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Student Loan Debt in Bankruptcy: Central Florida's Program Leading in the Right Direction

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STUDENT LOAN DEBT IN BANKRUPTCY: CENTRAL FLORIDA'S PROGRAM LEADING IN THE RIGHT DIRECTION

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INTRODUCTION

In the United States, bankruptcy is viewed in a negative light; that is, for everyone who has not utilized its "fresh start" approach. However, with debt playing such a crucial part of American lives, bankruptcy should not come with the associated stigma. In fact, debt and the concept of bankruptcy have been so fundamental to the formation and the foundation of the United States, the area of bankruptcy law deserves more attention than it currently invites.

Debt and bankruptcy go hand-in-hand, and while debt is considered a social norm, bankruptcy is scrutinized as an oddity. Social theory suggests that failure to pay a debt was considered to be a sin, and thus, being a delinquent debtor was also an indication of a moral failure.[1] Being a negligent borrower was punishable by imprisonment, much like the commission of a crime.[2] That was until federal law banned the practice of debtor's prison in 1833.[3] Because of this, bankruptcy was, and still is, depicted as an evil enabling debtors to escape their obligations.[4]

This article discerns an alternative view, that is—bankruptcy is necessary. A lifeline offered to debtors without a choice but to look for relief from creditors. In particular, this Note focuses on students as the targeted debtors who are unable to escape a perpetual life of recurring monthly payments. Because more American debtors are cast into this new class of indentured servitude, this lifeline of bankruptcy needs to exist as part of a check and balance on big banking, "super-creditors," and economics.

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[1] Matthew B. Tozer & Ben E. Lofstedt, *Is Bankruptcy Scriptural?*, CHRISTIAN LEGAL CHRONS. (2006), https://www.christian-attorney.net/bible_bankruptcy.html.
[2] *A Brief History of Bankruptcy*, BANKRUPTCYDATA, https://www.bankruptcydata.com/a-history-of-bankruptcy (last visited Apr. 9, 2021).
[3] Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq
[4] David Haynes, *Are You Avoiding Bankruptcy Because of Stigma?*, THE BALANCE, https://www.thebalance.com/bankruptcy-still-carries-stigmas-but-it-shouldn-t-316106 (June 5, 2020).

American students, now more than ever, face a financial crisis in pursuing higher education.[5] Prior to 1976, student loan debt, much like other forms of unsecured debt, was dischargeable through bankruptcy proceedings by showing financial hardship.[6] However, today this is not the case. In 1987, the United States Second Circuit Court of Appeals issued a ruling essentially leaving struggling student debtors without the option to include educational loans in bankruptcy any further.[7] *Brunner* yielded a new three-part test adopted by the Circuits for a student debtor to demonstrate financial hardship.[8] This new test drastically raised the bar for the student debtor and made satisfying the test standard extremely difficult.[9] Although the Court articulated the policy behind the *Brunner* test as a way to prevent the student debtor from abusing bankruptcy,[10] in reality, this ruling left the student debtor susceptible and vulnerable. This new test, in almost all senses, exempted federal and non-profit educational loans from bankruptcy proceedings and left future student debtors subject to abuse from "one-sided" student loans.

So why are American dreamers targeted as consumers of educational loans? Without the help of financial aid, most families would not be able to send their children to college and allow them to further pursue their dreams.[11] This leaves many students without a choice but to take out loans: loans that, uniquely, are incapable of being discharged or even restructured through bankruptcy proceedings when a debtor faces financial ruin.[12] Ironically, educational loans often times are the culprit for putting the debtor into the struggling situation to begin with.[13] This targeting gives good reason behind the student debt crisis currently being faced.

It took Americans 42 years from the inception of Federal Student Aid, in 1965, for the national federal student loan balance to reach a total debt of 500 billion dollars.[14] Frenziedly, it only took another six years, from 2007 until 2013, for the total loan balance to double to 1 trillion dollars.[15] And following that, it took only five years, until 2018, to reach 1.5 trillion dollars.[16] Today, this 1.5 trillion dollars accounts for ten-percent of the nation's total debt.[17]

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[5] Betsy DeVos, *Prepared Remarks by U.S. Secretary of Education Betsy DeVos to Federal Student Aid's Training Conference* (Nov. 27, 2018), https://www.ed.gov/news/speeches/prepared-remarks-us-secretary-education-betsy-devos-federal-student-aids-training-conference.
[6] Richard Pallardy, *History of Student Loans: Bankruptcy Discharge*, SAVINGFORCOLLEGE.COM (Mar. 18, 2021), https://www.savingforcollege.com/article/history-of-student-loans-bankruptcy-discharge.
[7] *See generally* Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).
[8] *Id.* at 396.
[9] *See id.* at 395.
[10] *Id.* at 396.
[11] DeVos, *supra* note 5.
[12] Sarah O'Brien, *Bankruptcy Would be an Easier Option for Consumers Under Elizabeth Warren's Plan*, CNBC (Jan. 7, 2020, 2:39 PM), https://www.cnbc.com/2020/01/07/bankruptcy-would-be-easier-option-for-consumers-under-warren-plan.html.
[13] *Id.*
[14] DeVos, *supra* note 5.
[15] *Id.*
[16] *Id.*
[17] *Id.*

While it can be argued an exponential increase in the debt balance is due to negligent borrowing, when analogizing bankruptcy as a necessary good, the focus is redirected to negligence or abuse by the lender. If lenders, like the government in this instance, had no risk of over lending and losing their investment, there would be no incentive for the lender to control the amount of capital the investor lent out. This ultimately contributes to the creation of a "super-lender." In general, by exempting student loans from bankruptcy proceedings, educational lenders continue to stake and extend, while students fall prey and are left with seldom options when the loans simply become too much.[18]

At 1.5 trillion dollars in federal student aid, student loans make up one-third of the Federal Government's portfolio balance sheet.[19] This means uncollateralized student loans account for over 30% of all federal assets.[20] U.S. Secretary of Education, Betsy DeVos, prepared a statement explaining, "Only through government accounting is this student loan portfolio counted as anything but an asset embedded with significant risk."[21] DeVos also said, "[i]n the commercial world, no bank regulator would allow this portfolio to be valued at full, face value."[22] Federal Student Aid's student loan portfolio is larger than any private bank's consumer loan portfolio: "[b]ehemoths like Bank of America or J.P. Morgan pale in comparison."[23] Federal Student Aid is also the largest loan portfolio within the entire Federal Government, even when you combine the entire Federal Government's direct loan portfolio– by 1.1 trillion dollars.[24]

This can all be summed up quite simply. We, as a country, have a crisis with student loans. "These loans aren't just financial products. They represent students and families 'in distress' with very real implications for our economy and our future."[25] Legislators and federal student lenders are gambling with the Nation's economy; the House is betting the house on the security of student loans. And, in all practical senses, even by imputing security to the unsecured educational loans, by exempting them from bankruptcy, repayment of the educational loans remains an optimistic, improbable, result.[26]

We need change. The courts need to charter a new course, allowing educational loans into bankruptcy. In doing this, the courts can provide a struggling student debtor an approach to avoid this new said class of servitude. After all, this current oppression defeats the purpose of Federal Student Aid. The oppression presently targeting student debtors is counter-productive to one of Congress's fundamental intentions of the bankruptcy code—that individuals receive forgiveness and a fresh start.

This Note examines the leading initiative the Middle District of Florida is taking with its creation of the Student Loan Management program. By creating such a program, a

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[18] Pallardy, *supra* note 6.
[19] DeVos, *supra* note 5.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

student debtor is able to seek resolution of their educational loans in a chapter 13 bankruptcy proceeding. With this modern push to bring unsecured educational loans back into the arena of bankruptcy, the Middle District of Florida is drawing nation-wide attention from both the public and government sectors.

While the Middle District of Florida is no stranger to national recognition, following the implantation of its Mortgage Modification Program during the housing crisis and Great Recession, in continuing its forward-thinking approach in bankruptcy proceedings, the Middle District of Florida is utilizing its power within bankruptcy law for change in the direction of better.[27] This radical movement with student loans, in a chapter 13 proceeding, will hopefully draw enough awareness to spark some reformation on educational loans and student debtors. Simultaneously, it aims in advocating to shed the stigma of punishing a debtor after falling victim to a targeted practice of entrapment.

I. HISTORY, BACKGROUND, AND STIGMA

The orthodox stigma of bankruptcy traces to early marketplaces and merchants. The majority view accepts "bankruptcy" as a derivative from the Latin *bancus*, meaning bench or table, and *ruptus*, meaning broken.[28] Combined, the "broken-table" was symbolic of a banker in the public marketplace who was unable to continue lending or meet obligations.[29] The broken table was symbolic of failure and inability to negotiate.[30] Springing from this common practice came *banco rotto*, which, practiced in Medieval Italy, translated from Italian means broken bank.[31] Often, merchants and bankers would flee quickly, in an attempt to avoid obligations with the money entrusted to them.[32]

In 1542, Henry VIII of England was the first to pass official laws concerning bankruptcy. However, continuing the negative imputation, debtors unable to pay their obligations were considered criminals, punishable by way of debtor's prison or even death.[33] It was not until the 18th century that the world saw the first forward-thinking system. With the introduction of Statute 4 Anne Ch.17, a debtor received positive reinforcement by being allowed to discharge debt as a reward, when the debtor agreed to pay what they could.[34] This radical new concept encouraged honesty in bankruptcy proceedings and the forthcoming presentation of a debtor's assets to be surrendered.

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[27] Tammy Branson & Christie D. Arkovich, *Student Loan Management Program in the United States Bankruptcy Court for the Middle District of Florida*, ORANGE CNTY. BAR ASS'N (Jan. 7, 2020), https://www.orangecountybar.org/news/student-loan-management-program-in-the-united-states-bankruptcy-court-for-the-middle-district-of-florida/.
[28] *A Brief History of Bankruptcy*, *supra* note 2.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *A Brief History of Bankruptcy*, *supra* note 2.

Although bankruptcy was incorporated into the United States Constitution in 1787, the first federal bankruptcy law in the United States was not enacted until 1800 as a temporary response to poor economic conditions.[35] The Founding Fathers, including George Washington, were debtors—often to the extreme. When the original colonies declared independence from England, the declaration presumably was to stir a war. War, being a business, required financing. Certainly, thirteen small colonies did not have the resources to bankroll a war;[36] thus, the colonies went to France to borrow money.[37] When the United States defaulted to France, the States were forced to go back to England, to borrow money, to pay France.[38]

Before continuing forth with the social relevance, it is important to framework bankruptcy's elemental aspects. Bankruptcy provides a legal avenue for a debtor to reduce or eliminate certain debts, either by discharging of such debt, or by restructuring the debt through repayment over a term of years.[39] A debt is simply a liability on a claim,[40] and a claim is a right to payment.[41] A debtor is a person or municipality owing liability on a claim,[42] whereas a creditor is an entity that has a claim against a debtor.[43]

Modern bankruptcy emphasizes rehabilitation; however, this was not always the focus.[44] Bankruptcy law in the United States has followed the roller coaster of economic climates and has taken the temperament of each. Prior to the 20th century, bankruptcy rules and practices opted in favor of the creditor, with the primary focus on recovering creditor assets.[45] Additionally, almost all bankruptcies were involuntary, meaning the creditor triggered the action and the debtor was forced into the judicial proceedings.[46]

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), early forms of bankruptcy law were replications of English traditional rules. The current federal bankruptcy laws began to fill the disparity, with more focus on the individual debtor seeking relief from creditors. Although there has been continued growth from the first Bankruptcy Act, the current bankruptcy code leaves much to be desired.

Current federal bankruptcy law has been the product of several reorganizations and reforms. The first modern drastic change came with the Bankruptcy Act of 1898, allowing companies in distress to utilize protection from creditors.[47] Following the Great Depression in the 1930s, the United States began to see this first articulation from the Supreme Court

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[35] *Id.*
[36] John L. Smith, Jr., *How Was the Revolutionary War Paid For?*, J. AM. REVOLUTION (Feb. 23, 2015), https://allthingsliberty.com/2015/02/how-was-the-revolutionary-war-paid-for/.
[37] *Id.*
[38] *Id.*
[39] *A Brief History of Bankruptcy*, *supra* note 2.
[40] 11 U.S.C. § 101(12) (2012).
[41] *Id.* § 101(5)(A).
[42] *Id.* § 101(13).
[43] *Id.* § 101(10).
[44] *A Brief History of Bankruptcy*, *supra* note 2.
[45] *Id.*
[46] *Id.*
[47] *See* David A. Skeel Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 332-33 (1999).

of the United States' position, that the primary goal of bankruptcy law was to offer a debtor a "fresh start" from financial burdens and relief from creditors.[48] Continuing in 1938, Congress allowed the reorganization of businesses enacting the Chandler Act of 1938, with the focus on minimizing losses to customers rather than creditors.[49]

In the Bankruptcy Reform Act of 1978, Congress revamped the bankruptcy code to give the chapters a more substantial value, while making it easier for both businesses and individual debtors to reorganize or file bankruptcy.[50] However, this progress was brought to a halt when the Supreme Court of the United States ruled in 1982 that the Bankruptcy Act of 1978 was unconstitutional because it provided bankruptcy court judges too much power, determining the judges were non-Article III judges.[51] This was addressed in 1984 with the Bankruptcy Amendment Act of 1984, and in 1986 with the addition of a chapter 12 bankruptcy.[52]

When the Bankruptcy Act of 1994 was passed by congress, it resulted in a new record number of bankruptcy filings.[53] The new provisions in the Act allowed for expedited filings, as well as encouraging individual debtors to use a chapter 13 reschedule, as opposed to a chapter 7 liquidation and discharge.[54] This Act of 1994 also created a National Bankruptcy Commission to investigate further bankruptcy law changes.[55]

Even though it appears throughout the development of the United States' bankruptcy laws, that there have been slight shifts towards shying away from the punishing of a debtor, the area of bankruptcy law itself has still been unable to discard the stigma in totality. Ever wonder why bankruptcy chapters are all odd numbers? It is suggested that legislators purposely labeled bankruptcy chapters as odd numbers to reflect the perspective given to bankruptcy.[56] While the alleged articulated reasoning for labeling all bankruptcy chapters as odd numbers was to leave room for bankruptcy law to expand, in 2005 when the code was expanded, chapter 15 was added—another odd number.[57] But the further question is, who cares? Why is bankruptcy important?

Article I, § 8, Clause 4 of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."[58] The Founding Fathers distinguished bankruptcy to be so paramount that the jurisdiction was not reserved to the states by way of the 10th Amendment.[59] Rather, in delegating

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[48] *A Brief History of Bankruptcy*, *supra* note 2.
[49] *Id.*
[50] *Id.*
[51] Lyle Denniston, *Opinion Analysis: Bankruptcy Courts' Powers Pared Down*, SCOTUSBLOG (June 23, 2011, 10:34 AM), https://www.scotusblog.com/2011/06/bankruptcy-courts-powers-pared-down/.
[52] *A Brief History of Bankruptcy*, *supra* note 2.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Why is Bankruptcy So Odd?*, YESNER L. (Oct. 14, 2016), https://www.yesnerlaw.com/why-is-bankruptcy-so-odd.
[57] *Id.*
[58] U.S. CONST. art. I, § 8, cl. 4.
[59] *See Id.*; U.S. CONST. amend. X.

constitutional authority over bankruptcy to Congress on a federal level, bankruptcy is endowed with the full effect of the supreme law of the land, provided by way of the Supremacy Clause.[60] In doing such, "[s]tates may not regulate bankruptcy, but they may pass laws that govern other aspects of the relationship between a debtor and creditor."[61]

So, while obvious ground has been covered expanding the field of bankruptcy law, it seems the legislatures have dropped the ball in addressing its full importance. But, even more so, this failure to perceive bankruptcy in a light distant from the negative connotations is not limited to just the legislative branch. As a clear indicator, and as previously mentioned otherwise, we see this attitude even coming from within the judicial branch with their ruling in *Brunner*, as well as the halting decision in 1982.[62] The resistance, in ruling bankruptcy judges as non-Article III judges, for fear of giving bankruptcy judges too much power, is a clear example of the very real stigma. Especially, considering that bankruptcy judges are federal district judges and bankruptcy law occupies a field preemption.[63]

The direction in which attention should be focused, in addition to not punishing a debtor, is allowing the debtor to escape a burden. Not allowing a debtor to escape has been the subtle wind in the sails, steering bankruptcy, as the natural legislative and judicial progression.[64] The most recent overhauling revision of bankruptcy came as a product under the Bush Administration.[65] BAPCPA blatantly shifted away focus from consumer relief and instead issued assistance in favor of creditors.[66] BAPCPA targeted consumers in bankruptcy and assumed that all consumers were "abusing" bankruptcy. Despite the title of the act, BAPCPA reduced the consumer protections under the bankruptcy code, especially for student debtors.[67]

Under Section 220 of the BAPCPA, student debtors were directly targeted as consumers.[68] Section 220 extended the protections traditionally afforded to the government and non-profit lenders, to private educational loan lenders.[69] In doing such, private lenders now exist in the "super-creditor" status, as the Federal Government occupies in the bankruptcy system, because private loans are non-dischargeable pursuant to Section

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[60] U.S. CONST. art. VI.
[61] Stephanie Jurkowski, *Bankruptcy*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/bankruptcy (June 2017).
[62] Denniston, *supra* note 51.
[63] *Id.*
[64] Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229 (2010).
[65] Amanda Logan & Christian E. Weller, *Bush's Bankruptcy Legacy: Three Years and Nearly 1.5 Million Bankruptcy Filings Later*, CTR. FOR AM. PROGRESS (Apr. 17, 2008, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2008/04/17/4299/bushs-bankruptcy-legacy-three-years-and-nearly-1-5-million-bankruptcy-filings-later/.
[66] *Id.*
[67] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 109th Cong. (codified as amended in scattered sections of 11 U.S.C. Most provisions of the Act became effective October 17, 2005).
[68] *See* Linda E. Coco, *Bankruptcy Means-Testing, Austerity Measures, and Student Loan Debt* 21-22 (2020) (unpublished) (on file with the Southwestern Law Review).
[69] 11 U.S.C. § 523(a)(8)(B) (2012).

523(a)(8).[70] The U.S. Bankruptcy Code's protection of student loan lenders as "super-creditors" means that a significant portion of the adult population lives under a 10–25 year (or longer) contract to pay the federal government and investors a percentage of their income, which is nothing less than 21st Century debt peonage (Galenson, 1984). Unlike the typical consumer debtor in bankruptcy, the student loan debtor is denied a fresh start through relief from his or her unsecured debts under the U.S. Bankruptcy Code. The student loan debtor is denied legal protections, freedoms, and rights given to the typical debtor in bankruptcy who is unencumbered by student loan debts. As if that's not bad enough, the 2005 amendments to the Bankruptcy Code hurt the student loan debtor in other ways too.[71]

So, while the Federal Government remains a "super-lender," lending money without end on the taxpayer's behalf, the bankruptcy stigma also creates this "super-creditor" status in regard to educational loans, immune to bankruptcy proceedings.

With a combination of the two, young American student debtors are forced into an enslavement of payments. Considering both sides of the stick, young Americans are left holding the tax burden supporting the lending, as well as their individual educational loans of the American dreamer. With so much at stake, and only being able to rely on a false sense of security, why not begin to charter a new course? It would make sense that the Federal Government has its interest in protecting the Federal Student Aid loan portfolio and uses bankruptcy law as an avenue since bankruptcy law is federal law.[72] But, our current model defeats the entire purpose of the Federal Student Aid. By excluding student loans from bankruptcy, the Federal Government limits liability, as well as enables its continuance of the current practice.

II. THE CURRENT FINANCIAL AID MODEL

The current "user-pay" practice emerged as education began to drift towards models of marketization, into our foundation of a credit-based financial structure.[73] The "user-pay" vision resulted in tuition hikes,[74] reductions in scholarships and grant funding,[75] and an increase in students drawing on loans to pay tuition costs.[76] The model was championed in the sense that the possibility to attend college for students was now more

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[70] *Id.*
[71] Coco, *supra* note 68, at 21.
[72] Bill Fay, *Bankruptcy & Student Loans*, DEBT.ORG, https://www.debt.org/students/bankruptcy/ (May 18. 2020).
[73] *See generally* Linda Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1 (2012).
[74] JOHN QUINTERNO, THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS 32 (Rebecca Clendenin ed., 2012), http://www.demos.org/sites/default/files/publications/TheGreatCostShift_Demos_0.pdf.
[75] MICHAEL MUMPER, REMOVING COLLEGE PRICE BARRIERS: WHAT GOVERNMENT HAS DONE AND WHY IT HASN'T WORKED 104-05 (1996).
[76] *Id.*

available than it had ever been in U.S. history.[77] However, in all actuality, it took an educational system that should remain neutral and created a capitalist market for education. This, controlled by loans, cast student-borrowers into a new class of indentured servitude.[78]

Currently only—one in four—Federal Student Aid borrowers are paying down both principal and interest.[79] Of the Federal Government's student loan portfolio, nearly 20% of all loans are delinquent or in default.[80] To put that into perspective, the delinquent or in default rate of student loans is seven times the national rate of delinquent or in default consumer credit cards.[81] Because borrowers are paying so little, their loan balance continues to grow, and for the Federal Student Aid's portfolio today, 43% of loans are considered "in distress."[82]

Since 2010, the debt level has ballooned for individual borrowers.[83] However, of the 70% loan growth, only 30% is due to the increase in the number of borrowers.[84] "Nearly three-quarters of accumulated debt represents the same students taking out a greater and greater loan."[85] This trend in growth remains true for all types of higher education institutions.

With this staggering data, Federal Student Aid has simply been turned into a business disguised behind the gesture of promoting the availability of education. Federal Student Aid is supposed to provide for the benefit of students and families.[86] The "core mission is to ensure that all eligible individuals benefit . . . for education beyond high school."[87] Even further needing to be considered is the benefit of education beyond high school. Promptly put, limited or conditional access to education is detrimental to individuals.[88] A proper functioning democratic society maintains an interest in its citizens seeking an education. Amongst many interests, Federal Student Aid was meant to encourage the expansion of knowledge and be a protection of equality.[89] Furthermore, in supporting democratic structures, education should be neutral and natural.[90] Limiting an individual's access to collective resources and influence is, simply put, adverse to democracy.

And so as follows, the government is pursuing its own interest in spreading the influence of democracy, while simultaneously profiting substantially off of American

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[77] *Id.* at 89.
[78] Coco, *supra* note 68, at 2.
[79] DeVos, *supra* note 5.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *About Us*, FEDERAL STUDENT AID, https://studentaid.gov/about (last visited Jan. 26, 2020).
[87] *Federal Student Aid Information Center (FSAIC)*, OKLA. DEP'T OF REHAB. SERVS., http://www.okdrs.gov/guide/federal-student-aid-information-center-fsaic/revisions/11482/view (last visited Jan. 26, 2020).
[88] PIERRE BOURDIEU, PASCALIAN MEDITATIONS (Richard Nice trans., 2000).
[89] *See* DEREK V. PRICE, BORROWING INEQUALITY: RACE, CLASS, AND STUDENT LOANS 32, 53 (2004).
[90] BOURDIEU, *supra* note 88.

students wishing to participate in the current model. In allowing the continuation of the "user-pay" practice, the Federal Government has forced the majority of Americans to draw on loans to afford the cost of undergraduate and post-graduate education.[91]

The United States Department of Education ("DOE") collected a profit of over $101 billion from 2008–2013 from a stream of monthly student loan payments. This stream of monthly payments from American student debtors generates about $41.3 billion in income for the Federal Government annually.[92] The counterargument offered at the same time, is that forgiveness, or discharge of educational loans, is just impossible because the stream of profits goes towards paying down the national deficit.

However, in considering the collection of taxes, at the same time as offering cuts to the upper 1%, and by chaining student debtors to payments, the Federal Government from 2010–2014 eliminated $3 trillion of income.[93] As a result of this current financial aid model, the Federal Government has "been responsible for shifting a larger portion of the cost of higher education on to middle and low-income students and their families,"[94] and Congress has repeatedly declined opportunities to overhaul or redesign student financial aid statutes.[95]

Additionally, the U.S. Bankruptcy Code has further carved out education as a purely individual responsibility, with the Code's adoption of the Higher Education Act's provisions for student debt. Educational loan lenders have unlimited time to collect on student loan debts and limitless legal powers to do so.[96] As an educational lender, the Federal Government has the ability to garnish wages without a court judgment; additionally, the Federal Government can seize federal tax refunds and can limit social security payments to the student debtor in order to obtain repayment of a student loan.[97] Essentially, these student loan lenders have greater power than any other non-priority, unsecured creditor.[98]

This current model of Financial Student Aid is nothing short of terrifying. The all-too-real sequence is that Financial Student Aid grants loans to students unable to afford an education after high school. The availability of financing drives the cost of college and university tuition sky-high. Sky-high tuition rates force students to draw more, and more,

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[91] DeVos, *supra* note 5.
[92] David Jesse, *Government Books $41.3 Billion in Student Loan Profits*, USA TODAY, https://www.usatoday.com/story/news/nation/2013/11/25/federal-student-loan-profit/3696009/ (Nov. 25, 2013, 1:32 PM).
[93] Kay Bell, *Eight Tax Breaks That Cost Uncle Same Big Money*, FOX BUS., https://www.foxbusiness.com/features/eight-tax-breaks-that-cost-uncle-sam-big-money (Jan. 12, 2016).
[94] MUMPER, *supra* note 75, at 109.
[95] Stephen Burd, *Bringing Market Forces to the Loan Program*, THE CHRON. OF HIGHER EDUC. (Feb. 2, 2001), https://www.chronicle.com/article/bringing-market-forces-to-the/20801.
[96] DEANNE LOONIN & JILLIAN MCLAUGHLIN, THE STUDENT LOAN DEFAULT TRAP: WHY BORROWERS DEFAULT AND WHAT CAN BE DONE 8 (July 2012), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/student-loan-default-trap-report.pdf.
[97] *See generally* Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009).
[98] Coco, *supra* note 68, at 19.

on loans. Educational loans, held by the government and private lenders, now burden the student once the student graduates. Students, now swimming in debt, face financial ruin. Because the student debtor is unable to include educational loans in bankruptcy, the student cannot escape whatever high-interest loan terms they were forced to take. All the while, the interest continues to accumulate, and the educational lenders have no time limit to collect on the loan, assuming no risk. The Federal Government garnishes wages, withholds tax returns, and limits social security payments—indefinitely. In the end, the American student is trapped between choosing an undergraduate or post-graduate education and a burdensome ball and chain of payments.

To clarify, it is not the position of this Note that educational loans should simply be erased from the books. In addition, a debtor should not be given an enabling sword, allowing an aspiring professional receiving a financially rewarding education, to deceitfully draw on loans with the intent to seek bankruptcy shortly after graduation. The fear of such, is what empowered educational lenders to target student debtors as such today. Alternatively, if we, as a society, trusted bankruptcy as a tool that could level the playing field for creditors and debtors, then perhaps a student debtor would have a light at the end of the tunnel.

III. A NEW COURSE

The United States Bankruptcy Court has recognized student loans to be a cause of financial difficulties for many Americans. According to the Middle District of Florida, over 44 million Americans have unpaid student loan debt totaling $1.5 trillion.[99] In order to avoid litigation, the Middle District of Florida issued an administrative order prescribing a procedure for implementing a Student Loan Management Program ("SLM").[100] Effective October 1, 2019, this program prescribes debtors, district-wide, to seek repayment options with their student loan lenders.[101]

The purpose of SLM is to create a forum for debtors and lenders to discuss consensual student loan repayment options.[102] "The goal of SLM is to facilitate communication and the exchange of information in an efficient and transparent manner, and to encourage the parties to consensually reach a feasible and jointly beneficial agreement under the administrative oversight of the United States Bankruptcy Court for the Middle District of Florida."[103]

Under this Administrative Order, the Middle District of Florida is bringing student loan lenders to the table and acknowledging the need for student debtors to have more of a

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[99] Third Am. Administrative Order Prescribing Procedures Student Loan Management Program, Administrative Order FLMB-2019-5 (Bankr. M.D. Fla. Sept. 20, 2019), https://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=88.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

voice considering the repayment terms of educational loans. By recognizing this need, the Bankruptcy Court understands the student loan crisis and the vulnerability of the student targeted by the lender.

This SLM applies any educational benefit or loan made by any governmental unit, funded by any governmental unit, or any loan that purports to be a student loan.[104] Regarding a student debtor, any individual or joint debtor who files a chapter 7, 11, 12, or 13 of the Bankruptcy Code is eligible to seek the SLM.[105] The SLM even provides for the participation of a Trustee if so desired.[106] Either party to the bankruptcy case may initiate SLM after the Debtor pays their bankruptcy filing fee.[107] However, the debtor must complete the required Document Preparation Software before filing a Notice of Resolution.[108] This seems to focus the debtor on driving the participation.[109]

Shifting control to the debtor, even more so, is the Good Faith Requirement. By having all parties act in good faith, the parties must promptly respond to all inquiries through the portal and provide all the requested documentation and information.[110] In creating a portal, the Court provides a secure online service that allows for communication between the parties and the submission of documents.[111] With having the information immediately available to all parties, through a secure website, it provides transparency to the debtors and creditors.[112]

In addition to bringing the educational loan lender to the table, the Bankruptcy Court requires the lender to provide a "full range of solutions available" to the student debtor on any eligible loan.[113] While the SLM Program does not require the student loan creditor to add or modify any existing repayment options, the lender must include any rehabilitation, consolidation, Income Driven Repayment Plan ("IDR"), or settlements.[114] Any consensual agreement reached thereafter must also comply with the law and regulations set forth by the DOE. This consideration to the DOE, shows reverence to the debtor and creditor relationship, as well as the debtor's original obligations to the debtor.

The biggest misconception, however, is that this SLM forces the creditor to participate.[115] Because education loan lenders are still considered creditors, their participation is not required any more so in the bankruptcy proceeding than any other

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Branson & Arkovich, *supra* note 27.

creditor already required by the bankruptcy code.[116] The program "merely encourages the parties to communicate effectively."[117] The program's efforts seek a debtor to "receive a 'fresh start' and not a 'false start.'"[118] Without this communication, the debtor potentially is left in a worsened condition after a chapter 13 proceeding, with student loans.[119]

Due to the automatic stay issued upon a bankruptcy filing, the student loan creditor is unable to seek collection of a debt during the proceeding, without judicial permission.[120] Because of this, and student loans being exempted from bankruptcy, the DOE and loan services place a hold during a bankruptcy.[121] With a traditional restructuring plan spanning 3–5 years, "a debtor who owes $100,000 in student loans with an interest rate of eight percent owes more than $148,000" after their five-year chapter 13 repayment plan.[122] In implementing the SLM, the procedure ultimately facilitates a student debtor to work directly with the loan servicers, with the court, and supervising trustee.[123]

Arguably, one of the other biggest objectives of the SLM is to promote a student debtor in seeking an IDR with the student loan servicer.[124] This remains another pushback and highly contested from the Department of Justice (DOJ), since the DOJ finds that IDR plans already exist. The DOJ even goes as far to mention that in some computer driven IDR plans, it is possible a student debtor receives a $0 payment or that some student debtors may seek forgiveness upon qualification.[125] While this is true, audits suggest otherwise.

According to the inspector general, an audit of student loan servicers found that 61% of the time, "student loan servicers are non-compliant with federal loan servicing requirements regarding forbearances, deferments, and IDR plans."[126] Therefore, the SLM benefits debtors providing their own advocate to review their options and apply for the right program.[127]

> The audit report states that one of Federal Student Aid's ("FSA") objectives is to include the implementation of processes, tools, and methods that protect the interests of students, and to support FSA in making service providers accountable. The objective further states that FSA would ensure that its processes for resolving student issues are simple for customers to

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[116] U.S. Dep't of Just., *Administrative Order Prescribing Procedures for Student Loan Modification Program*, Opinion Letter (Aug. 9, 2019) D.J. No. : 77-17M-679 (response letter to Department of Justice from Student Loan Committee, Sept. 3, 2019 further addresses these concerns brought by Department of Justice).
[117] Branson & Arkovich, *supra* note 27.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] U.S. Dep't of Just., *supra* note 116.
[126] Branson & Arkovich, *supra* note 27.
[127] *Id.*

> use and sophisticated enough to capture insights that can be used to refine student aid operations. The SLMP has all of these ideas wrapped into one program.[128]

Further, mentionable resistance lies with the mistaken belief that after the student debtor successfully completes a chapter 13 bankruptcy proceeding, the remaining student debt outside of the 3 to 5 year plan is automatically discharged because of the participation of the educational loan lender.[129] For the student debt to be discharged, a separate court order is required. However, doesn't plain sense tell us that it is better for the lender to receive some repayment on the student loan, as opposed to the debtor defaulting or a complete discharge? When it comes to student loans, it is apparent that educational loan servicers are hoping for balances to remain delinquent and grow. With such high-interest rates and other terms forced on vulnerable consumers, by keeping unsecured student loans out of bankruptcy, these lenders are conceivably "banking" on it.

IV. CONCLUSION

In viewing bankruptcy as a necessary good, federal courts could hold educational lenders accountable for balefully targeting consumers. With a more even playing field, educational loan terms could be more flexible for students, and more flexible terms would leave prospective students able to contribute, as intended, to society, by providing financing for a higher education. In addition, with more undergraduate and post-graduate students being able to earn higher wages, as they transition into contributing members of society, the members ultimately contribute more through taxes as well. Lastly, this trend would continue to lead to promoting democracy, a more educated prosperous society, and continue in protecting equality. Currently, we have a system that favors the education loan creditors and leaves students without an option but to take loans.

Instead of using it against the debtor and carrying the traditional orthodox stigma of bankruptcy to punish a debtor, what if bankruptcy was utilized as a tool to punish the creditor for abusing its now super-power in lending? This is the goal of the United States Bankruptcy Court for the Middle District of Florida with their SLM. In holding usually unsusceptible educational loan creditors accountable, and bringing them to the table in bankruptcy, Central Florida is leading the way for student debtors to address their oppressive educational loans. In providing the student debtor with the Student Loan Management Program, students are able to seek the fresh start congress intended after claiming bankruptcy. Without a way for an American student to pursue an education on fair terms, the financial America being created is a life of student loan indentured servitude; leaving the future generation dragging a ball and chain of recurring payments.

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[128] *Id.*
[129] *Id.*