁸⁶ The limitation on the discharge of educational loans allows future students to have access to educational funding from a robust and self-sustaining federal student loan program. The congressional record is replete with suggestions that, absent this policy, all students would suffer as widespread abuse by opportunistic college graduates would force the system to collapse.⁸⁷

Ultimately, the aforementioned justifications for the exceptional treatment of educational loans in bankruptcy are premised on the assumption that graduates do in fact experience a financial benefit. Indeed, the Congressional Record reflects the belief that the educational loan program facilitates an education that itself will provide enough of an eco-

85. This is troublesome in the sense that it suggests that African Americans should simply content themselves with the reduced life opportunities and circumstances that are the mainstay of those who do not get an education. It is my contention that American society simply may not countenance such a conclusion because it implicitly embodies an affirmation of the disparate economic and social realities that African Americans, and other similarly situated Americans, experience vis-à-vis their wealthier counterparts.

86. See Frattini, *supra* note 70, at 549 (“[T]he legislative history indicates Congress was concerned about the viability of the Federal Education Loan Program, and enacted § 523(a)(8) to prevent further abuse by students deliberately taking advantage of this program through the bankruptcy system.”)(emphasis on “abuse” omitted).

87. *E.g.*, 124 CONG. REC. 1792 (1978) (“Some have said that we are discriminating against students. We are not discriminating against students with this amendment to the Bankruptcy Act. In fact, it works the exact opposite. Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education. The people who are leaving the institutions already have the benefit of their educations, so that this is not an antistudent provision, as some would contend, and is not a class discrimination against those students. It is to keep the student loans program going, and to keep it viable.”).

conomic benefit to mitigate any financial distress that the almost absolute duty to repay the loan may create.⁸⁸

If getting a college diploma does indeed mean greater financial stability, then lending money freely to promote education while strictly policing the discharge of this debt in bankruptcy makes sense. The education confers a benefit on both the individual and society justifying the federal expenditure. Once the education is attained, the attendant benefit conferred to the individual justifies the imposition of the duty to repay the loan, bankruptcy notwithstanding, because the graduate will have the resources to meet the duty without hardship. The new data reported here from the CBP, however, alters the premise upon which the nondischargeability of educational loan rests and on this basis calls into question the practical nondischargeability of educational loans in bankruptcy.

*D. The Data Undercut the Rationale for the Nondischargeability
of Educational Loans in Bankruptcy*

The data I report in this Article weaken the rationale for nondischargeability of educational loans in bankruptcy, and reveal the policy of nondischargeability as potentially too costly and limiting for certain groups. While the health and sustainability of the student loan program is certainly a significant and reasonable concern, the manner in which the federal government goes about achieving this end is less legitimate if it disparately impacts particular groups within the United States. In the case of the potential African American college student, it may render unattractive the pursuit of a college diploma if the cost contributes to financial instability and the benefits are less measurable as a financial matter.

Furthermore, it might also affect educational and career choices. The student for whom educational borrowing is most risky might choose to limit her time in school or limit her choice of career based on cost. For example, if it takes eight years of school to become a doctor as opposed to two years to become a medical assistant in a doctor's office, the prospective student might choose the latter, ability notwithstanding. While as a general matter this sort of choice is not especially troublesome (the world needs medical assistants as well as doctors) it becomes problematic when those choices track racial or socioeconomic differences. Indeed, such results would only serve to widen the wealth and achievement gaps that currently exist along racial and socioeconomic lines.⁸⁹ If Congress believes that education for all is important then it should not advocate, explicitly

88. See Pardo & Lacey, *supra* note 4, at 419-32 (describing an in depth account of the 1970's debate around the treatment of student loans in bankruptcy, complete with the prevailing rationales on both sides of the fight).

89. See generally Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J. L. & POL'Y 53 (2006).

or implicitly, a policy that functionally renders the choice to go to college a wise choice for some groups and a poor choice for other groups. All Americans should be encouraged to pursue an education because education is good for both individual and country.⁹⁰ Just as Congress makes educational loans almost universally available, it should not functionally preclude specific groups from realizing the advantages of education.

III. WHY AFRICAN AMERICANS MAY NOT EXPERIENCE THE PROTECTIVE BENEFITS OF A COLLEGE DEGREE AS COMPARED TO WHITES

I do not mean to suggest that educational attainment is a hopeless enterprise for African Americans. On the contrary, education has been one of the primary means by which African Americans have worked to overcome years of oppression, hardship, and inequality brought on and perpetuated by slavery and its aftermath.⁹¹ Certainly, getting an education has generally positive results for African Americans. More specifically in financial terms, data tell us that African Americans who earn college diplomas earn higher salaries than African Americans without a college

90. See Edward M. Kennedy, *A Senator's Perspective on American Higher Education in a Global Economy*, 47 ARIZ. L. REV. 1, 3 (2005) ("The founders understood the importance of education to the strength of the democracy that they created. They saw it not just as an individual right, but as a means of creating informed and active citizens. Thomas Jefferson said that no nation can be both ignorant and free."). See Guinier, *supra* note 12, at 125-28. There are some who argue that college is not for everyone, citing perceived differences in academic ability and preparation and suggesting that the jobs that these persons take after college do not require a college degree. See Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269, 295-96 (2006); U.S. DEPT. OF EDUC., COLLEGE FOR ALL?: IS THERE TOO MUCH EMPHASIS ON GETTING A 4-YEAR COLLEGE DEGREE? (1999) (Analyzing various arguments against the college-for-all movement.).

91. Education has always been of particular significance to African Americans' social advancement in America. During slavery times, African slaves were often denied an education for fear that its acquisition would undermine the institution of slavery itself. See Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F.L. REV. 1045, 1060 (2008) ("The denial of education to slaves and their children was seen as necessary to the proper functioning of the institution of slavery. Following emancipation, the continued denial of education to blacks was an integral part of the structures that perpetuated the subordination of newly freed blacks and the generations which followed them.") Since the abolition of slavery, education has been an important means of combating the debilitating legacy of discrimination that slavery has left in its wake. Increased levels of education have helped African Americans to make greater strides socially and economically. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 65-67 (1994) ("Advances in black education had important ramifications for the future of Jim Crow. For many whites, the institution of segregation, fathomable in a post-slavery era when most blacks were illiterate and unskilled, became increasingly difficult to comprehend or defend once educational and skill differentials had substantially narrowed.").

diploma.⁹² Thus, getting an education is important for African Americans as a financial matter.

Rather, in this section, I propose several reasons that may help to explain why education alone may not insulate African Americans from financial distress. Some of the documented historical and societal inequalities that African Americans experience may begin to explain why education may not do the work for African Americans that it might for others. Specifically, the fact that African American graduates earn smaller incomes than White graduates, are more likely to borrow money for college than Whites, are less likely to have family resources upon which they may depend for financial support, are more likely to be financially responsible for both legal and other dependents, and generally pay more for credit may help to explain why the benefits of education are not enough to place African American college graduates in a better position vis-à-vis the sort of financial hardship that leads to bankruptcy. In short, African Americans face greater challenges (reflective of inequality in American society) that may work to contravene the positive effects of the college diploma.

A. African Americans Earn Less than Whites After Graduating from College

Disparities in income are significant because they bear upon the comparative ability of individuals to meet their cost of living. While there is no difference in the actual cost of a college degree at a particular institution, an individual's relative burden will vary depending in large part on her individual ability to meet that cost. Thus, disparities in income levels matter in terms of the repayment of educational loans for African American college graduates because African American college graduates make less money after graduation than White college graduates. According to the College Board, in 2007, the median earnings of the full-time, year-round African American female worker, ages 25-34, with a bachelor's degree, was \$36,500 compared to \$38,800 for African American men, \$37,500 for White women, and \$46,900 for White men.⁹³ Because college costs remain the same for all students, African Americans who borrow money for school, yet earn less than Whites, are at a disadvantage in terms of being able to repay burdensome educational loans while also devoting income to the daily cost of living. With less money to meet financial needs, the inescapable burden of repayment of educational loans may become greater for African Americans.

92. See BAUM & MA, *supra* note 10, at 12. In 2007, an African American man with a college degree made approximately \$14,000 more per year than an African American man without a college degree. Similarly, an African American woman with a college degree made approximately \$15,000 more per year than an African American woman without a college degree.

93. See *id.*

B. African Americans Are More Likely to Borrow Money for School

Debt makes people more financially vulnerable because a debtor must assign her future earnings to debt repayment even as that income must also stretch far enough to encompass payment of present expenses such as housing, food, etc.⁹⁴ The more debt an individual takes on, the less money that individual has to allocate to other expenses. In terms of educational debt, African Americans are particularly vulnerable because African American undergraduates are more likely to borrow money for college than Whites. The National Center for Education Statistics (NCES) reports that among 1999–2000 bachelor's degree recipients, 79.8 percent of African Americans borrowed for their undergraduate education as compared with 63.7 percent of Whites.⁹⁵ These data suggest that African American students are in greater need of educational financial resources so they borrow more often, possibly hoping that the investment in education will reap some tangible benefits on the back end. Furthermore, a 2002 study found that 55 percent of African Americans who borrowed money for school graduated from college with “unmanageable” educational debt as compared to 39 percent of all students who borrowed money for school.⁹⁶ Thus, in taking on debt to finance a college education, African Americans appear to become more vulnerable to the strain that this debt may place upon their future earnings. Moreover, a higher likelihood of educational debt combined with the fact that African Americans make less money than Whites after graduation may render African Americans particularly susceptible to financial distress.

C. African Americans Are Less Likely to Have Family Resources to Support Educational Costs

Family financial resources, perhaps better described by the concept of “wealth,” are important because they are often a safety net for individ-

94. See Dariely Rodriguez, *Left Behind: The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Economic, Social and Racial Justice*, 18 BERKELEY LA RAZA L.J. 65, 67 (2005) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934)) (“When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern.”).

95. See THE NATIONAL CENTER FOR EDUCATION STATISTICS, DEBT BURDEN: A COMPARISON OF 1992-93 AND 1990-2000 BACHELOR'S DEGREE RECIPIENTS A YEAR AFTER GRADUATING 10 (March 2005), available at <http://nces.ed.gov/pubs2005/2005170.pdf>.

96. See Tracey King & Ellynne Bannon, The State PIRG's Higher Education Project, *The Burden of Borrowing: A Report on the Rising Rates of Student Loan Debt at 1* (2002), available at <http://www.pirg.org/highered/BurdenofBorrowing.pdf>.

uals who find themselves in financial trouble.⁹⁷ The ability to call home to ask a parent for a loan or to access family assets to help weather difficult times may make all the difference for individuals in financial trouble. For students, family financial resources may mean lower debt loads as families with such means are able to absorb a portion, if not all, of the cost of a college degree, while the contrary is true for those coming from families without significant resources.⁹⁸

African Americans are more likely to come from lower income households in which financial resources that might be used to subsidize higher education are likely to be slim, which makes them more likely to require outside financing to pay for college costs.⁹⁹ Consequently, in order

97. See Shapiro, *supra* note 89, at 56–57 (“Wealth is a storehouse of a family’s financial resources and, when combined with income, frames the opportunity for families to secure the ‘good life,’ however they define it, typically by human capital development, business opportunities, home ownership, community location, health, travel, comfort, or security. Wealth, then, is a special kind of money utilized to launch social mobility, create opportunities and status, or pass along advantages to one’s children. Two families with similar incomes but widely disparate wealth most likely do not share similar life trajectories, and we must consider this when thinking about inequality and public policy . . . Wealth is seen first as a personal safety net, or an unspecified amount of money that is stored away to cushion against the unexpected health crisis, job termination, legal difficulty, or repair of the family car.”).

98. See Elizabeth Warren et al., *Service Pays: Creating Opportunities by Linking College with Public Service*, 1 HARV. L. & POL’Y REV. 127, 130 (2007) (“Those who do not have family resources to rely upon after they graduate have a more difficult time repaying their loans.”); see also DALTON CONLEY, BEING BLACK, LIVING IN THE RED at 57–60 (1999). “Even when we compare white and minority families at the same income level, whites enjoy a huge advantage in wealth. For instance, at the lower end of the income spectrum (less than \$15,000 per year), the median African American family has no assets, while the equivalent white family holds \$10,000 worth of equity. At upper income levels (greater than \$75,000 per year), white families have a median net worth of \$308,000, almost three times the figure for upper-income African American families (\$114,600).” *Id.* at 1.

99. Census data reveal that African Americans are more likely to live in poverty and have a lower median income than Whites. According to a US Census press release citing statistics from 2007, “among the race groups and Hispanics, black households had the lowest median income in 2007 (\$33,916). This compares to the median of \$54,920 for non-Hispanic White households. Asian households had the highest median income (\$66,103). The median income for Hispanic households was \$38,679.” Additionally, the poverty rate for African Americans was 24.5 percent in 2007 as compared to 8.2 percent for Whites, and 19.5 percent of African Americans had no medical insurance as compared to 10.4 percent of Whites. See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2007, Current Population Reports*, (August 2008), available at <http://www.census.gov/prod/2008pubs/p60-235.pdf>; see also Press Release, U.S. Census Bureau, *Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down* (August 26, 2008), available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html; see also Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 181, 184–85 (2008) (stating that African Americans are more likely to come from low-income families and that “low income families do not have the financial ability to pay outright or save money

to address the ever-increasing cost of a college education,¹⁰⁰ African Americans are more likely to need to borrow. Thus, a higher proportion of African American students must begin their post-college lives in debt,¹⁰¹ which in turn leads to a diminished capability of surviving economic landmines such as sudden medical problems and unexpected lay-offs. Perhaps in a deeper hole, they must divert a larger share of their future income to the repayment of educational debt. Moreover, the same dearth of family resources that increases the likelihood of educational borrowing may also limit the options for a bailout when financial difficulty hits. And, in the current economy in which African American families have experienced significant losses in terms of wealth, the inability to call upon family in times of personal financial difficulty may be even more pronounced.¹⁰²

D. African American Bankruptcy Filers Are More Likely to Be Financially Responsible for Both Legal and Other Dependents

Another factor that may play into the particular vulnerability of African Americans is the degree to which they must support others, including both legal dependents such as children and non-legal dependents such as extended family members.¹⁰³ For example, while a health care plan might cover the cost of medical care for a legal dependent, it may not provide coverage for an extended family member. Thus for the individual who has assumed financial responsibility for a niece or an aunt, there is an additional financial burden to carry. African Americans are

in advance to send a child to college, so these families, particularly the student pursuing higher education, must depend on other sources of funding.”); see also King & Bannon, *supra* note 96, at 4 (stating that, “Many African Americans and Hispanic student borrowers are more likely to face additional burden, as they are more likely to come from low-income backgrounds.”); see also A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 Mo. L. Rev. 919, 956 (2006) (“The racial income and wealth gaps cause minorities to incur significantly higher student loan debt.”).

100. See THE COLLEGE BOARD, *infra* note 155.

101. See THE COLLEGE BOARD, SANDY BAUM & PATRICIA STEELE, WHO BORROWS MOST?: BACHELOR’S DEGREE RECIPIENTS WITH HIGH LEVELS OF STUDENT DEBT 6 (2010) (Reporting data that African American bachelor’s degree recipients are more likely to carry high debt levels after graduation.)

102. See Michael Powell, *Blacks in Memphis Lose Decades of Economic Gains*, N.Y. Times, May 30, 2010, http://www.nytimes.com/2010/05/31/business/economy/31memphis.html?ref=the_new_poor.

103. See Dickerson, *supra* note 11, at 955; see also Laura Ann Foster, *Social Security and African American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN’S L.J. 55, 82-83 (2001) (citing Niara Sudarkasa, *Management by Stress: The Reorganization of Work Hits Home in the 1990s*, in AMERICAN FAMILIES: A MULTICULTURAL READER (Stephanie Coontz et al. eds., 1999) for the proposition that “African American families are often organized around consanguineal cores consisting of spouses, children, adult siblings, in-laws, and other patrilineages or matrilineages.”)

more likely to live within this type of family structure than Whites.¹⁰⁴ In fact, more often than not, African American families are headed by unmarried women who shoulder the financial burden of the group.¹⁰⁵

Data from the CBP reflects this reality. African American women bankruptcy filers in 2007 were more likely to report being financially responsible for other individuals,¹⁰⁶ yet they were less likely to share the financial burden of supporting dependents with a spouse or significant other. Sixty-five percent of African American women in the CBP survey reported being financially responsible for at least one dependent, as compared to 53 percent of all other filers in the survey.¹⁰⁷ However, only 38 percent of African American female filers reported being married, as compared to 44 percent of all other filers.¹⁰⁸ And, within the general population, these disparities are even greater where 27.5 percent of African American women are married with a spouse present in the household as compared to 34.2 percent of African American men, 53.2 percent of White women, and 56.8 percent of White men.¹⁰⁹ Thus, family structure may also help to explain why African Americans are more vulnerable as a financial matter, college diploma notwithstanding.

E. African Americans Pay More for Credit

Another burden that African Americans are more likely to bear and that may affect the relative burden of repaying educational loans is the fact that African Americans routinely pay more for credit than other groups in society. In the midst of the current subprime crisis, it has been well documented that African Americans, regardless of creditworthiness, were often subject to usurious subprime loans and other predatory lending practices.¹¹⁰

104. *Id.*

105. See generally Robert Staples, *Changes in Black Family Structure: The Conflict Between Family Ideology and Structural Conditions*, 47 J. OF MARR. & FAM. 1005 (1985) (noting the dramatic rise in single female-headed households among African Americans and discussing the influence of structural conditions on this phenomenon.).

106. With no differentiation made between legal dependents and others who the debtor might have been supporting financially.

107. $p < .01$.

108. $p < .05$.

109. See Rose M. Kreider & Tavia Simmons, *Marital Status: 2000* at 3, U.S. Census Bureau, available at <http://www.census.gov/prod/2003pubs/c2kbr-30.pdf>.

110. See Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 329–31 (2005) (“Even where the variable of income is controlled, African Americans are disproportionately burdened by higher-cost loans Economic literature appears in near consensus that African Americans generally obtain credit on disadvantageous terms More troubling, however, is the likelihood that subprime lenders—and predatory lenders—are deliberately targeting African Americans to exploit their vulnerability and historic disconnection from financial markets.”); see also Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield*

Moreover, a recent study suggests that African Americans routinely pay higher interest rates on credit cards than other Americans.¹¹¹ Increased interest rates and predatory lending may eat up a significant portion of future earnings, yet this consideration is ignored in the strict adherence to the highly restrictive tests designed to implement the undue hardship standard.¹¹² The fact that African Americans with burdensome educational loans must pay more for access to other forms of credit, with lower incomes, suggests a particular vulnerability in light of the practical nondischargeability of educational loans in bankruptcy.

Ultimately, all of these considerations, comparatively lower incomes, increased educational debt, restricted family resources, increased financial responsibility for others and the higher cost of credit, undermine the perception that the acquisition of education alone is enough to justify the exceptional treatment of educational loans in bankruptcy. Consequently, for African Americans who borrow money for school, these additional burdensome circumstances implicate the disparate impact of congressional educational loan discharge policy, especially vis-à-vis its educational lending policy. While education generally may be beneficial enough to justify congressional support of educational borrowing and consequently greater financial vulnerability, education alone is not beneficial enough to create a measurable barrier against financial distress for everyone. This, in turn, calls into question congressional justification of educational loan discharge

Spread Premiums, 12 STAN. J.L. BUS. & FIN. 289, 296 (2007) (“Our study suggests that the least sophisticated borrowers, including Hispanics and African Americans, may be particularly susceptible to these abusive pricing practices.”). In their study of mortgage broker costs, Professor Jackson and Ms. Burlingame found that variations in mortgage broker costs correlated to race and that African Americans “paid on average between \$482 and \$733 more in broker compensation.” *Id.* at 350. Professor A. Mechele Dickerson comments on the fact that African Americans who qualified for lower prime rate loans were often steered toward high interest subprime products. A. Mechele Dickerson, *Bankruptcy and Mortgage Lending; The Homeowner Dilemma*, 38 J. MARSHALL L. REV. 19, 34 (2004). “Steering especially appears to be directed toward elderly and minority borrowers. For example, while the number of subprime purchase loans to black borrowers increased by 686% from 1995–2001, the number of prime conventional purchase loans actually fell by almost 6%.” *Id.* at 35.

111. See Jennifer Wheary & Tamara Draut, *Who Pays?: The Winners and Losers of Credit Card Deregulation* 6, DEMOS (2007), available at http://www.demos.org/pubs/whopays_web.pdf (“African American and Latino credit card holders with balances are more likely than whites and borrowers of other races to pay interest rates higher than 20%.”).

112. See Jose A. Garcia, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America* at 8, DEMOS (2007), available at <http://www.demos.org/pubs/stillborrowing.pdf> (“The reality that African American and Latino households are more likely to be indebted than the average household should be considered in the context of continued disparities in earnings and employment among white households and households of color.”).

policy in bankruptcy. If education is the gateway to the middle class,¹¹³ then the tension between a liberal lending policy and a restrictive discharge policy may effectively lock the gate and stunt the upward mobility of African Americans, and other similarly situated borrowers, who seek to improve upon their life circumstances through education.

IV. THE POLICY CHANGES THAT CONGRESS MIGHT CONSIDER TO BEGIN TO HELP ALL AMERICANS REALIZE THE BENEFIT OF AN EDUCATION

Congress supports education by appropriating funds for educational loans. Taking on educational loans often means greater risk and financial vulnerability, but there is no attendant safety net in bankruptcy as educational loans are practically nondischargeable. Educational loans are treated this way because Congress believes that making these loans dischargeable would jeopardize the integrity and sustainability of the educational loan program. Moreover, Congress believes that the almost absolute duty to repay educational loans is justified by the financial benefits that education brings. Given these new data suggesting that not all groups experience the same protective benefits of a college education, how might federal educational loan discharge policy reflect the fact that a one-size-fit-all approach may not work?

There are at least three alternatives that Congress might consider in addressing its bankruptcy policy regarding educational loans in light of its potential for a disparate impact. The most obvious course of action would be to make educational loans fully dischargeable in bankruptcy. Alternatively, Congress might return to the concept of a mandatory, post-graduate waiting period during which the loans would not be dischargeable absent a finding of undue hardship. Lastly, Congress might define the undue hardship standard in order to give courts greater guidance and discretion in considering the relative circumstances of each debtor.

Outside of bankruptcy, Congress might ramp up its support of programs that forgive debt after a certain amount of public service. Alternatively, Congress could further commit to the creation and funding of loan programs that would make college more affordable so that Americans are less likely to graduate with unmanageable educational debt. At the extreme end of the spectrum, Congress could make college free for all Americans. This would reflect a belief that education has enough of a public benefit to warrant this sort of expenditure.¹¹⁴ However, given the

113. See *Higher and Higher Education: Trends in Access, Affordability, and Debt*, DEMOS (2007), available at http://archive.demos.org/pubs/Higher%20Ed%20brief_080607.pdf ("A college degree is a necessary qualification for entry to the middle class.").

114. This, of course, is contrary to the trend which perceives education as having predominantly private benefits. See Guinier, *supra* note 12.

recent and continued resistance to healthcare for all Americans, perhaps solutions within the scope of the current regime are most useful. As such, I do not explore the possibility of free college for all Americans.

A. Congress Could Make Educational Loans Fully Dischargeable in Bankruptcy

Congress might consider whether educational debts should be stricken altogether from section 523 of the Bankruptcy Code, making educational loans fully dischargeable in bankruptcy.¹¹⁵ The obvious problem here is the potential for abuse in the form of mass discharge that could destabilize the federal lending program. The main concern in this regard is the student who borrows money for college, reaps the benefit of the education then subsequently seeks to discharge that debt in bad faith or alternatively the less mal-intentioned student who, nonetheless, does not prioritize repayment knowing that bankruptcy is an option lurking in the background.¹¹⁶ On a large scale this would pose a serious problem for the sustainability and integrity of the federal student lending program.

Given this concern, the recently passed Health Care and Education Reconciliation Act of 2010 might deter Congress from making educational loans completely dischargeable in bankruptcy.¹¹⁷ As recently signed into law by President Obama, the Act mandates that all new federal student lending be originated by the federal government.¹¹⁸ This legislation, with its increased appropriation of tax dollars for the federal educational lending program, might hinder a change in the treatment of educational loans in bankruptcy because the taxpayer will be footing the bill entirely.¹¹⁹ If a change to dischargeability inspired a mad rush of students to slough off their educational debt, the taxpayer perhaps would pay a hefty price.

This concern might be allayed, however, by the fact that there is no empirical evidence that making educational loans completely dischargeable would lead to droves of students rushing to bankruptcy courts in order to dump bothersome loans on the eve of a lucrative career. In fact,

115. In fact, this was the suggestion of the National Bankruptcy Review Commission in 1997. See Pottow, *supra* note 8, at 250, (stating that despite the Commission's recommendation "to scrap nondischargeability," Congress chose to further embrace nondischargeability by adding privately originated loans to those protected from discharge in 523(a)(8)).

116. See Pottow *supra* note 8.

117. See Statement of Rep. Ertel, *supra* note 9.

118. H.R. 4872, 111th Congress. (2010).

119. This sort of concern for the taxpayers was expressed when Congress was initially considering making educational loans non-dischargeable. "Mr. Chairman, the street-wise student who is avoiding his obligation and making the taxpayers pick up the tab for him is going to discredit this program. When the program is discredited, the students who are really in need are not going to be able to get the loans they need." 124 CONG. REC. 1794 (1978).

if anything, the strongest empirical evidence that Congress does possess suggests that opportunistic discharging of educational loans was not a problem when nondischargeability of educational loans was originally promulgated.¹²⁰ Thus, Congress might credibly envision Americans seeking education as conscientious and trustworthy borrowers who would honor the obligation to repay their educational debt and who would prioritize this repayment if only to maintain the viability of the student loan program for the sake of their own children and as taxpayers themselves. Additionally, the stigma and personal cost of filing for bankruptcy might serve as appropriate deterrents for those who might consider abusing the system.¹²¹ Hence, in lieu of treating students who borrow money for college as probable swindlers and cheaters,¹²² Congress might acknowledge the real financial risks involved in getting a college degree and reflect this consideration in its bankruptcy policy.¹²³

The concern for abuse may also be addressed by relying on other sections within the Bankruptcy Code that work to weed out abusive debtors. For example, section 707 of the Code grants judges the discretion to dismiss cases that they deem to be filed by debtors in bad faith.¹²⁴

120. Prior to the inclusion of § 523(a)(8) in the Bankruptcy Code in 1978, the General Accounting Office (GAO) studied the incidence of the discharge of federally backed student loans in bankruptcy. The GAO found that less than 1 percent of these loans had been discharged in bankruptcy. See Pardo & Lacey, *supra* note 4, at 420–21; see also Frattini, *supra* note 70, at 542–43.

121. See Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 246 (2006) (“Our claim is modest: the data are consistent with the hypothesis that during a period when bankruptcy reporting became public and the media were filled with exhortation and stories about bankrupt families, the stigma of filing for bankruptcy may have increased.”); but see Edith H. Jones & Todd J. Zywicki, *It’s Time for Means Testing*, 1999 BYU L. REV. 177, 180 (1999) (“In our view, the evidence now available tends to suggest that the recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social stigma traditionally accompanying bankruptcy, and by changes in the law and legal practice that have facilitated filing bankruptcy.”).

122. This perception of the student loan debtor as prone to dishonest behavior is encompassed in Professor Pottow’s notion of “shaming” as a potential rationale for the nondischargeability of educational loans. He says, “the argument is that students fall into a class of morally deficient debtors whom society wants to stigmatize and punish for non-economic reasons.” See Pottow, *supra* note 8, at 259–60.

123. Other types of debtors subject to the nondischargeability exception in 523(a)(8) include those with tax debts (who incidentally still receive preferred treatment as compared to debtors with student loans since federal tax debts are dischargeable after three years, 523(a)(1)) and debtors who owe domestic support obligations. See Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 513 (2000) (“Student loans were thus categorized along with most tax debts, debts obtained by false pretenses or fraud, debts for embezzlement, larceny, or similar legal impropriety, debts for child support or alimony, debts for willful and malicious injury to another, and debts for criminal restitution.”).

124. 11 U.S.C. § 707(b) (1978); see e.g., *In re Egebjerg*, 574 F.3d 1045, 1048 (9th Cir. 2009).

This section would permit a bankruptcy judge to dismiss the petition of a debtor who appeared to be abusing this type of dischargeability provision in an attempt to slough off inconvenient educational debt in bad faith.

At the very least, Congress might consider repealing the portion of the 2005 amendments that grants nondischargeability status to privately originated loans that are not federally insured.¹²⁵ Since these loans are not federally guaranteed, there can be no suggestion of compromise to the federal student lending program if these loans are made dischargeable. They are tantamount to credit card debt and should be treated accordingly in bankruptcy.¹²⁶

B. Congress Could Return to the Time-Lapse Discharge Policy

Congress could reinstate the time-lapse discharge policy. Between 1979 and 1998, there was a mandatory time period during which educational loans were nondischargeable absent a showing of undue hardship. Until 1990, absent a showing of undue hardship, educational loans were nondischargeable if the debtor filed for bankruptcy within the five years after the loans first became due.¹²⁷ Congress amended the Code in 1990 to extend that time to seven years.¹²⁸ Consequently, the debtor seeking to discharge her educational loans in bankruptcy had to wait until seven years after those loans first became due to file if she hoped to discharge those loans without proving that their repayment constituted an undue hardship. Congress eliminated this time-lapse element altogether in the 1998 amendments and limited the discharge of educational loans to those debtors who could show that repayment created an undue hardship.¹²⁹

The time-lapse strategy seems to balance the concern of the good faith debtor with unmanageable educational loans with the need to weed out the bad faith debtor who would commit fraud or “soft fraud” and abuse the Bankruptcy Code to scrape off inconvenient educational debt.

125. See BAPCPA, *supra* note 64. Senator Durbin introduced a bill in 2007 that would have made privately originated student loans dischargeable. S. 1561, 110th Cong. (2007) This bill did not become law, but in April, 2010, new legislation to make privately originated student loans dischargeable in bankruptcy was introduced by Senators Durbin, Whitehouse, and Franken in the Senate (Fairness for Struggling Students Act, S. 3219) and by Representatives Cohen and Davis in the House (Private Student Loan Bankruptcy Fairness Act, H.B. 5043).

126. Barring a few circumstances including when procured fraudulently, credit card debt is dischargeable in bankruptcy. See 11 U.S.C. § 523(a)(2) (1978). Professor Pottow questions whether the nondischargeability of private loans could truly serve to maintain the integrity of the student loan program given that the data show a low bankruptcy filing rate of student loans and therefore do not necessarily support the notion that nondischargeability lowers lending costs. See Pottow, *supra* note 8, at 275-76.

127. After the five years, those loans were fully dischargeable.

128. 11 U.S.C. § 523(a)(8), amended by Pub. L. No. 101-647, § 362(1)-(2) (1990).

129. 11 U.S.C. § 523(a)(8), amended by Pub. L. No. 105-244, § 971(a) (1998).

Recent graduates “on the eve of a lucrative career” would likely have more to lose than a set of textbooks by filing for bankruptcy.¹³⁰ Certainly, in the seven years that the debtor would have to wait to seek a discharge, the debtor would likely have accumulated some potentially non-exempt personal property that would become vulnerable in a Chapter 7 filing.¹³¹ The possibility of jeopardizing this property in a filing might provide enough of a deterrent to the potentially abusive filer. For the good faith debtor who finds herself justifiably in need of a fresh start in bankruptcy, however, there would be some hope of relief instead of a potential lifetime under the weight of unmanageable educational debt.

The treatment of tax debt in the Bankruptcy Code bolsters the reinstatement of the time-lapse strategy as a means of preventing the opportunistic discharge of a debt whose non-payment has negative implications for the public welfare. Section 523 includes federal tax debt among its list of nondischargeable debts, yet permits this debt to be discharged after three years of its accrual.¹³² Thus, the treatment of tax debt in bankruptcy legitimizes a similar treatment of educational loans in bankruptcy given the similarity of tax debt to educational loan debt in terms of their relationship to the interest of the public purse.

C. Congress Could Define Undue Hardship in the Bankruptcy Code

Alternatively, Congress might consider defining undue hardship so as to give courts direct guidance in determining under what circumstances educational loans should be discharged in bankruptcy. Commentators have proposed this sort of amendment or clarification to the Code as a potential solution to the current problems associated with the undue hardship standard.¹³³ However, it is unclear whether a congressional definition of undue hardship would in fact improve the position of the debtor seeking to discharge educational loans. Perhaps the nature of an undue hardship standard is that it defies any principled definition that does not exclude significant numbers of deserving debtors from finding relief.¹³⁴

In bankruptcy, judges have imposed their own notions as to what constitutes undue hardship in the absence of a congressional definition of

130. See Pottow, *supra* notes 77–80 and the attendant text.

131. In a Chapter 7 filing, non-exempt personal property becomes property of the bankruptcy estate to be potentially liquidated and subsequently distributed among creditors with recognized claims. See 11 U.S.C. § 541 (1978).

132. See 11 U.S.C. § 523(a)(1) (1978).

133. See Cloud, *supra* note 9, at 804; see also Frattini, *supra* note 70, at 572.

134. Scott Pashman, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(A)(8): Reassessing Undue Hardship After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605, 616 (2001) (“‘Undue Hardship’ is a concept so fraught with subjective elements that we must consider the totality of the circumstances to confirm its presence or absence.”) (quoting *In re Moorman*, 44 B.R. 135, 137–38 (Bankr. W. D. Ka. 1984)).

the term, often resulting in “differential treatment” of “similarly-situated debtors.”¹³⁵ For example, in *In re Gerhardt*, Fifth Circuit Judge Edith Jones stated that “nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he is trained, obtain a low-paying job, and claim that it would be an undue hardship to repay his student loans.”¹³⁶ In *Gerhardt*, the debtor had studied to be a cello player, but was unable to find work as a cellist that would facilitate the repayment of his loans. For Judge Jones, undue hardship did not permit the debtor Gerhardt to accept work only as a cellist, but meant rather that he must be unable to find *any* paying work before receiving a discharge.¹³⁷ His choice to study music, presumably knowing beforehand that work as a musician would not pay well, gave him no right to find relief from the burden of repaying his loans upon the reality of low-paying work in his chosen area of study.

Contrast this to Bankruptcy Judge Dorothy Eisenberg’s holding in *In re Lebovits*.¹³⁸ In *Lebovits*, a debtor who incurred significant educational loans in order to become a social worker, and who did not earn enough as a social worker to pay his monthly bills, was able to show that repayment of his educational loans would have constituted an “undue burden,” even though his monthly bills included expenses such as the cost of parochial school for his seven children.¹³⁹ Unlike Judge Jones, Judge Eisenberg did not suggest that the debtor’s choice to be a social worker (a job that notoriously pays little) meant that he could not return to the courts seeking relief from his debt. By contrast, Judge Jones’s construction of undue hardship would have meant that Lebovits had no right to relief in bankruptcy given that he continued to work as a low-paid social worker, with seven children who required an expensive education to boot.

135. “An Undue Hardship? Discharging Educational Debt in Bankruptcy”: Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111 Cong. 28 (2009) (statement of Raphael I. Pardo); see also Robert B. Milligan, Comment, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 261-63 (2000).

oans in Bankruptcy, 34 U.C. DAVIS L. REV. 221, 261-63 (2000).

136. *In re Gerhardt*, 348 F.3d 89, 93 (5th Cir. 2003).

137. *Id.*

138. *In re Lebovits*, 223 B.R. 265 (Bankr. E. D. N.Y. 1998).

139. The debtor was a member of an “orthodox religious faith” that required him to “obey strict religious laws” including educating his children in a particular manner. *Id.* at 269-72. Judge Eisenberg determined that it was not contrary to the tenets of undue hardship for the debtor to spend \$700 per month on private school. “It is well settled that a federal statute cannot unreasonably interfere with the liberty of parents to direct the upbringing and education of their children. Therefore, by enacting the Bankruptcy Code in 1978, Congress did not intend to interfere with a debtor’s right to rear and educate his children according to orthodox religious tenets. Hence, the Court finds that the amount expended in this case for parochial school tuition is a reasonable and necessary expense of this Debtor.” *Id.* at 272.

The question is then whether a congressional definition of undue hardship would work to align these types of divergent judicial conceptions of undue hardship. In order to assess whether defining undue hardship would be an effective course of action in this context, it is useful to investigate another instance in which Congress has expressly defined this term. Consider undue hardship as it appears in the Americans with Disabilities Act (ADA).¹⁴⁰ The ADA requires that employers provide “reasonable accommodation” to their disabled employees, but the Act also relieves employers from having to make a reasonable accommodation if doing so would pose an undue hardship. Congress has specifically defined undue hardship in the statute as well as in the Code of Federal Regulations,¹⁴¹ but this has not relieved courts of the challenges of interpreting undue hardship within the statute. In *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538 (7th Cir., 1995), Judge Posner interpreted the “reasonable accommodation” standard as requiring a cost-benefit analysis that would free the employer, under the undue hardship standard, from having to make an “otherwise reasonable” accommodation for a disabled employee if doing so would jeopardize the “employer’s financial survival or health.”¹⁴² However, there is significant scholarly debate as to the proper

140. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, codified as amended as 42 U.S.C. § 12101 et. seq. (2000).

141. 42 U.S.C. § 12111(10)(A)-(B) (2008).

(10) Undue hardship

(A) In general. The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

142. *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995). Most courts have similarly interpreted the standard in this manner. See Cass R. Sunstein, *Cost Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommoda-*

interpretation and application of undue hardship as it relates to “reasonable accommodation” in the ADA, congressional definition notwithstanding.¹⁴³ For example, Cass Sunstein argues that Judge Posner’s interpretation of the “reasonable accommodation” standard as requiring a cost-benefit analysis vis-à-vis the undue hardship defense for employers results in “an incorrect outcome”¹⁴⁴ insofar as it fails to take into account certain costs (including potential “expressive and symbolic”¹⁴⁵ harms that the disabled employee may experience) when excusing an employer from its duty to make the accommodation in question.¹⁴⁶ The simple point here is that even with a congressional definition of undue hardship, judicial “intuitions” may still pose a problem for litigants seeking relief. Indeed, there is a case to be made that courts still construct methods of evaluation that run the risk of resulting in questionable outcomes, even where Congress has defined the term.

Thus, a congressional definition of undue hardship in the Bankruptcy Code may not necessarily solve the problem that seems inherent in interpreting undue hardship, namely the imposition of judicial notions of what conditions of living a debtor ought to endure before meeting the standard. In other words, a congressional definition of undue hardship alone may not be enough to give judges adequate guidance so that disparities in interpretation such as the ones that exist between *Gerhardt* and *Lebovits* do not occur. As in the case of the ADA, the end result might simply be another judicially-constructed test, similar to the *Brunner* or totality-of-the-circumstances test, that leaves the parties involved unsatisfied.

D. Congress Could Create and/or Fund Programs That Will Make College More Affordable

Congress might also continue to work to make a college education more accessible. On the back end, Congress might consider enacting additional legislation that would allow college graduates to work off loan debt in exchange for public service. Currently, the College Cost Reduction and Access Act of 2007 (CCRAA) includes a Public Service Loan

tion, Balancing, and Stigmatic Harms, 74 U. CHI. L. REV. 1895, 1899 (2007) (“The Supreme Court has yet to rule explicitly on the question, though it has written in a way that is consistent with Judge Posner’s approach, and though an approach akin to Judge Posner’s has come to dominate the doctrine of the lower courts.”).

143. *Id.* at 1896; see also Michael Ashley Stein, *The Law and Economics of Disability Accommodation*, 53 DUKE L.J. 79, 81 (2003).

144. Sunstein, *supra* note 142, at 1896.

145. *Id.* at 1909.

146. “The first problem is that cost-benefit analysis might incorporate intuitions rather than disciplining them. Without a method for calculating costs or benefits, analysts are likely to rely on their own hunches and speculations. . . . The second involved stigma.” *Id.* at 1908.

Forgiveness provision in which the loans of eligible college graduates are forgiven after ten years of fulltime employment in public service.¹⁴⁷ Another proposed program, entitled "Service Pays," suggests that for each year that a college graduate who received federal educational aid works in public service, one year of college expenses will be forgiven.¹⁴⁸ The creators of the Service Pays program suggest that, "the program makes a clear statement that education is worth the investment, both nationally and individually."¹⁴⁹ For African Americans and other similarly situated borrowers who are seeking an education, this sort of program may help to offset the substantial costs.

Loan forgiveness in exchange for public service does not come without potential downsides, however. While it might make education more affordable, the requirement that participants work in the public sector for a set amount of time seems a limitation on the aspirations of the recent graduate who hopes to work in the private sector. It would be important to know whether working off debt in this way after graduation would itself function as an unreasonable limit on the career aspirations of the student in question. Perhaps this type of program would place students who would have to rely upon it in order to finance their education at a disadvantage as compared to the student with resources who may begin her career in the private sector immediately upon graduation.¹⁵⁰ On the other hand, this sort of program would permit graduates who face the prospect of repaying large educational debts the opportunity to accept lower paying public service jobs without having to worry about paying their bills.¹⁵¹ Overall, loan forgiveness programs appear to benefit both the individual hoping to fund an education as well as society. Moreover, they further legitimize the expenditure of federal dollars to promote education if graduates spend a significant amount of time working in the public interest.¹⁵²

147. See College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007); see also Schrag, *supra* note 53.

148. See Warren et al., *supra* note 98, at 131.

149. *Id.* at 132

150. The program does envision some private participation. See *id.* at 135. But for the student who, for example, wants to become a stock broker in a firm that promotes from within, getting started five years after graduation instead of immediately after graduation would be an obstacle to reaching his or her career goals.

151. See e.g., Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 915 (1995) (reporting that "law school debt . . . had a statistically significant effect only on the choice between elite for-profit and not-for-profit jobs, and only for African American and Latino women. A higher debt burden increased the relative probability that a graduate would take an elite for-profit job").

152. See *id.* at 142 ("By tying debt forgiveness to public service, Americans would have the chance to say that everyone who does this kind of work deserves a substantial reward from the rest of us.").

Congress might also continue its work to make college more affordable. For example, the recently passed Health Care and Education Reconciliation Act of 2010 includes an increase in need-based Pell Grants¹⁵³ as well as changes to the income-based repayment program (IBR) in order to make loan repayment more affordable for graduates.¹⁵⁴ These measures, although laudable, accept as a given the problem of the steadily increasing cost of a college diploma. Consequently, they work merely to help students manage and repay educational debt, instead of working to address the often-prohibitive cost of college.¹⁵⁵ It is here that perhaps the true problem lies. Going to college has become prohibitively expensive for many Americans, and low-income students and African Americans specifically experience a greater burden as a result of these increases.¹⁵⁶ Certainly, in recognition of this reality, a change in the Bankruptcy Code's treatment of educational loans is hardly a panacea, but it is a step in the right direction.¹⁵⁷

CONCLUSION

Earning a college degree is important for its tangible effects, such as its correlation with increased earning power, as well as for its intangible effects, such as its association with increased democratic participation.¹⁵⁸

153. See Michael Mumper, *The Future of College Access: The Declining Role of Public Higher Education in Promoting Equal Opportunity*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 102–04 (2003)(presenting a brief history of the Pell Grant).

154. College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007)

155. The College Board reported that costs at public four-year colleges and universities rose 4.9% beyond inflation between 1999–2000 and 2008–2009. The College Board, *Trends in College Pricing 2009*, http://trends.collegeboard.org/files/2009_Trends_College_Pricing.pdf. Considering the importance of education to the future of the nation, Congress might consider additional programs that disincentivize colleges from increases in tuition that do not track the general rate of inflation.

156. See Mumper, *supra* note 153, at 102 (“[T]uition [inflation] increases have a disproportionate impact on low-income students. . . . [A] \$1,000 increase in tuition at four-year public colleges reduces enrollment in that sector by 13.7 percent . . . [for] whites and 21.4 percent for blacks.”)

157. See Pottow, *supra* note 8, at 275 (“Returning to reality, the real problem . . . is the affordability of post-secondary education. . . . Addressing higher education affordability concerns by rejiggering the bankruptcy laws is throwing a thimble of water on a conflagration.”)

158. See 153 CONG. REC. S9800 (daily ed. July 24, 2007) (statement of Sen. Obama)(“Education is the centerpiece of a deal America has entered into with its students: if you work hard, if you gain the right set of skills, and if you accept responsibility for your learning, you have a chance for a better life. That is the basic premise of education in our country. And this deal includes a college degree. A college education and a diploma improve the chance of getting a good job, increase earning potential, and ease entry into the middle class.”); see also Guinier, *supra* note 12, at 126 (Stating, “the historical

As the data reported here suggest, education helps individuals to withstand financial difficulty and to stay out of bankruptcy. But the data also reveal that a college degree may not work to help African Americans stay out of bankruptcy. African Americans, who are more likely to need to borrow money in order to get a college education, are particularly hit by the nondischargeability of educational loans in bankruptcy. This observation might prompt Congress to reconsider the current treatment of educational loans in bankruptcy.

Congress understands that education is one of the pillars of upward mobility in American society. The transformative power and benefits of education extend beyond their application to African Americans and other similarly disenfranchised American communities. Without a doubt, for most Americans education remains a vital means to greater job opportunity, financial stability, and increased social equality and economic prosperity. For African Americans particularly, education remains one of the primary tools employed to scrape away the residue of social and economic inequality left by slavery and subsequent years of discrimination. Data that suggest disparate outcomes in the economic protection that results from a college degree should prompt Congress to reconsider both current educational lending policy and the bankruptcy discharge policies.

guiding principle of both public and private universities has been to educate people who would then better serve society as workers, citizens, and leaders.”).

