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Schoolbooks and Shackles: The Undue Hardship Standard and Treatment of Student Debt at Bankruptcy

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SCHOOLBOOKS AND SHACKLES: THE UNDUE HARDSHIP STANDARD AND TREATMENT OF STUDENT DEBT AT BANKRUPTCY

Abstract: Individual debtors who file for Chapter 7 bankruptcy can discharge most of their pre-petition debts and emerge from bankruptcy with a financial "fresh start." Student loan debt is one of the few exceptions to this general policy. Congress created the student loan discharge exception, 11 U.S.C. § 523(a)(8), to prevent student debtors from abusing the bankruptcy system. Specifically, Congress sought to prevent students who graduated from higher education programs from discharging their debts at bankruptcy, and then beginning lucrative careers. Congress, however, included an important carve-out to this exception for debtors whose loans impose an "undue hardship." The undue hardship standard has created myriad problems for bankruptcy judges because Congress left the term undefined in the Bankruptcy Code. Thus, courts developed a variety of tests for undue hardship, most notably the *Johnson*, *Bryant*, *Brunner*, and Totality tests. The *Brunner* test, which the majority of bankruptcy courts apply, imposes an extremely demanding burden on debtors to show undue hardship. Today, with student debt and tuition costs reaching unprecedented levels, Congress should reconsider the Bankruptcy Code's treatment of student debt. This Note argues that Congress should amend the Bankruptcy Code to define undue hardship based on the Totality test used by a minority of courts. This change would promote national uniformity and would give honest student debtors an attainable opportunity for student loan discharge. In the context of the modern student debt crisis, this relatively moderate reform would significantly help millions of student debtors.

INTRODUCTION

From her one-time position of economic stability, Vera Frances Thomas had an opportunity to make an investment, and she chose to invest in herself.[1] A healthy, fifty-seven year old woman eager to further her education, Ms. Thomas enrolled at Thomas Nelson Community College.[2] Ms. Thomas worked and attended classes simultaneously, financing her education with loans from

[1] *See* Appellant's Opening Brief at *7, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019) (No. 18-11091) (describing Vera Frances Thomas's decision to enroll in community college at age fifty-seven). Ms. Thomas made $11.40 per hour while working a "steady" job at a call center in Virginia. *Id.* at *7–8.

[2] *Id.* at *8. The highest level of education that Ms. Thomas attained before starting the community college program was a high school education. *Id.*

the federal government.[3] Unfortunately, Ms. Thomas became overwhelmed by this balancing act and discontinued her education after two semesters.[4] Ms. Thomas's decision to leave the program marked the beginning of a physical and financial spiral that would leave her in an unrecognizable state of desperation.[5]

Shortly after deciding not to return for a third semester of college, Ms. Thomas's physician diagnosed her with diabetic neuropathy, a degenerative disease that caused pain and numbness in her lower limbs.[6] To manage her illness, Ms. Thomas took unpaid leave from her job at a call center, which eventually fired her from her position.[7] Ms. Thomas could neither reap the benefits of her education nor pay off its costs, which came due after her loans entered repayment.[8] Despite these dispiriting circumstances, Ms. Thomas took steps to minimize expenses and earn new income.[9] She traveled across the country to move in with her boyfriend and obtained employment at three different jobs, but these attempts were all in vain.[10] Ms. Thomas could not continue working, as diabetic neuropathy limited her to sedentary tasks and these jobs required her to be on her feet.[11] As a last resort, Ms. Thomas filed for bankruptcy because she could not repay her student loan debt.[12]

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[3] *Id.* (stating that Ms. Thomas took out $7,000 in two loans from the federal government in February 2012 and September 2012).

[4] *Id.* (describing how Ms. Thomas attempted to balance school and work but chose not to return for a third semester of classes when this became too difficult).

[5] *See infra* notes 6–12 and accompanying text (describing Ms. Thomas's physical and financial decline).

[6] Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450 (5th Cir. 2019) (describing diabetic neuropathy's detrimental impact on Ms. Thomas's capacity to continue working at the call center); *see Diabetic Neuropathy*, MAYO CLINIC (Mar. 3, 2020), https://www.mayoclinic.org/diseases-conditions/diabetic-neuropathy/symptoms-causes/syc-20371580 [https://perma.cc/A3ZA-V3FU] (characterizing diabetic neuropathy as a serious complication of diabetes that can cause painful, debilitating symptoms).

[7] *See In re Thomas*, 931 F.3d at 450. Ms. Thomas lost her position and access to her unemployment benefits in 2016 after another company acquired her employer. *Id.*

[8] *See id.* Ms. Thomas made two payments of $41.24 and $41.61 after her repayment period began in December 2013. *Id.*

[9] *See infra* note 10 and accompanying text (describing Ms. Thomas's attempts to save money while simultaneously bolstering her income).

[10] Appellant's Opening Brief, *supra* note 1, at *10 (listing the steps that Ms. Thomas took to defray costs after leaving community college). Specifically, Ms. Thomas worked at Perfumania, Whataburger, and the United Parcel Service after moving to Texas with her boyfriend. *Id.* Her lawyer argued that her incomplete education limited her opportunities to these low-paying jobs. *Id.*

[11] *See In re Thomas*, 931 F.3d at 450 (stating that the reason Ms. Thomas could not hold any of these positions was the active nature of the work requirements). A 2017 U.S. Food and Drug Administration report on diabetic neuropathy featured testimonials of patients with diabetic neuropathy. *See generally* CTR. FOR FED. DRUG EVALUATION & RSCH. & U.S. FOOD & DRUG ADMIN., THE VOICE OF THE PATIENT (2017), https://www.fda.gov/files/about%20fda/published/The-Voice-of-the-Patient—Neuropathic-Pain-Associated-with-Peripheral-Neuropathy.pdf [https://perma.cc/MP33-49BY] (providing anecdotal accounts from patients living with diabetic neuropathy). One patient stated that "If I were to stand for . . . [ten] minutes [or] walk a half to three-quarters of a mile, I would start getting deep muscular

In the bankruptcy proceedings and appeal that followed, both courts held that Ms. Thomas was not entitled to a discharge of her student loan debts, meaning she would still be liable for her debts even after the bankruptcy proceedings concluded.[13] The appropriate legal test for whether Ms. Thomas could discharge her student loans considered whether her circumstances imposed an "undue hardship" on her.[14] Her debilitating illness, her thrice unsuccessful attempts at obtaining employment, and her move across the country to save money did not avail her.[15]

Ms. Thomas's plight has broader implications than just bankruptcy law; it raises questions about the value of education and the U.S. government's role in sponsoring it.[16] Education is a deeply rooted ideal in the United States both legally and culturally.[17] Indeed, the Supreme Court interpreted the right to receive an equal education as deriving from the U.S. Constitution itself.[18] Education is also inextricably tied to the American dream because many view it as a ladder to financial and social prosperity.[19] None other than Benjamin Franklin endorsed this view when he observed that "an investment in knowledge pays the best interest."[20] Ms. Thomas and thousands of other similarly-situated

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pain." *Id.* at 6. Another stated that pain "usually happens when I am overtired [or if] I've been standing or walking for more than a few minutes." *Id.*

[12] *In re Thomas*, 931 F.3d at 450. Specifically, Ms. Thomas filed for Chapter 7 bankruptcy in Dallas and sought for her student loans to be discharged, meaning that she would no longer have to pay these debts. *Id.*; *see infra* note 31 and accompanying text (describing how some debtors receive a "fresh start" at bankruptcy with a discharge). For a detailed discussion and definition of Chapter 7 bankruptcy, see *infra* notes 25–64 and accompanying text.

[13] *In re Thomas*, 931 F.3d at 452–53 (affirming the bankruptcy court's decision to deny Ms. Thomas a discharge of her student loan debt); Thomas v. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 486 (Bankr. N.D. Tex. 2017) (holding that Ms. Thomas was not entitled to a discharge of her student loan debt because she could not demonstrate an undue hardship), *aff'd*, 931 F.3d 449.

[14] *See In re Thomas*, 931 F.3d at 452 (stating that the proper test for student loan discharge is whether a debtor can demonstrate an undue hardship).

[15] *See id.* at 450, 452–53 (describing the measures that Ms. Thomas took to improve her financial situation but declining to discharge her student loan debt).

[16] *See supra* notes 11–12, 15 and accompanying text (describing Ms. Thomas's struggle to pay off her student loan debt).

[17] *See infra* notes 18–20 and accompanying text.

[18] U.S. CONST. amend. XIV, § 1 ("No state . . . shall deny to any person within its jurisdiction the equal protection of the laws."); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (interpreting the Fourteenth Amendment to protect the educational rights of all American children).

[19] *See* Barack Obama, The American Dream (Nov. 7, 2007), https://www.cnn.com/2007/POLITICS/12/21/obama.trans.americandream/# [https://perma.cc/HZ4J-MZCG] (identifying affordable higher education as a means to "reclaim the American dream"); Martin Luther King, Jr., Guidelines for a Constructive Church (June 5, 1966), https://kinginstitute.stanford.edu/king-papers/publications/knock-midnight-inspiration-great-sermons-reverend-martin-luther-king-jr-5 [https://perma.cc/PW9V-N7H2] (lamenting in a speech on the American dream the inadequate, segregated schools for African-American students, and arguing that this holds the United States back from becoming a great nation).

[20] John Ames & Chip Bowles, *The American Bankruptcy Institute's Investment in Knowledge: The Chapter 11 Professional Fee Study*, NORTON BANKR. L. ADVISER, Feb. 2008, at 2, 2 (citing Ben-

debtors might take issue with that statement, however, having invested in their education, failed to thrive, and discovered that bankruptcy did not provide a backstop for their suffering.[21]

Part I of this Note reviews the history of student debt in bankruptcy proceedings and describes the most prominent undue hardship tests that bankruptcy courts apply.[22] Part II of this Note analyzes the merits and drawbacks of these undue hardship tests and concludes that the Totality test is the best approach.[23] Lastly, Part III of this Note discusses the role of government in student lending and proposes reforms to the student lending regime in light of the modern student debt crisis.[24]

I. DISCHARGING STUDENT DEBT IN BANKRUPTCY

The United States is facing a student debt crisis, with millions of Americans owing a collective $1.5 trillion in student debt in 2019.[25] Since outstripping the collective total of credit card debt in March 2012, student debt has continued its alarming trajectory, coinciding with increasing rates of student borrowing and growing tuition costs.[26] These turbulent conditions force stu-

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jamin Franklin's axiom to complement the American Bankruptcy Institute's funding of a study on Chapter 11 professional fees); Patti Van Slyke, *Bruce Hopkins' Excellent Adventure*, J. KAN. BAR ASS'N, May 2017, at 21, 22 (quoting Benjamin Franklin to emphasize the accomplishments of a practicing attorney and author).

[21] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 452–53 (5th Cir. 2019) (refusing to discharge Ms. Thomas's student loan debt); Jessica L. Gregory, *The Student Debt Crisis: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481, 485 (2014) (stating that there are thousands of students who filed for discharge of student loans at bankruptcy). In addition to the procedural and financial burdens of a bankruptcy filing, debtors often feel stigmatized by relying on this last resort option. *See* Yvana L.B.H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEVS. J. 289, 290–91 (2012) (describing the societal shaming that impacts debtors and how this affects their future fiscal responsibility).

[22] *See infra* notes 25–169 and accompanying text.

[23] *See infra* notes 170–237 and accompanying text.

[24] *See infra* notes 238–288 and accompanying text.

[25] Gregory, *supra* note 21, at 481–82 (comparing the student debt crisis with the subprime mortgage crisis). *See generally* CTR. FOR MICROECONOMIC DATA, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2019: Q3 (2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2019Q3 [https://perma.cc/4BMG-8RHL] (analyzing data from Equifax to identify trends in American debt as of November 2019).

[26] ZACHARY BLEEMER ET AL., ECHOES OF RISING TUITION IN STUDENTS' BORROWING, EDUCATIONAL ATTAINMENT, AND HOME OWNERSHIP IN POST-RECESSION AMERICA 1 (2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr820.pdf?la=en [https://perma.cc/W6B2-25QG] (stating that the prevalence of student borrowing by age twenty-five rose from 25% in 2004 to 45% in 2016); Gregory, *supra* note 21, at 483 (contending that higher tuition costs are partially responsible for the increase in student debt). Moreover, college tuition has grown four times faster than the consumer price index since 1978 and three times faster than the rate of inflation since 1983. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 334 (2013); Gregory, *supra* note 21, at 483.

dent debtors to seek shelter under the roofs of their parents' houses and, in many cases, under the protection of the U.S. bankruptcy courts.[27]

In general, bankruptcy offers debtors an avenue for discharging debt to improve their financial situation, or at least to stop the proverbial bleeding.[28] Chapter 7 bankruptcy, the focus of this Note, relieves debtors from paying most of their pre-bankruptcy debts, which debtors can finance by selling their non-exempted assets.[29] Chapter 7 bankruptcy, from a policy perspective, aims to provide debtors with a financial "fresh start."[30] That said, the fresh start principle is not absolute: the Bankruptcy Code restricts which types of debtors can petition for Chapter 7 bankruptcy and which types of debts are dischargeable.[31] With regard to student debt, bankruptcy courts will only discharge this

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[27] BLEEMER ET AL., *supra* note 26, at 1 (concluding that the percentage of twenty-three to twenty-five-year-olds living with their parents or elders increased from 33.5% in 2004 to 44.9% in 2015). A report on the relationship between student borrowing and rising tuition, prepared for the New York Federal Reserve, postulated that the burden of student loan debt limits student debtors' access to mortgages and home ownership. *Id.* at 1–2.

[28] 11 U.S.C. § 727(a) (listing instances where a debtor's debt is not dischargeable at bankruptcy); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that a central tenet of the Bankruptcy Code is to provide debtors with the opportunity to emerge from bankruptcy with fewer financial obligations). The Supreme Court, in a subsequent opinion to its 1934 case *Local Loan Co. v. Hunt*, elaborated that bankruptcy is intended to benefit the unfortunate debtor, not the unscrupulous one. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (describing the intended beneficiary of bankruptcy to be the "honest but unfortunate debtor" (quoting *Local Loan Co.*, 292 U.S. at 244)); *see also* 11 U.S.C. § 548(a)(1) (vesting the bankruptcy trustee with power to avoid fraudulent transfers); Tyner v. Nicholson (*In re* Nicholson), 435 B.R. 622, 630 (B.A.P. 9th Cir. 2010) (allowing courts to consider a debtor's bad faith actions when determining if a debtor may claim property as exempt at bankruptcy).

[29] ROBERT E. GINSBERG ET AL., GINSBERG & MARTIN ON BANKRUPTCY § 12.01 (5th ed. Supp. IV 2020) (discussing the basic mechanisms of Chapter 7 bankruptcy). Chapter 7 is also known as "ordinary" bankruptcy and is a liquidation procedure, unlike Chapter 11, which deals with the reorganization of businesses, and Chapter 13, which allows debtors to retain some of their property and use income to pay off pre-filing debts. *Id.* §§ 12.01, 13.01, 15.01.

[30] *Garner*, 498 U.S. at 287 (recognizing the fresh start principle as central to the Bankruptcy Code); Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394, 399 (Bankr. D. Mass. 2001) ("[B]arring abuse of the bankruptcy courts and the Code, all debtors deserve at least a chance at a fresh start."). Generally, Chapter 7 of the Bankruptcy Code describes how individuals and businesses' assets are liquidated and distributed to creditors to satisfy outstanding debts. *See* 11 U.S.C. § 101(41) (defining "person" to include individuals, corporations, and partnerships); *id.* § 109 (stating that "persons" who are "debtors" may file for Chapter 7 relief and listing exceptions); *id.* §§ 725–726 (describing the process for selling a debtor's assets and distributing the proceeds to satisfy creditors' claims). The concept of the fresh start has animated bankruptcy law for decades, and dates back to a 1904 Supreme Court decision, *Wetmore v. Markoe*. *See* 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start . . . ."). The fresh start principle is bolstered by provisions that exempt the sale of certain types of personal property to satisfy creditors' claims, thus allowing the debtor to emerge from bankruptcy with some, if limited, assets. Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 853 (1999) (contending that without exemption laws, bankruptcy would merely be a reprieve for individual debtors, not a fresh start).

[31] *See* 11 U.S.C. § 109(a) (requiring that debtors seeking bankruptcy relief have domicile in the United States); *id.* § 109(b) (excluding railroads, domestic insurance companies, and banks from Chapter 7 bankruptcy relief); *id.* § 523(a) (listing debts that cannot be discharged by individual debt-

obligation when a debtor can demonstrate that the debt imposes an undue hardship.[32] This exacting standard reflects Congress's goal of protecting the integrity of the student loan system from abuses by opportunistic student debtors.[33]

Consequently, the fresh start principle and the bankruptcy courts' obligation to protect the student loan system conflict.[34] The meaning of undue hardship is the battleground for these clashing policy goals because Congress did not define the term in the Bankruptcy Code.[35] In the context of the student debt crisis, there are profound implications for student debtors based on how courts define and operationalize undue hardship.[36]

Section A of this Part provides an overview of the Chapter 7 bankruptcy system with a focus on discharging debt.[37] Section B reviews the legislative

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ors). A "discharge" occurs when a debtor's legal duty to pay a debt or obligation is extinguished. *Discharge*, BLACK'S LAW DICTIONARY (11th ed. 2019). The concept of a discharge is central to the fresh start notion of bankruptcy, described by Judge Melvin S. Hoffman as "the bulls-eye of bankruptcy." Nickless v. Fontaine (*In re* Fontaine), 467 B.R. 267, 270 (Bankr. D. Mass. 2012).

[32] 11 U.S.C. § 523(a)(8) (stating that, absent an undue hardship, student debt is non-dischargeable in bankruptcy); Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450–51 (5th Cir. 2019) ("To discharge student loan debt under the Bankruptcy Code, a debtor must show that the debt would impose an 'undue hardship' on the debtor if it is not discharged." (quoting 11 U.S.C. § 523(a)(8))).

[33] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 22 (Bankr. D. Mass. 2005) (stating that the purpose of the undue hardship standard was to avoid abuses of the bankruptcy system by student debtors). It is exceedingly difficult for debtors to demonstrate an undue hardship; only twenty-nine of 72,000 student loan debtors who went through bankruptcy proceedings successfully discharged their debt in 2008. Gregory, *supra* note 21, at 485.

[34] *See In re Hicks*, 331 B.R. at 24 (noting that the Totality test for undue hardship seeks to balance the dual concerns of a debtor's fresh start and protecting the student loan system from abuse); *supra* notes 30–31 and accompanying text (describing the tension between the fresh start principle and the Bankruptcy Code's limitations on the types of debtors that can file for bankruptcy). Arguably, a "fresh start" is an overly optimistic term for the position most individual debtors find themselves in after a Chapter 7 proceeding. *See* Arthur W. Rummler, *Life After Bankruptcy: Post Bankruptcy Protection from Employment Discrimination*, DUPAGE CNTY. BAR ASS'N BRIEF, Jan. 2012, at 26, 29. For example, debtors fear retaliation from current employers or discrimination by future employers because of their decision to file, despite some state protections against these practices. *Id.*

[35] *See* 11 U.S.C. § 523(a)(8) (including the undue hardship standard but leaving it undefined); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (noting that Congress's silence on the meaning of undue hardship has created a large body of conflicting case law attempting to define the term); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 302 (3d Cir. 1995) (same). In attempting to apply the undue hardship standard, courts have developed a range of tests, including the so-called *Bryant* test, *Johnson* test, *Brunner* test, and Totality test. *See In re Faish*, 72 F.3d at 303–04 (comparing the merits of the *Bryant*, *Brunner*, and *Johnson* tests); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 736–37, 741 (Bankr. D. Me. 2000) (adopting the Totality test and rejecting the *Johnson* and *Brunner* tests). The Bankruptcy Code, located in Chapter 11 of the U.S. Code, states the bankruptcy rules that apply in cases across all ninety U.S. bankruptcy districts. *Process—Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics [https://perma.cc/6XJE-TKJ3].

[36] *See supra* notes 25–27 and accompanying text.

[37] *See infra* notes 40–64 and accompanying text.

and case law history of student debt discharges.[38] Section C focuses on four undue hardship tests used by bankruptcy courts to determine if a debtor can discharge student debt.[39]

A. Bankruptcy: Basic Structure and Debt Discharges

Bankruptcy law is nearly as old as the United States itself, with the U.S. Constitution empowering Congress to pass bankruptcy laws as part of its Article I powers.[40] Consumer debtors seldom utilized bankruptcy law, codified in Title 11 of the United States Code, until the enactment of the Bankruptcy Reform Act of 1978, which established Chapters 7 and 13 of the Bankruptcy Code.[41] Both individual and business debtors can access chapter 7 bankruptcy, which focuses on liquidation.[42] The majority of consumers who file for bankruptcy do so under Chapter 7 because it affords them the opportunity of a financial fresh start.[43]

The debtor or the debtor's creditors initiate the Chapter 7 bankruptcy case by filing a petition with the bankruptcy court.[44] Upon filing, two important events occur: the bankruptcy estate is created and the automatic stay is trig-

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[38] *See infra* notes 65–82 and accompanying text.

[39] *See infra* notes 83–169 and accompanying text.

[40] U.S. CONST. art I., § 8, cl. 4 ("The Congress shall have power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[. . . .]"); *see* Brett Weiss, *"Not Dead Yet:" Bankruptcy After BAPCPA*, MD. BAR J., May 2007, at 17, 18 (describing the historical origins of the U.S. bankruptcy system).

[41] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532); Weiss, *supra* note 40, at 18 (assessing the impact of the Bankruptcy Reform Act on consumer debtors). In Chapter 7 bankruptcy, the bankruptcy trustee liquidates the consumer debtors' assets to satisfy creditors' claims, whereas in Chapter 13 bankruptcy, debtors may pay their creditors with regular sources of income. Weiss, *supra* note 40, at 18.

[42] 11 U.S.C. § 109(b) (limiting which debtors can seek Chapter 7 bankruptcy protection). This code provision clarifies when a "person" may be a "debtor" for the purposes of Chapter 7. *Id.* The Bankruptcy Code defines "debtor" to mean "a person or municipality concerning which a case under this title has been commenced." *Id.* § 101(13); *see id.* § 109(a) (limiting who can access Chapter 7 bankruptcy proceedings). Additionally, the code defines "person" to include individuals, partnerships, and corporations. 11 U.S.C. § 101(41); *see id.* § 109(a). Thus, reading these definitions together, a business may be a debtor and person able to seek Chapter 7 protection. *See id.* §§ 101(13), (41), 109(b).

[43] *See* David M. Madden, *Dissecting Chapter 7 Bankruptcy for Businesses*, DUPAGE CNTY. BAR ASS'N BRIEF, May 2010, at 34, 34 (stating that most consumer bankruptcy cases arise under Chapter 7); *supra* note 30 and accompanying text (discussing the bankruptcy fresh start principle). Most consumer bankruptcy cases are resolved within six months of filing without a court proceeding. Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2297, 2305–06 (2019) (describing the consumer bankruptcy system's mechanics).

[44] 11 U.S.C. §§ 301–303. This general rule applies to voluntary cases (when the debtor chooses to file a petition), involuntary cases (when creditors file a petition), and joint cases (spouses jointly file a petition). *See id.*

gered, preventing nearly all creditor activity.[45] For the debtor, the importance of these two events can hardly be overstated.[46] When the bankruptcy estate arises, with limited exceptions, all of the debtor's property interests become property of the estate, which the Chapter 7 bankruptcy trustee controls.[47] The trustee, responsible for the administration of the estate, has the power to sell the property of the estate and distribute the proceeds to satisfy claims from the debtor's creditors.[48]

Additionally, filing the bankruptcy petition triggers an automatic stay, an injunction that precludes almost all post-petition creditor activity.[49] This powerful tool protects the estate from creditors depleting it and shields the debtor from creditors that exert pressure for debt repayment.[50] Bankruptcy courts abhor violations of the automatic stay and have the authority to impose compensatory and punitive damages against creditors who continue collection activities after a debtor has filed a petition.[51] Examples of prohibited creditor actions

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[45] *Id.* § 362 (describing the automatic stay, which prevents nearly all creditor activity once the petition has been filed); *id.* § 541(a) (stating that the filing of a bankruptcy petition creates an interest in nearly all of the debtor's property, which is held in the bankruptcy estate).

[46] *See infra* notes 47–48 and accompanying text.

[47] 11 U.S.C. §§ 541(a)–(b), 542(a)–(c) (describing which of the debtor's assets becomes the property of the estate, including property which the debtor did not possess when the bankruptcy case began); James W. McNeilly, Jr., *Representing Chapter 7 Bankruptcy Debtors: Going for Broke*, WIS. LAW., Nov. 2004, at 10, 62 (stating that property of the estate becomes subject to the bankruptcy trustee's control). An example of property that does not become part of the bankruptcy estate is funds placed in a retirement account at least one year before the individual files a bankruptcy petition. 11 U.S.C. § 541(b)(5).

[48] 11 U.S.C. § 363(b)(1) (stating that the trustee has the power to sell property of the estate, subject to some limitations); *id.* § 704(a) (listing the duties of the trustee, including collecting the property of the estate and liquidating it). The United States Trustee, part of the U.S. Department of Justice, creates the panel of trustees that work on Chapter 7 bankruptcy cases. 57 JOEL LEWIN & ERIC F. EISENBERG, MASSACHUSETTS PRACTICE: CONSTRUCTION LAW §§ 16.2, 16.8 (2019) (distinguishing between the United States Trustee and the Chapter 7 trustees that the United States Trustee is responsible for appointing). In carrying out their role, trustees owe fiduciary obligations to the bankruptcy court, the bankruptcy process, and the parties they serve. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 147–48 (2006). The trustee must avoid acting in a self-interested manner by taking any actions adverse to the bankruptcy estate. *Id.* at 156.

[49] 11 U.S.C. § 362(a) (listing which creditor activities the automatic stay prohibits once a bankruptcy petition is filed); Weiss, *supra* note 40, at 20–21 (stating that the automatic stay precludes creditor collection activities such as letters, calls, and filing of lawsuits).

[50] *See* 11 U.S.C. § 362(a); Weiss, *supra* note 40, at 21 (concluding that the automatic stay and bankruptcy petition "make bankruptcy an attractive option for debtors being harassed by creditors, those with claims and judgments against them, or those who simply cannot pay their bills").

[51] 11 U.S.C. § 362(k)(1) (stating that creditors who violate the automatic stay are subject to actual damages and may also be required to pay punitive damages if their violation is willful); *see* Achterberg v. Creditors Trade Ass'n, Inc. (*In re* Achterberg), 573 B.R. 819, 840–41 (Bankr. E.D. Cal. 2017) (imposing punitive damages on a creditor that willfully violated the automatic stay by failing to vacate a court judgment against the debtor after the debtor filed for bankruptcy). Compensatory damages, also known as actual damages, are "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." *Damages*, BLACK'S LAW DICTIONARY, *supra* note

include creating liens against the debtor's property, repossessing property of the estate, and appropriating the debtor's wages to satisfy claims.[52] Put simply, the bankruptcy estate creates a pool of the debtor's disposable assets and the automatic stay protects the pool from depletion.[53]

The goal of any Chapter 7 debtor is to discharge as much debt as possible and emerge from bankruptcy free of the financial obligations that necessitated filing for bankruptcy in the first place.[54] Typically, debtors who acts honestly are entitled to a general discharge of all their pre-petition debt.[55] Conversely, debtors who act dishonestly by engaging in fraud, destroying financial information, or disobeying the court forfeit their opportunity for a general discharge.[56] In addition, Chapter 7 categorically makes certain types of debts non-dischargeable.[57] Non-dischargeable debts fall into two categories, those which

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31. In contrast, punitive damages "are intended to punish [the defendant] and thereby deter blameworthy conduct." *Id.* In 2017 in *Achterberg v. Creditors Trade Ass'n, Inc.* (*In re Achterberg*), U.S. Bankruptcy Court for the Eastern District of California Judge Ronald H. Sargis emphasized the seriousness of violating the automatic stay, describing it as a fundamental protection for debtors and "not something with which a creditor may trifle." *In re Achterberg*, 573 B.R. at 835. Significantly, punitive damages are only available when a creditor willfully violates the stay, meaning that the creditor has knowledge of the automatic stay and intended the action that violated it. *Id.* at 831 (citing Goichman v. Bloom (*In re* Bloom), 875 F.2d 224, 227 (9th Cir. 1989)).

[52] 11 U.S.C. § 362(a)(3)–(4) (prohibiting creditors from taking possession of property of the estate, creating a lien, and wage garnishment). The Bankruptcy Code defines a "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation." *Id.* § 101(37). Thus, once the automatic stay is in effect, the creditor cannot create an interest in the property of the estate. *See id.* § 362(a)(4).

[53] *See supra* notes 47–52 and accompanying text (describing the nexus between the bankruptcy estate and automatic stay).

[54] Colonial Penniman, LLC v. Williams (*In re* Colonial Penniman, LLC), 575 B.R. 664, 686 (Bankr. E.D. Va. 2017) ("Intended to provide a breathing spell from the factors that drove the debtor to bankruptcy, the automatic stay protects a debtor from any action that would interfere with the debtor's ability to effectively reorganize."); *see* Curtis v. LaSalle Nat'l Bank (*In re* Curtis), 322 B.R. 470, 483 (Bankr. D. Mass. 2005) (describing the discharge as a "cornerstone[]" of bankruptcy law, allowing the debtor to emerge from bankruptcy with new financial opportunity).

[55] 11 U.S.C. § 727(a) (stating that an individual debtor will receive a discharge absent fraud or concealment); Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 22 (Bankr. D. Mass. 2005) ("A debtor under Chapter 7 of the Bankruptcy Code is generally entitled to a discharge of all debts that arose before the filing of the bankruptcy petition.").

[56] 11 U.S.C. § 727(a)(3) (barring discharge when a debtor has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained"); *id.* § 727(a)(4) (excluding debtors engaging in fraud from receiving a discharge); *id.* § 727(a)(6) (requiring that debtors obey lawful orders from the court to receive a discharge).

[57] *See infra* notes 58–60 and accompanying text (listing the types of debts that cannot be discharged at bankruptcy). In addition to Chapter 7 bankruptcy cases, student debt discharges are available for some debtors who file for bankruptcy under Chapter 13 of the bankruptcy code, which allows individual debtors with regular incomes to pay off debts with a payment plan. *See* 11 U.S.C. § 109(e) (allowing Chapter 13 bankruptcy relief for individuals with regular income); Claxton v. Student Loan Mktg. Ass'n (*In re* Claxton), 140 B.R. 565, 568–69 (Bankr. N.D. Okla. 1992) (stating that a debtor

are automatically non-dischargeable, and those which must be raised by a creditor in an adversarial proceeding.[58] Notable automatic discharge exceptions include some tax obligations, domestic support obligations, and student loans.[59] Alternatively, exceptions to discharge initiated by an adversary proceeding include money obtained by false pretenses, fraud by the debtor acting in a fiduciary capacity, and willful and malicious injury caused by the debtor.[60]

Within this framework, the student loan debt discharge exception is significant because the Bankruptcy Code gives debtors a lifeline for extreme circumstances.[61] If a debtor can demonstrate by a preponderance of the evidence that the student loan debt imposes an undue hardship, then the court may discharge this debt.[62] The conspicuous absence of an undue hardship definition in the Bankruptcy Code saddled bankruptcy courts with the arduous tasks of both interpreting and applying this term.[63] The Bankruptcy Code's silence on this definition of undue hardship precludes easy answers, necessitating a review of undue hardship's legislative and case law in order to understand how courts apply it today.[64]

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who filed for Chapter 13 bankruptcy would receive a student debt discharge if the debtor could demonstrate an undue hardship, but holding that in this case the debtor did not meet this burden).

[58] 11 U.S.C. § 523(a) (stating exceptions to an individual debtor's discharge at bankruptcy); Mark S. Zuckerberg & Amanda K. Quick, *Exceptions to the Bankruptcy Discharge*, RES GESTAE, Oct. 2013, at 32, 32 (distinguishing between automatic exceptions to discharge and those initiated by creditors' adversary proceeding).

[59] 11 U.S.C. § 523(a)(1), (5), (8) (excluding, automatically, some tax obligations, domestic support obligations, and student loans from discharge); *see* Zuckerberg & Quick, *supra* note 58, at 32 (listing automatic exceptions to debt discharges).

[60] 11 U.S.C. § 523(a)(2)(A), (4), (6); *see* Zuckerberg & Quick, *supra* note 58, at 33–34 (stating exceptions to debt discharges brought by adversary proceeding). A 2004 U.S. Bankruptcy Court for the Northern District of Ohio case, *Superior Metal Products v. Martin* (*In re Martin*), provides an example application of the willful and malicious injury exception. *See* 321 B.R. 437, 439–40 (Bankr. N.D. Ohio 2004). In *In re Martin*, the defendant-debtor cashed a $36,500 check intended for a different party and spent all of the money. *Id.* at 439. The court held that the defendant-debtor acted willfully by cashing the check knowing that he was not the intended recipient and acted maliciously because he used the proceeds for personal gain. *Id.* at 440–42.

[61] *See infra* note 62 and accompanying text (describing the undue hardship safety valve for student debtors in dire circumstances).

[62] 11 U.S.C. § 523(a)(8) ("[U]nless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents . . . ."); Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 36 (Bankr. D. Mass. 2005) (requiring that a debtor prove undue hardship by a preponderance of the evidence).

[63] *See* 11 U.S.C. § 101 (defining terms of art used in the Bankruptcy Code, but omitting undue hardship from the list). In his 2013 concurring opinion in *Roth v. Educational Credit Management Corp.* (*In re Roth*), Judge Jim Pappas of the U.S. Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Ninth Circuit attributed Congress's decision to leave undue hardship undefined as evidence that Congress intended bankruptcy judges to "craft a working definition." 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

[64] *See infra* notes 65–82 and accompanying text.

B. Discharging Student Debt in Bankruptcy: A Historical Perspective

Before 1976, debtors enjoyed wide latitude to discharge student loan debt.[65] In 1898, Congress enacted the Nelson Act, which dealt exclusively with liquidation and provided debtors the opportunity to raise affirmative defenses for discharging debts in bankruptcy.[66] Congress overhauled the Nelson Act in 1938 when it enacted the Chandler Act, which introduced the concept of business reorganization.[67] There remained, however, no provision dealing explicitly with student loan debt.[68]

This legal landscape changed dramatically when Congress enacted the Education Amendments of 1976.[69] That law barred a debtor from discharging student loan debt if the debtor incurred it within five years of filing a bankruptcy petition, unless the debtor could demonstrate that payment would impose an undue hardship on the debtor or the debtor's dependents.[70] When Congress revised the Bankruptcy Code two years later with the seminal Bankruptcy Reform Act of 1978, it imported the undue hardship standard almost verbatim under 11 U.S.C. § 523(a)(8).[71] Lacking a definition of undue hardship,

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[65] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 453 (5th Cir. 2019) (stating that prior to 1976, abuses of the student loan system were common because it was easier to discharge student debt at bankruptcy).

[66] Bankruptcy Act of 1898, ch. 541, 30 Stat. 554; David S. Kennedy & Erno Lindner, *The Bankruptcy Amendatory Act of 1938 / the Legacy of the Honorable Walter Chandler*, 41 U. MEM. L. REV. 769, 770–71 (2011) (describing the overhaul of the 1898 Nelson Act, which primarily dealt with liquidation); Robert P. Wasson, *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal and Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEVS. J. 77, 95 (2003) (describing the historical development of discharges in bankruptcy law).

[67] Bankruptcy Act, Amendments of 1938, ch. 575, 52 Stat. 840; Kennedy & Lindner, *supra* note 66, at 776–77 (detailing the broad changes introduced by the Chandler Act); Wasson, *supra* note 66, at 95 (stating that the 1898 amendment was the fourth federal bankruptcy statute and was later overhauled by the Chandler Act).

[68] *In re Thomas*, 931 F.3d at 453 (stating that Congress introduced the undue hardship standard for student loan debt in 1976 when it amended the Higher Education Act of 1965).

[69] *See infra* note 70 and accompanying text; Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (repealed 1978) (adding § 439A to revise the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219).

[70] Education Amendments of 1976 § 439A (amending the Higher Education Act of 1965 and requiring that the debtor demonstrate undue hardship to discharge student loans incurred within five years of bankruptcy filing). More specifically, the Act allowed discharge of a student loan debt "only if such discharge is granted after the five-year period . . . beginning on the date of commencement of the repayment period of such loan . . . [and] only if . . . payment from future income or other wealth will impose undue hardship on the debtor or his dependents." *Id.*; *In re* Fonzo, 1 B.R. 722, 722–23 (Bankr. S.D.N.Y. 1979) (relying on this statutory language when applying the undue hardship test to a student debtor).

[71] 11 U.S.C. § 523(a)(8) ("A discharge . . . of this title does not discharge an individual debtor from any debt . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents . . . ."); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532) (updating the

courts looked to the sparse legislative history of the student loan discharge exception to infer its meaning.[72] Bankruptcy courts began this inquiry by asking what concern motivated Congress to single out student loan debt as nondischargeable; by understanding the underlying policy, courts could then infer what type of cases should fall within the undue hardship carve-out.[73]

From the U.S. Court of Appeals for the Third and Sixth Circuits, a consensus emerged that Congress had two goals in mind when creating the student loan discharge exception: to protect the student loan program from financial ruin and to prevent opportunistic student debtors from taking advantage of bankruptcy proceedings.[74] Congress was concerned with student debtors unfairly benefiting from the fresh start policy by discharging their student debt at bankruptcy shortly after completing their education, and then leveraging those degrees to launch lucrative careers.[75] Relying on these policy aims and language from the 1973 report by the Commission on the Bankruptcy Laws of the United States, courts developed a variety of tests for evaluating undue hardship, resulting in a confusing and conflicting body of case law.[76]

Bankruptcy Code to include the undue hardship standard). The Higher Education Act provision prohibited discharges for student debt unless "such loan first became due before five years before the date of the filing of the petition; or excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." Bankruptcy Reform Act of 1978 § 523.

[72] *See In re Thomas*, 931 F.3d at 543 (reviewing the history of undue hardship with an emphasis on the underlying congressional policy in enacting § 523(a)(8)); *In re* Pelkowski, 990 F.2d 737, 742–44 (3d Cir. 1993) (interpreting the undue hardship standard based on debates in the United States House of Representatives and United States Senate).

[73] *See infra* note 74 and accompanying text (describing Congress's dual goals for the student loan discharge exception).

[74] *In re Pelkowski*, 990 F.2d at 743 ("[T]he debate in the main focused on the twin goals of rescuing the student loan program from fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors."); Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992) (concluding that the student loan discharge exception protects the solvency of the student loan program).

[75] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) ("The policy of this provision was clear. Congress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligation from doing so."); Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 22 (Bankr. D. Mass. 2005) (describing the special treatment courts apply to student loans as a result of student debtors abusing the fresh start system). The Commission on the Bankruptcy Laws of the United States, which drafted its influential findings in a 1973 report, was particularly concerned with consumer debtors engaging in financially reckless acts with the knowledge that they could rely on a bankruptcy discharge. *Report of the Commission on the Bankruptcy Laws of the United States*, 29 BUS. LAW. 75, 94–95 (1973) [hereinafter *Report on the Bankruptcy Laws*]. This theory of consumer debtor abuse was the impetus for imposing an exception on student loan discharges within five years of the loans coming due. *Id.* at 96.

[76] *Report on the Bankruptcy Laws*, *supra* note 75, at 94 ("The Commission heard testimony at its hearings and received a number of communications from officers of organizations and institutions to the effect that easy availability of discharge from educational loans threatens the survival of existing educational loan programs."); *see* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 299–300 (3d Cir. 1995) (describing undue hardship as an area of law "in a state of considerable confusion, with bankruptcy courts within our Circuit applying a broad range of standards."); Kopf v.

More amendments to the Bankruptcy Code were to follow, continuing Congress's trend of abrogating debtors' opportunities to discharge student loan obligations.[77] In 1990, Congress extended the period in which a debtor must demonstrate undue hardship for student discharge from five to seven years.[78] Finally, in 2005, Congress eliminated the seven-year time period entirely with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005; thereafter, law required that *all* debtors wishing to discharge student loans must demonstrate undue hardship at any time between incurring the debt and filing bankruptcy.[79]

Today, the student debt discharge exception remains largely unchanged from the 2005 amendments.[80] This is not to say, however, that courts have settled the issue of student loan debt.[81] On the contrary, Congress's decision to leave undue hardship undefined in each subsequent revision of the Bankruptcy Code generated a proliferation of judge-made tests, the most prominent of which will be discussed in Section C of this Part.[82]

U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 736 (Bankr. D. Me. 2000) ("Without express statutory definition, 'undue hardship' has proved an eely notion. Courts have long struggled to articulate its content."). Courts have based the widely accepted *Brunner* test for undue hardship on the following language from a report by the Commission on the Bankruptcy Laws: "the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments." Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y. 1985) (quoting REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 140 n.14 (1973)), *aff'd*, 831 F.2d 395 (2d Cir. 1987). Thus, part of the *Brunner* test requires a showing that the debtor or his dependents cannot maintain a minimal standard of living. *Id.* at 756.

[77] *See infra* notes 78–80 and accompanying text (detailing the amendments).

[78] Crime Control Act of 1990, Pub. L. No. 101–647, § 2522, 104 Stat. 4789, 4865–68 (increasing the period in which a debtor must demonstrate an undue hardship from five to seven years). The Crime Control Act also prevented debtors unable to fulfill their obligations from receiving a discharge for government service scholarships. *Id.*; *see* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 543 (5th Cir. 2019) (analyzing the impact of the 1990 amendments to the Bankruptcy Code).

[79] Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 220, 119 Stat. 23, 59 (further revising the student loan discharge exception to apply to all student loan debt, regardless of when the debtor incurred the debt).

[80] *See* 11 U.S.C. § 523(a)(8)(A)–(B) (providing that Title 11 does not discharge an individual debtor from any debt, "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or an obligation to repay funds received as an educational benefit, scholarship, or stipend; or any other educational loan that is a qualified education loan").

[81] *See infra* notes 83–169 and accompanying text.

[82] *See infra* notes 83–169 and accompanying text.

C. Testing for Undue Hardship

To understand the attitude of bankruptcy judges towards the undue hardship tests, one need only look at the unflattering terms used in their opinions.[83] Judges have described undue hardship as an "eely notion" and an "empty vessel susceptible to being filled with whatever policy objectives courts deem appropriate."[84] The body of case law attempting to define and apply the concept of undue hardship creates confusion on two fronts.[85] First, the tests themselves are difficult to parse because each contains multiple elements or steps.[86] Second, the differences between the tests are difficult to distinguish because all use similar language and espouse the same policy goals.[87] The following Subsections will describe the four most prominent tests and their position in modern undue hardship jurisprudence.[88]

1. The *Johnson* Test

The U.S. District Court for the Eastern District of Pennsylvania crafted the *Johnson* test in 1979.[89] In *Pennsylvania Higher Education Assistance Agency v. Johnson* (*In re Johnson*), Deborah Lee Johnson incurred two loans from a bank totaling $1,500 to finance her tuition for community college.[90] After completing one semester, Ms. Johnson made no attempts to pay this debt

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[83] *See infra* note 84 and accompanying text.

[84] *See* Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999) (characterizing undue hardship as an "empty vessel" (quoting Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 170 (1996))); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 736 (Bankr. D. Me. 2000) (describing undue hardship as an "eely notion").

[85] *See infra* notes 86–87 and accompanying text.

[86] *See In re Andresen*, 232 B.R. at 139 (adopting the totality of the circumstances test); *In re Kopf*, 245 B.R. at 737–38 (describing the *Johnson* test, which contains a mechanical checklist, a policy element, and a good faith element); Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985) (creating the three-part *Brunner* test), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[87] *In re Kopf*, 245 B.R. at 740 (stating that the Totality test is broadly similar to elements of the *Johnson* and *Brunner* tests); Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (contending that all undue hardship inquiries begin with the same threshold question of what constitutes a minimal standard of living).

[88] *See infra* notes 89–169 and accompanying text.

[89] Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *59–61 (E.D. Pa. June 27, 1979) (creating a three-part undue hardship test, now known as the *Johnson* test). The *Johnson* test was the first of the undue hardship tests and influenced subsequent undue hardship tests. *In re Andresen*, 232 B.R. at 137–38.

[90] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *1. To finance her education, Ms. Johnson issued a $1,500 promissory note, which the Pennsylvania Higher Education Assistance Agency (PHEAA), subsequently purchased. *Id.* at *1–2. She only completed one semester at Northampton County Community College, and at the time of the trial, she was pregnant, involved in divorce proceedings, and planning to subsist on welfare. *Id.* at *1–2, *36.

when it became due, and subsequently filed for bankruptcy.[91] Relying on the Higher Education Act of 1965, Ms. Johnson's creditor, the Philadelphia Higher Education Assistance Agency (PHEAA), objected to the discharge of her student debt because it did not impose an undue hardship.[92]

The court held that the PHEAA's objection was improper on procedural grounds, but proceeded to describe the undue hardship test—the enduring legacy of this case.[93] The test consists of three parts: (1) a mechanical checklist of factors, to assess if the debtor can repay the loan; (2) a good faith test, to determine whether the debtor is maximizing their net income; and (3) a policy test, to measure whether the result would comport with Congress's goals underlying the student loan discharge exception.[94]

At its core, the mechanical checklist assesses whether the debtor's income during the loan repayment period allows the debtor to pay off the loan while still maintaining a minimal standard of living.[95] The first part of this analysis measures the debtor's earned income based on a litany of factors, including current employment status, wages earned, skills, education, and other sources of income.[96] The second part of this analysis measures the debtor's expenses, which include two categories: reasonable cost of living expenses and unavoidable extraordinary expenses, such as medical bills.[97] Having approximated the

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[91] *Id.*

[92] *Id.* at *3–4; *see* Education Amendments of 1976, Pub. L. No. 94–482, § 439A, 90 Stat. 2081, 2141 (repealed 1978) (amending the Higher Education Act of 1965, which Congress in turn repealed in November 1978).

[93] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *18–19 (holding that the PHEAA's objection could not rely on the Higher Education Act of 1965 because Congress repealed the act on November 6, 1978, prior to commencement of the case). The PHEAA was the unfortunate victim of the brief interlude between the repeal of the Higher Education Act in 1978 and enactment of the Bankruptcy Reform Act in 1979, which codified the student loan discharge exception in 11 U.S.C. § 523(a)(8). *Id.*; *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (repealed 1978).

[94] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *59–61 (summarizing the three prongs of the undue hardship test). In reviewing this complicated three-part structure of the *Johnson* test, Judge Haines of the U.S. Bankruptcy Court for the District of Maine succinctly commented that the *Johnson* test "test[s] too much." Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000).

[95] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *22 ("Essentially, we must ascertain what sources of income are likely to be available to the debtor in the future, during the years when loan payments will be required, and whether this income will be sufficient to support the debtor—and his dependents—at a 'minimal standard of living,' in addition to funding repayment of the student loan.").

[96] *Id.* at *25–30 (listing the factors relevant to determining a debtor's earned income during the loan repayment period). In sum, the court identified eleven factors relevant to earned income: rate of pay, wages or salaries earned, skills, sex, ability to obtain and retain employment, current employment status, employment record, education, health, access to transportation, and whether the debtor has a small dependent child. *Id.*

[97] *Id.* at *31–35 (discussing which expenses are relevant to the mechanical checklist prong of the test). The court assessed the reasonableness of expenses based on the debtor's family status, including

debtor's net income during the period of loan repayment by subtracting reasonable and extraordinary expenses from total income, the court asks whether the debtor can maintain a minimal standard of living while repaying the student loan.[98]

Next, the court applies the second prong of the test by assessing whether the debtor has acted in good faith in attempting to repay the student loan.[99] In this inquiry, the court considers three factors: (1) the debtor's efforts to secure high-paying employment, (2) the debtor's efforts to maximize income, and (3) the debtor's efforts to minimize expenses.[100] The court in *In re Johnson* reasoned that the good faith prong reflects the policy that only *honest* debtors deserve a fresh start at bankruptcy and that Congress expected honest debtors to maximize their net income to pay off their debts.[101] If the court finds that the debtor has met both the mechanical and good faith prongs of the test, the debtor has demonstrated an undue hardship and the court will discharge the student debt.[102]

If, however, the debtor passes the mechanical test but fails the good faith test, the court proceeds to the third prong of the test by assessing whether granting the debtor a discharge of their student loan debt would contravene

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whether the debtor had a spouse or dependent. *Id.* at *31. Extraordinary expenses, by comparison, were non-discretionary expenses such as medical bills. *Id.* at *32–33.

[98] *Id.* at *40–41 (applying the test to Ms. Johnson's financial situation and concluding that she lacked sufficient income to pay off her student loan and maintain a minimal standard of living). In 1995 in *Faish v. Pennsylvania Higher Education* (*In re Faish*), the U.S. Court of Appeals for the Third Circuit framed the question raised by the mechanical test:

> Will the debtor's future financial resources for the longest foreseeable period of time allowed for repayment of the loan, be sufficient to support the debtor and his dependents at a subsistence or poverty standard of living, as well as to fund repayment of the student loan? If the question is answered affirmatively, discharge of the student loan must be denied.

72 F.3d 298, 303 (3d Cir. 1995).

[99] *See infra* notes 100–102 and accompanying text (explaining what goes into the good faith analysis).

[100] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *44 ("[A] court should consider three questions: whether the debtor has made a bonafide effort to get a good-paying job; whether he has made a true effort to maximize his financial resources; and whether the debtor has been careful to minimize expenditures.").

[101] *Id.* (describing the policy underlying the good faith test); *see In re Faish*, 72 F.3d at 303 (identifying negligent or irresponsible debtors that failed the good faith test). In 1979 in *Pennsylvania Higher Education Assistance Agency v. Johnson* (*In re Johnson*), the U.S. District Court for the Eastern District of Pennsylvania reasoned that limiting discharges to debtors who acted in good faith was common sense because the government's lending system rests on the premise that student debtors will make competent, strenuous efforts to repay their debts. 1979 U.S. Dist. LEXIS 11428, at *42–43.

[102] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52 (stating that the court need not apply the policy prong of the *Johnson* test unless the debtor passed the mechanical test but failed the good faith test).

Congress's policy goals underlying the student loan discharge exception.[103] The *In re Johnson* court reasoned that Congress aimed to prevent students from abusing the bankruptcy system by discharging their student loans when their assets are minimal, then leveraging their education to obtain high-paying jobs.[104] Like the good faith test, the *In re Johnson* court identified three considerations relevant to the policy test: (1) the amount of the student loan debt, (1) the student debt as a percentage of total indebtedness, and (3) the educational benefit derived from the student loans.[105] Applying this test to Ms. Johnson, the court held that she was not the type of abusive debtor that Congress targeted because her student loan debt was relatively small, it comprised a relatively small percentage of her total debt, and she never experienced any benefit from her education.[106]

In conclusion, the *Johnson* test requires a debtor to meet the mechanical prong and either the good faith or policy prong to successfully demonstrate an

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[103] *Id.* ("Where a debtor's situation satisfies the requirements of a mechanical undue hardship test, but the debtor fails the good faith test, then the court must determine whether the policy underlying the § 439A bar to discharge would be affected by denying discharge to this particular individual.").

[104] *Id.* at *53 (stating Congress's policy for amending the Bankruptcy code to include the student loan discharge exception). The concern for students discharging debt before beginning a profitable career made possible by their federally financed education reverberates throughout the case law. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) ("Congress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligation from doing so."); Hicks v. Educ. Credit. Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 22 (Bankr. D. Mass. 2005) ("The Bankruptcy Code was amended to provide this special treatment for student loans in reaction to perceived abuses of the bankruptcy discharge—namely, that recent college graduates were filing for bankruptcy to rid themselves of student loan obligations 'on the eve of a lucrative career.'" (quoting Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999))). *Educational Credit Management Corp. v. Mason* (*In re Mason*), decided by the Ninth Circuit in 2006, exemplifies the type of behavior that Congress sought to discourage, where a debtor with a bachelor's and law degree attempted to discharge his student loans after failing the bar exam one time. 464 F.3d 878, 885 (9th Cir. 2006). The debtor failed to persuade the court that he made a good faith attempt at repaying his loans, noting that he only took the bar one time and has significant leisure time from working part-time. *Id.*

[105] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *54–56.

[106] *Id.* at *57–58. The court compared Ms. Johnson's $1,500 of student loan debt with two other students whose debts totaled $5,375.31 and $5,575 respectively. *Id.* at *54. Likewise, the court compared Ms. Johnson's percentage of indebtedness (30%) against a law student whose student loans comprised 78% of his total indebtedness. *Id.* at *55. The *In re Johnson* court, stating that few bankruptcy courts focused on the percentage of indebtedness in their analysis, did not provide further guidance about what percentage would be significant. *Id.* The reasoning underlying this factor is that students aiming to abuse the bankruptcy system took out educational loans with the understanding that they would be discharged, and thus would not have other outstanding debts. *Id.* at *53–55.

undue hardship.[107] *In re Johnson*'s legacy is its influence on the modern undue hardship tests, not its application by modern bankruptcy courts.[108]

2. The *Bryant* Test

Pennsylvania's bankruptcy courts continued to innovate after deciding *Johnson*, as evidenced by the U.S. Bankruptcy Court for the Eastern District of Pennsylvania repudiation of the *Johnson* test in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*) in 1987.[109] The *Bryant* test was a reaction to the perceived subjectivity of the *Johnson* test.[110] To achieve greater objectivity, the *In re Bryant* court focused on a concrete statistic, the federal poverty line, as the guiding factor for its novel methodology.[111] This approach grew out of the court's desire to avoid substituting its own judgment for that of the debtor's with regards to the reasonableness of the debtor's expenditures.[112]

The *In re Bryant* court first identified a threshold question common to any undue hardship analysis: what is the "minimal standard of living" for a student debtor?[113] The court reasoned that a debtor who lives near or below the federal poverty line does not have a minimal standard of living and thus, an undue

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[107] *See supra* note 103 and accompanying text (describing the *In re Johnson* methodology for applying the mechanical, good faith, and policy tests).

[108] *See In re Andresen*, 232 B.R. at 137–38 (characterizing the *Brunner* test as a variation on the *Johnson* test); Hicks v. Educ. Credit. Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 27 n.11 (Bankr. D. Mass. 2005) (commenting on the infrequent application of the *Johnson* test).

[109] *See* Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (rejecting the *Johnson* test in favor of a new test focused on an objective measure of debtor hardship, the federal poverty line); *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *59–61 (creating the *Johnson* test for undue hardship).

[110] *Compare In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *46–47 (scrutinizing whether the debtor's decision to move out of her parents' home maximized her financial resources), *with In re Bryant*, 72 B.R. at 915 (attempting to mitigate this type of subjective judgment by focusing its test on the federal poverty line).

[111] *In re Bryant*, 72 B.R. at 916 (identifying the federal poverty line as the principal factor in determining whether a debtor is maintaining a minimal standard of living). The court chose this yardstick because it is updated annually and considers the debtor's family situation. *See id.*

[112] *See id.* at 918 ("We find ourselves in disagreement with those courts which have denied discharges of student loans on the basis of whether any given expenses are justified, as these represent subjective value judgments concerning which we consider ourselves no better able to gauge than, generally, debtors themselves."). This approach breaks with the *Johnson* test, which assesses the reasonableness of the debtor's expenses in both its mechanical and good faith prongs. *Compare In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *59–61 (using the mechanical and good faith prongs to measure the effort and ability of a debtor to repay student loans), *with In re Bryant*, 72 B.R. at 918 (relying on an objective, numerical approach in its undue hardship test).

[113] *In re Bryant*, 72 B.R. at 916 ("A question presented at the outset is: What is the definition of 'a minimal standard of living?'"). To support this methodology, the court cited a report from the Commission on the Bankruptcy Laws of the United States, which stated that an undue hardship exists when the debtor and his dependents cannot maintain a minimal standard of living. *Id.* at 915; *see* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 140 n.14 (1973).

hardship is presumed.[114] The court recognized, however, that merely comparing the debtor's financial situation to the poverty line does not sufficiently capture relevant extraordinary circumstances.[115]

Under the second part of the test, the court must look to whether "unique" or "extraordinary" circumstances exist that impact the debtor's financial burden.[116] The *In re Bryant* court considered two general types of extraordinary circumstances.[117] First, there may be circumstances that *increase* the burden of student loans on the debtor, such as illness, medical bills, and unusual responsibilities of family members.[118] Second, there may be circumstances that render a student loan discharge unconscionable, such as a debtor's refusal to maximize their financial position or have potential to earn a significant income in the near future.[119] Viewing these two prongs together, the test proceeds as follows: a debtor who lives significantly *above* the poverty line is *not entitled* to an undue hardship discharge *unless* the debtor can demonstrate extraordinary circumstances that increase their financial burden; conversely, a debtor who lives *near or below* the federal poverty line *is entitled* to an undue hardship discharge *unless* there are extraordinary circumstances that render a discharge unconscionable.[120]

To the credit of the *In re Bryant* court, this test is easier to comprehend when applied to the facts of a case rather than in abstract description.[121] Twenty-five-year-old Mary Gamble incurred $3,000 of student debt.[122] After com-

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[114] *In re Bryant*, 72 B.R. at 916 ("[W]e hold that where the debtor's gross income *is* at, near or below the federal poverty guidelines, that *would* fulfill the meaning of 'minimal standard of living.'").

[115] *Id.* at 917 (recognizing that extraordinary circumstances may exist that would warrant a finding of undue hardship for a debtor who is significantly above the poverty line, such as debtors who refuse to maximize their resources through frivolous spending).

[116] *Id.*

[117] *See infra* notes 118–119 and accompanying text.

[118] *See In re Bryant*, 72 B.R. at 918 (listing extraordinary circumstances that would increase a debtor's financial burden).

[119] *Id.* at 919 ("Examples of such situations could be individuals who refuse, without good reason, to maximize their resources, or who have a distinct prospect of increased income in the immediate future, or whose circumstances are otherwise likely to undergo an imminent positive change."). The U.S. Bankruptcy Court for the Eastern District of Pennsylvania's 1987 discussion in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*) of Lewis Bryant's attempts to maximize his income is an example of the fiscal behavior the court sought to encourage. *Id.* at 925. After failing to pass the Pennsylvania bar exam five times, Bryant worked multiple part-time jobs in the legal field, obtained employment as a substitute teacher, worked as a counselor in a methadone clinic, and continued preparations to retake the bar. *Id.* at 923–24. Citing these activities, the court praised Bryant for his effort and motivation. *Id.* at 925.

[120] *See supra* notes 113–119 and accompanying text (describing different types of extraordinary circumstances).

[121] *See infra* notes 122–126 and accompanying text (applying the *Bryant* test to a concrete case).

[122] *In re Bryant*, 72 B.R. at 919–20 (describing Ms. Gamble's education and financial history leading up to her voluntary filing for bankruptcy in September 1985). In addition to Ms. Gamble, the court also reviewed the case of a debtor who was significantly above the poverty line and did not demonstrate an undue hardship. *Id.* at 921–22.

pleting several semesters of community college, Ms. Gamble dropped out because of financial difficulties and worked part time at a fast-food restaurant.[123] The court found that Ms. Gamble had an undue hardship because her net income was approximately half of the federal poverty line.[124] Ms. Gamble's creditors did not demonstrate any extraordinary circumstances that would have made a discharge of her student debt unconscionable.[125] Thus, she was entitled to a discharge of her student loan debt.[126]

The *Bryant* test did not survive long in the canon of undue hardship case law.[127] The Third Circuit repudiated the test in 1995 when it decided *Pennsylvania Higher Education Assistance Agency v. Faish* (*In re Faish*), adopting a new test, which became known as the *Brunner* test.[128] Criticisms that the *Bryant* test focused too narrowly on the debtor's financial condition at the time of bankruptcy and its perceived failure to account for Congress's policy aims caused the *Bryant* test to largely fade from relevance.[129]

3. The *Brunner* Test

Within months of the Bankruptcy Court for the Eastern District of Pennsylvania creating the *Bryant* test, the U.S. Court of Appeals for the Second

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[123] *Id.* The court also noted that she was healthy, had no dependents, no driver's license, and failed to secure employment as a secretary despite multiple attempts to do so. *Id.*

[124] *Id.* at 920 (noting that Ms. Gamble's net income of $2,880 was below the federal poverty threshold of $5,500). In 2021, the federal poverty level in the United States was $12,880 for a household of one person. *U.S. Federal Poverty Level Guidelines Used to Determine Financial Eligibility for Certain Federal Program*, OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, https://aspe.hhs.gov/2021-poverty-guidelines [https://perma.cc/W2K9-WRCZ] (listing the federal poverty level for 2021 for households between one and eight members in the lower forty-eight states and the District of Columbia).

[125] *In re Bryant*, 72 B.R. at 921 (holding that Ms. Gamble's creditor, PHEAA, did not show any extraordinary circumstances that would make discharging her loan unconscionable). The court rejected the PHEAA's argument that because Ms. Gamble could obtain a driver's license but did not do so, she passed up an opportunity to improve her job prospects. *Id.*

[126] *Id.* The court's decision not to discharge Paul Pine's student loan debt provides a counterexample for Ms. Gamble's case. *Id.* at 922–23. Mr. Pine's yearly net income was $7,332, which exceeded the federal poverty line at the time of $5,500. *Id.* at 922. The court found that Mr. Pine's debt was non-dischargeable because he failed to show any extraordinary circumstances that warranted a discharge. *Id.* at 923.

[127] *See infra* notes 128–129 and accompanying text (describing the rejection of the *Bryant* test in 1995).

[128] *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 304 (3d Cir. 1995) (rejecting the *Bryant* test in favor of the *Brunner* test); *see also In re Bryant*, 72 B.R. at 916–17.

[129] *See In re Faish*, 72 F.3d at 304 (rejecting the *Bryant* test because it failed to account for Congress's policy aims); Sands v. United Student Aid Funds, Inc. (*In re* Sands), 166 B.R. 299, 306 (Bankr. W.D. Mich. 1994) (rejecting the *Bryant* test because it discounts potential changes in the debtor's future financial condition); Craig A. Gargotta, *"Undue Hardship" and the Discharge of Student Loans*, 15 AM. BANKR. J. INST. 10, 42 (discussing how courts rejected the *Bryant* test because it failed to reflect congressional policy and did not hold debtors accountable for financial mismanagement).

Circuit in 1987 created the *Brunner* test in *Brunner v. New York State Higher Education Services Corp.*, sparking a revolution in undue hardship jurisprudence.[130] Since its inception, the *Brunner* test has appealed widely to bankruptcy courts and the majority of courts use it today.[131] Best understood as an improvement upon the *Johnson* test, the plaintiff must satisfy all three parts of the *Brunner* test to demonstrate an undue hardship.[132]

First, the debtor must show that based on current income and expenses the debtor cannot maintain a minimal standard of living.[133] This fact-based analysis focuses on the debtor's monthly net income.[134] If the debtor's reasonable monthly expenses, including repayment of the loan, exceed the debtor's income, then the debtor cannot maintain a minimal standard of living.[135]

Second, the debtor must demonstrate that this substandard financial state of affairs will continue for a significant part of the loan repayment period because of circumstances outside of the debtor's control.[136] In this analysis, courts consider whether some event or condition makes it unlikely that the debtor's income will increase in the future, thus decreasing the likelihood that the debtor will eventually be able to repay the student loans.[137] Types of cir-

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[130] Brunner v. N.Y. Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (affirming the district court's novel, three-part test for undue hardship). *But see In re Bryant*, 72 B.R. at 916–18 (creating the objective *Bryant* test for undue hardship).

[131] *See* U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (adopting the *Brunner* test in the U.S. Court of Appeals for the Fifth Circuit and recognizing it as the most widely accepted test for undue hardship); *In re Faish*, 72 F.3d. at 305 (adopting the *Brunner* test in the Third Circuit); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (adopting the *Brunner* test in the U.S. Court of Appeals for the Seventh Circuit).

[132] Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 137–38 (B.A.P. 8th Cir. 1999) (stating that the *Johnson* test strongly influenced the *Brunner* test). *Compare Brunner*, 831 F.2d at 396 (creating a three-part test that assesses a debtor's expenses and good faith efforts at repayment), *with* Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *59–61 (E.D. Pa. June 27, 1979) (applying a three-prong test for undue hardship, one of which focused entirely on a debtor's good faith attempts at repayment).

[133] *Brunner*, 831 F.2d at 396 (stating that the minimal standard of living prong of the test is the easiest for debtors to meet).

[134] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y. 1985) (determining whether a debtor maintains a minimal standard of living by reviewing the debtor's current income and expenses, including loan repayment), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[135] Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 451 (5th Cir. 2019) (holding that the debtor cannot maintain a minimal standard of living because her reasonable monthly expenses, $640, exceed her monthly income of $194); *Brunner*, 831 F.3d at 396.

[136] *Brunner*, 831 F.3d at 396 (requiring "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans"). In stark contrast to the minimal standard of living prong, courts have described this second prong as "exceptionally demanding" because the debtor's circumstances must be both exceptional and outside of the debtor's control. *In re Thomas*, 931 F.3d at 451.

[137] *See Brunner*, 831 F.3d at 396 (holding that the debtor failed to meet the second prong of the undue hardship test because she could not show that her present financial status would persist throughout the loan period); *In re Brunner*, 46 B.R. at 757–58 (stating that the debtor failed the sec-

cumstances that could satisfy this prong are disability, old age, dependents, and the total foreclosure of job prospects.[138] Moreover, some *Brunner* jurisdictions require the debtor to demonstrate a "total incapacity" to repay the student loan debt in order to satisfy this prong of the test.[139] This incredibly high standard limits discharges to extreme cases and sometimes bars debtors in truly calamitous situations from discharging student loan debt.[140]

Third, the debtor must show that they made good faith efforts to repay the student loan debt.[141] Courts measure good faith by the debtor's competence in managing their financial affairs by maximizing net income and taking steps to either pay off or defer the student loan debt.[142] Thus, courts look unfavorably upon debtors who have not repaid any of the debt or have used disposable income on non-essential purchases during the loan repayment period.[143]

The U.S. Court of Appeals for the Fifth Circuit's decision in *United States Department of Education v. Gerhardt* (*In re Gerhardt*) in 2003 provides an ar-

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ond prong of the test because she failed to present evidence that all of her job prospects in her desired field were closed).

[138] *Brunner*, 831 F.2d at 396 (describing the types of evidence that a debtor must demonstrate to satisfy the second prong of the *Brunner* test).

[139] *In re Thomas*, 931 F.3d at 451 (requiring total incapacity to repay the loan debt, both at the time of bankruptcy filing and in the future); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92 (5th Cir. 2003) (requiring total incapacity to satisfy the *Brunner* test); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 307 (3d Cir. 1995) (same). Judge Harlin D. Hale of the U.S. Bankruptcy Court for the Northern District of Texas summarized this requirement's devastating impact on student debtors when he stated that, "in fifteen years on the bench, the undersigned judge has never discharged a student loan over the objection of the lender." Thomas v. U.S. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 482 (Bankr. N.D. Tex. 2017), *aff'd*, 931 F.3d 449. In a rare example where a debtor satisfied the "total incapacity" standard, the debtor was diagnosed with cancer after taking out student loans, lost his house in Hurricane Ike (for which he was not insured), and suffered from clinical depression. Henslee v. Educ. Credit Mgmt. Corp. (*In re* Henslee), No. 06-35570-H5-7, 2010 WL 1372483, at *2–3 (S.D. Tex. Apr. 1, 2010).

[140] *See In re Thomas*, 931 F.3d at 450, 452–53. The Fifth Circuit's 2019 decision in *Thomas v. Department of Education* (*In re Thomas*) epitomizes the impact of the total incapacity standard in holding that the debtor did not have an undue hardship despite having diabetic neuropathy. *Id.* at 450. This debilitating disease prevented the debtor from all non-sedentary work and forced her to quit three different jobs. *Id.*

[141] *Brunner*, 831 F.2d at 396. The inclusion of a good faith requirement is a notable similarity between the *Johnson* and *Brunner* tests. *See id.*; Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *44 (E.D. Pa. June 27, 1979). They are distinguishable because, whereas the *Brunner* test requires good faith, it is not mandatory under the *Johnson* test if the debtor satisfies the policy prong. *See In re Johnson*, 1979 U.S. Dist. LEXIS, at *52.

[142] *See In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) (concluding that a debtor who negligently managed their personal finances did not act in good faith); *Brunner*, 831 F.2d at 397 (holding that the debtor did not act in good faith because she did not seek deferment of payment prior to petitioning for a discharge).

[143] *See In re Roberson*, 999 F.2d at 1136 (opining that using funds to send children to a private school during the loan repayment period demonstrates bad faith). If, however, a debtor makes no payments on his or her student loan debt because the debtor is financially unable to do so, then the lack of payments is not dispositive on the issue of good faith. Sands v. United Student Aid Funds, Inc. (*In re* Sands), 166 B.R. 299, 312 (Bankr. W.D. Mich. 1994).

chetypical, recent application of the *Brunner* test.[144] In *In re Gerhardt*, the debtor was a cellist in the Louisiana Philharmonic who owed more than $77,000 in student debt.[145] While working as a cellist and music teacher, Gerhardt earned $1,680.47 per month while paying $1,829.39 in monthly expenses.[146] First, in its analysis, the court found that Gerhardt could not maintain a minimal standard of living while repaying the student loans because his monthly expenses were greater than his monthly income.[147] Second, the court held that Gerhardt did not demonstrate additional circumstances that created a total incapacity to repay his loans for a significant period of the loan because he was healthy, educated, and had no dependents.[148] Although the court did not directly address whether Gerhardt made good faith repayment efforts, it implied that he did not by mentioning that he repaid only $755 of his total debt and chose to attend a music festival during the loan repayment period.[149]

Critics of the *Brunner* test contend that the second prong creates unreasonably harsh outcomes and that the good faith prong relies too heavily on analysis of past behavior, thus contravening the fresh start principle.[150] Notwithstanding these arguments, the *Brunner* test is unquestionably popular and is the current law in the majority of circuits.[151]

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[144] *In re Gerhardt*, 348 F.3d at 90–92; *see infra* notes 145–149 and accompanying text (describing application of the *Brunner* test for a musician who failed to demonstrate an undue hardship).

[145] *In re Gerhardt*, 348 F.3d at 90, 92. The debtor used $77,000 in loans to finance his musical education at University of Southern California, University of Rochester, and the New England Conservatory of Music. *Id.* at 90.

[146] *Id.* at 92.

[147] *See id.* (citing Gerhardt's net loss of $148.92 per month as evidence that he did not have a minimal standard of living).

[148] *Id.* The court also focused on Mr. Gerhardt's potential for finding employment outside of his chosen profession, such as teaching or working in a music store. *Id.* Based on this, the court reasoned that Mr. Gerhardt did not prove a total incapacity to repay his loans because he did not broaden his employment search beyond his chosen field. *See id.*

[149] *Id.*

[150] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 28 (Bankr. D. Mass. 2005) (stating that prong two of the *Brunner* test is "overkill" and contending that the good faith element is too retrospective); Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 367–68 (Bankr. W.D. Mo. 2001) (arguing that the *Brunner* test's good faith element lacks textual support in the legislative history).

[151] *See, e.g.*, *In re Gerhardt*, 348 F.3d at 91 (adopting the *Brunner* test in the Fifth Circuit); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305 (3d Cir. 1995) (adopting the *Brunner* test in the Third Circuit); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (adopting the *Brunner* test in the Seventh Circuit); *see also supra* note 131 and accompanying text (describing the widespread adoption of the *Brunner* test).

4. The Totality Test

A minority of federal circuits have adopted the Totality test, which serves as the modern counterpart to *Brunner*.[152] Proponents of the Totality test contend that its flexible structure gives bankruptcy courts greater discretion to account for extraordinary circumstances that affect a debtor's ability to repay student loans and thus avoids the harsh results created by the *Brunner* test.[153]

The modern formulation of the test, enumerated in *Long v. Educational Credit Management Corp.* (*In re Long*) in 2003 by the U.S. Court of Appeals for the Eighth Circuit, is innovative because of its unique structure.[154] The *Long* court focused on a single, overarching question: based on the debtor's future financial resources, will the debtor be able to pay off the student loan while maintaining a minimal standard of living?[155]

When answering this question, a bankruptcy court faces three subsidiary considerations: (1) the debtor's past, present, and approximated future financial resources; (2) the reasonable living expenses of the debtor and the debtor's dependents; and (3) other relevant facts and circumstances related to the debtor's case.[156] Prong three is the crux of the test because its open-endedness gives bankruptcy courts broad discretion to account for unique factors that affect a debtor's ability to pay.[157] The Totality test may have originated in the

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[152] *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (adopting the totality of the circumstances test for undue hardship); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) (same). *But see* Brunner v. N.Y. Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (stating a different three-part undue hardship test, often referred to as the *Brunner* test). Likewise, the U.S. Court of Appeals for the Sixth Circuit has adopted a variation of the totality approach, considering "many factors" in its undue hardship inquiry but declining to explicitly adopt any particular test. Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 437 (6th Cir. 1998).

[153] *See In re Long*, 322 F.3d at 554 ("We prefer a less restrictive approach to the 'undue hardship' inquiry."); *In re Kopf*, 245 B.R. at 744 (arguing that the "total incapacity" standard enumerated in *Brunner* is overly harsh).

[154] *In re Long*, 322 F.3d at 554–55 (describing the modern iteration of the Totality test); *infra* notes 155–156 and accompanying text (detailing the relevant considerations under the test). The U.S. Court of Appeals for the Eighth Circuit initially defined the contours of the Totality test in *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re Andrews*) in 1981. *See* 661 F.2d 702, 704 (8th Cir. 1981); *see also* Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999) (adopting the Totality test over the *Brunner*, *Bryant*, and *Johnson* tests).

[155] *See In re Long*, 322 F.3d at 554–55 ("Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged."). The emphasis on the "minimal standard of living" resembles the first prong of the *Bryant* and *Brunner* tests. *See id.*; Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 916 (Bankr. E.D. Pa. 1987) (using the federal poverty guideline to determine whether a debtor has a minimal standard of living); *Brunner*, 831 F.2d at 396 (including minimal standard of living in the first prong of its undue hardship test).

[156] *See In re Long*, 322 F.3d at 554.

[157] *Id.*; *see In re Andresen*, 232 B.R. at 140. For example, in 1999 in *Andresen v. Nebraska Student Loan Program* (*In re Andresen*), the Eighth Circuit held that a student loan debt created an undue

Eighth Circuit, but bankruptcy courts in the U.S. Court of Appeals for the First Circuit have taken up the mantle and championed it.[158] The U.S. Bankruptcy Court for the District of Massachusetts' decision in 2006 in *Gharavi v. United States Department of Education* (*In re Gharav*i) is worth examining in detail for its adroit application of the Totality test.[159]

In 1993, Minoo Gharavi enrolled in a four-year optometry program, which she financed with student loans.[160] After two years in the program, however, Ms. Gharavi was diagnosed with optic neuritis and Graves' disease, resulting in symptoms that effectively precluded her from completing her education.[161] She began working as an optometric technician, but a diagnosis in 2002 of multiple sclerosis limited her ability to work.[162] She filed for bankruptcy in April of 2003, seeking the discharge of her $63,628.01 in student debt from four loans.[163]

In *In re Gharavi*, Judge William C. Hillman emphasized the detrimental effects that multiple sclerosis had on Ms. Gharavi's present and prospective income, and calculated that based on reasonable expenses and expected future income, she had a monthly net income of $62.29.[164] This income was insufficient to cover even the most permissive payment schedule the lender proposed—$419.50 per month.[165]

The court reasoned that, based on Ms. Gharavi's disease, limited prospects for increased income, and her inability to meet the most inexpensive

hardship because the debtor's disability made it unlikely that she would increase her income in the future and she would lose access to child support once her child reached adulthood. 232 B.R. at 141.

[158] Gharavi v. U.S. Dep't of Educ. (*In re* Gharavi), 335 B.R. 492, 497 (Bankr. E.D. Mass. 2006) (applying the totality of the circumstances test); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) (adopting the totality of the circumstances test as the best approach to undue hardship); *see In re Andresen*, 232 B.R. at 139.

[159] *In re Gharavi*, 335 B.R. at 497.

[160] *Id.* at 494–96. Ms. Gharavi held a Bachelor of Science degree in architecture from Texas Southern University and sought to continue her education at the graduate level by enrolling at the New England College of Optometry. *Id.* at 494–95.

[161] *Id.* at 495. When Ms. Gharavi contracted optic neuritis in 1995, she took a leave of absence from the program but eventually returned to continue her studies. *Id.* When doctors subsequently diagnosed her with Graves' disease, the symptoms of which impaired her ability to concentrate and remember, she failed two of her final exams and left the program. *Id.*

[162] *Id.* at 496. Ms. Gharavi's multiple sclerosis symptoms included difficulty concentrating, memory loss, and fatigue, which limited her to working forty hours per week. *Id.* Moreover, these symptoms precluded her from obtaining a second job, which would have provided additional income to pay her student debts. *Id.* at 498.

[163] *Id.* at 498. Whether Ms. Gharavi made any payments towards her student loans was an issue of factual dispute between the parties: Ms. Gharavi claimed that she made monthly payments of $88.21 on two of these loans, but her creditors contended that they received no payments from her. *Id.*

[164] *See id.* at 497, 500 (stating that Ms. Gharavi "will never be able to earn substantially more than she earns now due to her multiple sclerosis"). Judge William C. Hillman took care to describe her monthly expenses in detail in the opinion, assessing the reasonableness of her cigarette use, transportation expenses, and tax refunds. *Id.* at 498–501.

[165] *Id.* at 501.

payment schedule, her student debt created an undue hardship that entitled her to a discharge.[166] Additionally, the court recognized that Ms. Gharavi could pay some of her student debt with her $62.29 monthly surplus and exercised its discretion to discharge only three of the four student loans.[167] To reach this conclusion, the court engaged in a fact-based analysis of Ms. Gharavi's finances and considered the impact that her physical ailments would have on her current and future financial prospects, thus applying the three considerations relevant to the Totality test analysis.[168] The court's decision to discharge some, but not all, of Ms. Gharavi's loans represents the flexibility and close factual analysis lauded by the Totality test's advocates.[169]

II. UNDUE HARDSHIP: WHICH TEST IS BEST?

Congress's decision to leave the term "undue hardship" undefined in the Bankruptcy Code left bankruptcy judges with discretion to decide which test applies in each federal circuit.[170] As discussed in Part I, the majority of courts today have adopted versions of the *Brunner* test, a minority of courts have endorsed the Totality test, and courts have largely shelved the *Johnson* and *Bryant* tests.[171] Analysis of these tests must delve deeper than simply assuming that a test's popularity equals its merit: this Note identifies two factors to serve as a yardstick against which one can measure the four undue hardship tests.[172]

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[166] *Id.* (discharging the majority of Ms. Gharavi's student loans).

[167] *Id.* ("The Debtor only has enough surplus income to afford payments on [Educational Credit Management Corporation (ECMC)] loan number one. I will therefore discharge all of the U.S. Department of Education's loans and all of ECMC's loans except loan number one."). The appropriateness of partially discharging student loans is a source of disagreement between bankruptcy courts. *See* Great Lakes Higher Educ. Corp. v. Brown (*In re* Brown), 239 B.R. 204, 212 (Bankr. S.D. Cal. 1999) (holding that bankruptcy courts have authority to partially discharge student loans). *But see* Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 136 (B.A.P. 8th Cir. 1999) (recognizing the possibility that bankruptcy courts lack authority to re-write student loans or grant partial discharges). The U.S. Bankruptcy Court for the District of Massachusetts in 2006 in *Gharavi v. U.S. Department of Education* (*In re Gharavi*) avoided the partial discharge issue, holding that discharge of some individual student loans but not others was not a partial discharge and thus, there was no question of the bankruptcy court's authority to do so. 335 B.R. at 501; *see* Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394, 401 (Bankr. D. Mass. 2001) (discharging some but not all of a debtor's student loans and holding that this was not a partial discharge).

[168] *See supra* note 156 and accompanying text (stating the three considerations that courts rely upon in their Totality test analysis).

[169] Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 24 (Bankr. D. Mass. 2005) (emphasizing the fact-sensitive nature of the Totality test inquiry and the discretion it affords courts to reach a balance between the fresh start policy and abuse of the student loan system).

[170] *See* 11 U.S.C. § 101 (defining terms of art in the Bankruptcy Code but omitting definition of the term undue hardship); *supra* note 35 and accompanying text (citing the Bankruptcy Code and numerous court decisions to show that Congress has not defined undue hardship).

[171] *See supra* notes 108, 128, 131, 152 and accompanying text (describing the current status of the *Johnson*, *Bryant*, *Brunner*, and Totality tests).

[172] *See infra* notes 175–181 and accompanying text.

Section A of this Part evaluates the undue hardship tests using a two-part framework, which is informed by the arguments that judges frequently use to endorse their preferred test.[173] Sections B through E apply this framework to assess the merits of the *Johnson*, *Bryant*, *Brunner*, and Totality tests respectively.[174]

A. Measuring the Merits of Undue Hardship Tests: A Two-Factor Approach

Although bankruptcy judges disagree about which undue hardship test is best, most anchor their discussion of the test in Congress's policy goals for the student debt discharge exception.[175] As previously stated in Part I of this Note, Congress aimed to protect the student loan system from opportunistic students abusing the system by discharging student debt at bankruptcy and then embarking on successful careers, free of repayment obligations.[176] Evidently, Congress cared deeply about achieving this end, as the student debt discharge exception contravened bankruptcy's axiomatic fresh start policy.[177] Consequently, when arguing for a particular undue hardship test, bankruptcy judges focus intently on whether the test successfully effectuates Congress's policy aims.[178]

That said, an effective undue hardship test must go further than merely incorporating Congress's policy goals—it must also be practicable.[179] Judges evidence their concern for creating a practicable test with criticism of some undue hardship tests for being difficult to apply, internally inconsistent, or unnecessarily complicated.[180] Thus, although judges have reached different con-

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[173] *See infra* notes 175–181 and accompanying text.

[174] *See infra* notes 182–237 and accompanying text.

[175] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 453 (5th Cir. 2019) (arguing in favor of the *Brunner* test by citing Congress's intention to prevent student debtors from abusing the student loan discharge); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 738 (Bankr. D. Me. 2000) (assessing the validity of the *Johnson* test by comparing it to Congress's policy against students abusing the bankruptcy system).

[176] *See supra* notes 74–75 and accompanying text.

[177] *See supra* notes 30–31 and accompanying text.

[178] *See* Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1242 (11th Cir. 2003) (reasoning that a valid undue hardship test should reflect Congress's aim of making student debt discharges more difficult); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (adopting the *Brunner* test because it comports with congressional intent); Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985) (reasoning that Congress chose to override the fresh start policy in favor of the student debt discharge exception), *aff'd*, 831 F.2d 395 (2d Cir. 1987). The explicit inclusion of a "policy" prong in the *Johnson* test underscores the impact of congressional policy on the undue hardship tests. Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *52 (E.D. Pa. June 27, 1979).

[179] *See infra* notes 180–181 and accompanying text.

[180] *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 303 (3d Cir. 1995) (arguing that courts should not apply the *Johnson* test because it is needlessly complicated);

clusions about which test to use, the common thread is an emphasis on these two considerations: (1) that a valid undue hardship test must reflect Congress's policy goals, and (2) that judges must be able to apply the test effectively in practice.[181]

B. The Johnson *Test: Strong on Policy, Weak on Organization*

The *Johnson* test most clearly reflects Congress's policy goals underlying the student loan discharge exception because it is the only test that devotes one prong entirely to what Congress sought to achieve.[182] The U.S. District Court for the Eastern District of Pennsylvania's 1979 *Pennsylvania Higher Education Assistance Agency v. Johnson* (*In re Johnson*) opinion highlights the court's commitment to furthering congressional policy by relying on lengthy quotations from the Commission on Bankruptcy Laws of the United States in the opinion and case law to operationalize Congress's policy.[183] Although this test reflects a commitment to Congress's goals, it is difficult to apply in practice.[184]

Arguably, the *Johnson* test is needlessly complicated and bizarrely organized.[185] The *Johnson* test's mechanical checklist requires bankruptcy judges to consider eleven factors assessing the debtor's financial wellbeing but does

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Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 30 (Bankr. D. Mass. 2005) (alleging that the *Brunner* test creates only the illusion of uniformity and consistency but lacks both in practice); Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 368 (Bankr. W.D. Mo. 2001) (stating that the good faith requirement of the *Brunner* test is inconsistent with the other prongs).

[181] *See supra* notes 175–180 and accompanying text (framing this Note's analysis of the undue hardship tests by citing to factors that have influenced judges' reasoning in precedent cases).

[182] *See infra* notes 183–191 and accompanying text. *Compare In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52 (relying on § 439A of the amended Higher Education Act of 1965 as support for its policy test), *with* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 740 (Bankr. D. Me. 2000) (adopting the Totality test, which focuses on a fact-specific inquiry into the debtor's ability to repay the loans rather than Congress's policy). More specifically, the U.S. District Court for the Eastern District of Pennsylvania in 1979 in *Pennsylvania Higher Education Assistance Agency v. Johnson* (*In re Johnson*) identified Congress's policy towards student debt discharge in bankruptcy as "combat[ing] the abuse of the bankruptcy laws by recently graduated students." 1979 U.S. Dist. LEXIS 11428, at *52.

[183] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52–54 (citing language from the Bankruptcy Commission and reviewing case law that embodies the Commission's policy aims to create the policy prong of the undue hardship test). The opinion in *In re Johnson* noted that, based on a review of the pertinent case law, the three factors most relevant to Congress's policy were the student's benefit from education, amount of student debt, and percentage of indebtedness. *Id.* at *54. Thus, the court used these factors to translate Congress's broad policy aim against abuses into a prong of the undue hardship test. *Id.*

[184] *See infra* notes 186–191 and accompanying text (analyzing the difficulties that applying the *Johnson* test creates).

[185] *See infra* notes 186–191 and accompanying text.

not indicate the relative weight of each factor.[186] Additionally, the debtor may demonstrate an undue hardship by meeting *either* the policy prong *or* the good faith prong of the test.[187] This functional equivalence begs the question of why both prongs are necessary.[188] Lastly, the good faith inquiry focuses on the debtor's *past* behavior to determine if the debtor sought to abuse the bankruptcy system, but the policy prong focuses on the debtor's *future* ability to repay their debts.[189] The test's inquiry into the debtor's past and future behavior is confusing because of its temporal inconsistency.[190] Therefore, it is unsurprising that the *Johnson* test influenced subsequent courts but those courts did not adopt the test wholesale because its ideas, despite their soundness, lacked practical coherence.[191]

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[186] *See supra* notes 95–98 and accompanying text (listing the factors that courts consider under the *Johnson* test). This mechanical checklist has been the source of much criticism from other courts because it makes the *Johnson* test more complicated. *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305 (3d Cir. 1995) (describing the *Johnson* test as "needlessly verbose and multifaceted"); Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987) (recognizing that the *Johnson* test is a valuable for cataloging relevant issues but is too complicated for courts to use in practice).

[187] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52 (noting that the policy prong is reached if the debtor succeeds in meeting the mechanical checklist but cannot establish good faith efforts to repay their student loans).

[188] *See* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) (commenting that inclusion of the good faith and policy prongs is superfluous and repetitive); *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52.

[189] *In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *50–51, *57–58 (focusing on a debtor's past expenditures to measure good faith but focusing on future payment obligations for the policy prong); *see In re Kopf*, 245 B.R. at 741–42 (noting that the policy prong's focus on the debtor's past behavior is inappropriate and lacks textual authority). In 2000 in *Kopf v. United States Department of Education* (*In re Kopf*), Judge James B. Haines, Jr. of the U.S. Bankruptcy Court for the District of Maine elaborated on this temporal element, postulating that the good faith prong was a vestige from when the Bankruptcy Code imposed a time limit on undue hardship:

> Analysis of the debtor's pre-bankruptcy repayment efforts and repayment history, an aspect of the *Johnson* test shared with *Brunner*, has historical roots in the time when student loans were automatically rendered dischargeable in bankruptcy when they had been due and unpaid for five, later seven, years. Courts were then concerned that a debtor who chose bankruptcy before five or seven years expired and sought "undue hardship" discharge within that period might not yet have given repayment efforts a chance. That time is past.

245 B.R. at 741.

[190] *See supra* notes 186–189 and accompanying text.

[191] *See* Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 137–38 (B.A.P. 8th Cir. 1999) (stating that the *Johnson* test heavily influenced the *Brunner* test); Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (recognizing that, like the *Johnson* test, the court would inquire into the debtor's capacity to maintain a minimal standard of living during the loan repayment period).

C. The Bryant *Test: The Inverse of the* Johnson *Test*

The second test, the *Bryant* test, is the inverse of the *Johnson* test because it fails to effectuate congressional policy, but is straightforward in application.[192] Unlike the *Johnson* court, which focused on Congress's fear of debtors abusing the bankruptcy system, the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 1987 in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*) cited language in the legislative history that addressed a debtor's ability to maintain a "minimal standard of living."[193] This language strongly influenced the design of the *Bryant* test, which is evident in the test's focus on the debtors' situation relative to the federal poverty line.[194] Subsequent decisions, however, affirmed that Congress's goal of preventing opportunistic student debtors from discharging debt is the key language in the legislative history, not the "minimal standard" language.[195]

Additionally, the *In re Bryant* court attempted to avoid making moral judgments about whether the debtor's expenses were reasonable, which also distinguishes its analysis from the *Johnson* test.[196] In short, the *Bryant* test was not broadly accepted because the *In re Bryant* court omitted Congress's abusive debtor policy and refused to pass moral judgment on the debtor's finances.[197] Moreover, by refusing to pass moral judgment on the debtor, the *Bryant* court ignored Congress's primary goal for the student debt discharge excep-

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[192] *See infra* notes 193–202 and accompanying text.

[193] *Compare In re Bryant*, 72 B.R. at 915–16 (relying on the Report of the Commission of the Bankruptcy Laws of the United States to include "minimal standard of living" as a focal point in its undue hardship test), *with In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *52 (citing the same report but focusing on the policy against student debtors taking advantage of bankruptcy to discharge student debt).

[194] *In re Bryant*, 72 B.R. at 915–16 (stating that the *Bryant* test uses the federal poverty line to measure whether a debtor can maintain a minimal standard of living).

[195] *Compare id.* at 916 (creating an undue hardship test that focused primarily on the debtor's ability to maintain minimal standard of living), *with* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 302 (3d Cir. 1995) (stating that the student loan discharge exception aimed to prevent abuse by undeserving student debtors), *and* Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394, 399 (Bankr. D. Mass. 2001) (stating that Congress's policy clearly sought to crack down on abuses of the student loan system).

[196] *Compare In re Bryant*, 72 B.R. at 918 ("[W]e feel strongly that our making moral judgments as to the appropriateness of expenditures by debtors should be kept to a minimum."), *with In re Johnson*, 1979 U.S. Dist. LEXIS 11428, at *31 (considering which expenses would be reasonable for a hypothetical debtor under similar circumstances as the debtor). This also distinguishes the *Bryant* test from the Totality test for undue hardship, which focuses on the reasonableness of the debtor's expenses. *See* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 746 (Bankr. D. Me. 2000) (assessing the debtor's living expenses for reasonableness in applying the Totality test); *In re Bryant*, 72 B.R. at 918.

[197] *See supra* notes 193–196 and accompanying text (stating that the *Bryant* test's objectivity was partially responsible for its lack of acceptance because the *Bryant* court refused to pass moral judgment on the debtor's financial decisions).

tion, namely to protect the student loan system against abusive student debtors.[198]

Although the *In re Bryant* test failed from a policy standpoint, it successfully created an intellectually satisfying test both in its clarity and practicability.[199] Its concentration on the federal poverty line is brilliant because it is clear, objective, updated annually, and accounts for a debtor's familial situation.[200] Additionally, by defining "minimal standards of living" as *near or below* the poverty line, the court retained flexibility to exercise discretion in borderline cases.[201] Ultimately, however, the test's simplicity and ease of application did not save it from widespread rejection by bankruptcy courts.[202]

D. The Brunner *Test: Effective, but Too Much So*

Although the third test, the *Brunner* test, represents a notable improvement to the *Johnson* and *Bryant* tests, its unreasonable strictness may create inequitable results.[203] From a policy perspective, the *Brunner* test succeeds because it prevents debtors from discharging their student loans before starting lucrative careers, which is what Congress intended.[204] The second prong of the *Brunner* test is the most stringent mechanism for enforcing this policy.[205] Under this prong, a debtor must demonstrate circumstances that prevent the debtor from maintaining a minimal standard of living during a substantial part of

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[198] *In re Bryant*, 72 B.R. at 918; *see In re Faish*, 72 F.3d at 304 ("The Bryant test's refusal . . . to question whether certain expenses debtors have incurred can be justified seems inconsistent with Congress's dual legislative goals . . . .").

[199] *See infra* notes 200–201 and accompanying text (praising the *Bryant* test because it used the federal poverty line as a bright-line rule and gave bankruptcy judges flexibility in assessing undue hardship).

[200] *In re Bryant*, 72 B.R. at 916 (arguing that the federal poverty line is an effective measure of poverty because it is updated every year and is used by numerous federal assistance programs).

[201] *See id.* at 919.

[202] *See In re Faish*, 72 F.3d at 304 (expressly rejecting the *Bryant* test and the reasoning that supports it); Claxton v. Student Loan Mktg. Ass'n (*In re* Claxton), 140 B.R. 565, 569 (Bankr. N.D. Okla. 1992) (deciding not to follow the *Bryant* test because it is too debtor-friendly).

[203] *See infra* notes 204–217 and accompanying text (describing the inequitable shortcomings of the *Brunner* test). The U.S. Court of Appeals for the Third Circuit in 1995 in *Pennsylvania Higher Education Assistance Agency v. Faish* (*In re Faish*) emphasized that the *Brunner* test is an improvement on the *Johnson* and *Bryant* tests, arguing that *Brunner* is clearer than the *Johnson* mechanical checklist and is more critical than the *Bryant* test with regards to student debtor's expenditures. *See* 72 F.3d at 306.

[204] *See In re Faish*, 72 F.3d at 305 (adopting the *Brunner* test because it comports with Congress's goal of preventing debtors from abusing the student loan system); *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993) (same). The U.S. Court of Appeals for the Third Circuit, in *In re Pelkowski*, supported its position on legislative intent by citing to Representative Allen E. Ertel, who argued that the increasing rate of bankruptcies resulting from student debt necessitates a change of law to prevent "discriminating against future students, because there will be no funds available for them to get an education." 990 F.2d at 742–43 (quoting 124 CONG. REC. 1791–92 (1978)).

[205] *See infra* notes 206–208 and accompanying text.

the repayment period.[206] This requirement allows bankruptcy judges to deny student debt discharges where debtors have favorable employment opportunities, robust health, small families, or strong educational backgrounds.[207] This effectively precludes student debtors from discharging loans out of convenience rather than necessity.[208]

The good faith prong of the test further reinforces Congress's aforementioned policy.[209] This inquiry focuses on whether the debtor is maximizing available financial resources to pay off the student loan debt.[210] To assess this, courts examine how long the debtor attempted to pay back loans before petitioning for bankruptcy and whether the debtor used disposable income on gratuitous purchases rather than loan repayment.[211] Thus, the good faith prong targets the student debtors that Congress sought to penalize, namely those who prioritize their own personal expenditures over repaying their loans and then file for bankruptcy relief without making a concerted attempt at repayment.[212]

The problem with the *Brunner* test is not in its application of Congressional policy; rather, the test is flawed because it focuses so intently on stopping student debtors from abusing the bankruptcy system that honest debtors get caught in the dragnet.[213] The stringency of the *Brunner* test's second prong bars debtors that Congress did not intend to prevent from discharging student debt from a financial fresh start.[214] When courts deny discharge under the

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[206] *See* U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92 (5th Cir. 2003) (restating the second prong of the *Brunner* test); *In re Faish*, 72 F.3d at 305 (elaborating that this prong of the *Brunner* test requires long-lasting and dire financial circumstances).

[207] *See In re Gerhardt*, 348 F.3d at 92 (denying student loan discharge because the debtor was well educated and did not seek job opportunities outside of his preferred field); Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 758 (S.D.N.Y. 1985) (denying discharge because the debtor was healthy, did not have any dependents, and did not make sufficient efforts to find employment), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[208] *In re Pelkowski*, 990 F.2d at 742 (recognizing Congress's policy of preventing debtors from discharging debt "on the brink of lucrative careers," and adopting the *Brunner* test).

[209] *See infra* notes 210–211 and accompanying text.

[210] *In re* Roberson, 999 F.2d 1132, 1134–35 (7th Cir. 1993) (stating that the good faith prong prevents debt discharge for debtors who failed to maximize financial resources).

[211] *In re Faish*, 72 F.3d at 305 (recognizing that the good faith prong intends to to preclude financially negligent debtors from discharging student loans); *Brunner*, 831 F.2d at 397 (holding that debtor did not act in good faith because she filed for discharge only one month after her loans became due); Sands v. United Student Aid Funds, Inc. (*In re* Sands), 166 B.R. 299, 312 (Bankr. W.D. Mich. 1994) (noting that debtors who file for bankruptcy shortly after debts become due is evidence of bad faith); *see also In re Gerhardt*, 348 F.3d at 92 (commenting on the debtor's decision to attend a music festival during the loan repayment period as relevant to the undue hardship discussion).

[212] *See supra* note 204 and accompanying text (discussing Congress's intent to disincentivize debtors from abusing the system by discharging student debts out of convenience rather than necessity).

[213] *See infra* notes 214–217 and accompanying text (emphasizing the demanding nature of the *Brunner* test and how it sometimes results in severe applications against student debtors).

[214] *In re Gerhardt*, 348 F.3d at 92 (stating that the second prong of the *Brunner* test is demanding because it requires total incapacity for future repayment); Hicks v. Educ. Credit Mgmt. Corp. (*In re*

Brunner test to debtors who cannot pay their student loans due to sickness or disability, the discrepancy between Congress's goals and courts' application becomes clear.[215] Far from being selfish students on the eve of lucrative careers, these debtors were on the eve of physical and financial ruin.[216] Thus, the *Brunner* test fails in practice because it does not discern between honest and dishonest debtors, especially in jurisdictions requiring a "certainty of hopelessness."[217]

Proponents of the *Brunner* test argue that a stringent standard is necessary to protect the integrity of the student loan system.[218] If, however, Congress intended to impose an undue hardship standard so insurmountable that virtually no student debtors can meet it, Congress might as well have dispensed with the undue hardship carve-out entirely.[219]

E. The Totality Test: Greater Discretion Creates More Equitable Results

The Totality test is arguably more flexible than the *Brunner* test because it relies on bankruptcy judges to exercise their discretion to achieve Congress's policy goals, creating a more sensitive test with potentially more equitable results.[220] The Totality test incorporates Congress's policy of preventing abuse of the bankruptcy system by student debtors, but does so more subtly than the

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Hicks), 331 B.R. 18, 28 (Bankr. D. Mass. 2005) (arguing that the second prong of the *Brunner* test goes too far by requiring a "certainty of hopelessness").

[215] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450, 452 (5th Cir. 2019) (holding that the debtor failed to satisfy the second prong of the *Brunner* test, despite leaving three jobs due to diabetic neuropathy); Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 679, 683 (6th Cir. 2005) (refusing discharge for debtor suffering from chronic depression, anxiety, and complications from colorectal surgery); Lozada v. Educ. Credit Mgmt. Corp. (*In re* Lozada), 604 B.R. 427, 431, 437–38 (Bankr. S.D.N.Y. 2018) (denying discharge for a debtor with diabetes, rotator cuff tears, and herniated discs in his spine).

[216] *See In re* Pelkowski, 990 F.2d 737, 742 (3d Cir. 1993) (adopting the *Brunner* test to prevent debtors from discharging loans before beginning successful careers).

[217] Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (requiring a certainty of hopelessness to demonstrate an undue hardship); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (same).

[218] *See In re Thomas*, 931 F.3d at 453 (stating that one goal of the student debt discharge exception was "rescuing the student loan system from fiscal doom" (quoting *In re Pelkowski*, 990 F.2d at 743)).

[219] *See supra* note 33 and accompanying text (citing statistics that demonstrate how few debtors succeed in discharging student loans because of undue hardship). In 2019, Congress did not take the opportunity to revise the undue hardship language in the Bankruptcy Code when it signed into law the Small Business Reorganization Act of 2019, which revised Chapter 11 of the Code. *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. The undue hardship provision remains unchanged by this Act. *See* 11 U.S.C. § 523(a)(8).

[220] *See infra* notes 221–237 and accompanying text (comparing the Totality test against the *Brunner* test, specifically focusing on the amount of discretion left to bankruptcy judges and effectuation of Congress's policy aims).

Johnson or *Brunner* tests.[221] It employs a fact-based inquiry into the debtor's personal and financial situations to assess whether the student debtor is honest or abusive.[222] This fact-based inquiry is the critical point that distinguishes the Totality test from the *Brunner* test.[223] Whereas the *Brunner* test relies on its stringent prongs to effectuate Congressional policy, the Totality test trusts bankruptcy judges to exercise their discretion to achieve these same ends.[224]

From a policy standpoint, the Totality test is similar to the *Brunner* test because both consider the fresh start principle that is central to bankruptcy, although arguably the Totality test does so more directly.[225] When applying the Totality test, judges balance the fresh start principle against Congress's policy that opportunistic student debtors should be treated more harshly than good faith debtors.[226] This approach differs from the *Brunner* test, which solely focuses on preventing discharges for students who take advantage of the bankruptcy system.[227] The Totality test, therefore, encompasses a broader perspective of the policy aims underlying the undue hardship test than the *Brunner* test does.[228]

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[221] *Compare* Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 24 (Bankr. D. Mass. 2005) (contending that the fact-sensitive inquiry of the Totality test reflects Congress's goal of preventing abuse of the bankruptcy system by student debtors), *with In re Roberson*, 999 F.2d at 1136 (preventing abuse of the bankruptcy system by only discharging student loans for debtors with a "certainty of hopelessness"), *and* Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *52–53 (E.D. Pa. June 27, 1979) (creating a policy prong of the undue hardship test to prevent abusive student debtors from discharging their loan debt).

[222] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553–54 (8th Cir. 2003) (stating its preference for the Totality test because it vests bankruptcy judges with discretion to grant discharges in accordance with congressional policy); *In re Hicks*, 331 B.R. at 24 (characterizing the Totality test as factually based and sensitive to context to enact Congress's policy).

[223] *See infra* note 224 and accompanying text (highlighting the fact-intensive focus of the Totality test as compared to the *Brunner* test).

[224] *Compare In re Long*, 322 F.3d at 554 ("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)."), *with* Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 681 (6th Cir. 2005) (requiring a certainty of hopelessness for a debtor to discharge student loans under the *Brunner* test).

[225] *See infra* notes 226–228 and accompanying text (stating that the Totality test addresses a wider range of policy concerns than the *Brunner* test).

[226] *In re Hicks*, 331 B.R. at 24 (stating that the Totality test strikes a balance between protecting the bankruptcy system and the fresh start policy); Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 365 (Bankr. W.D. Mo. 2001) (contending that the fact-based approach of the Totality test creates equitable results by balancing the fresh start and protection from abuse policies).

[227] *See supra* notes 204–207 and accompanying text (stating Congress's policy goal of preventing student debtors from discharging loans out of convenience, not necessity).

[228] *Compare In re Hicks*, 331 B.R. at 24 (arguing in favor of the Totality test because it balances the fresh start principle and policy against debtor abuse), *with In re* Roberson, 999 F.2d 1132, 1136–37 (7th Cir. 1993) (adopting a far more critical viewpoint towards student debtors and arguing for the *Brunner* test). In its impassioned defense of the *Brunner* test, the U.S. Court of Appeals for the Seventh Circuit in 1993 in *In re Roberson* argued that the *Brunner* test is appropriately demanding because student debtors assumed the risk of being unable to repay their loans. 999 F.2d at 1137. This

Additionally, the Totality test is arguably well-suited in practical application because it is both straightforward and flexible.[229] Unlike the tripartite approaches of the *Johnson* and *Brunner* tests, the Totality test focuses on answering one question: based on the debtor's income, reasonable expenses, and other relevant factors, will the debtor be able to maintain a minimal standard of living while repaying the student loans?[230] When applying this test, courts calculate a debtor's loan repayment capacity by examining the debtor's current and projected net income and whether these are likely to change.[231] Judges have discretion to consider factors making loan repayment *more likely*, such as a student loan consolidation program, or *less likely*, such as a debtor's debilitating illness.[232]

Critics of the Totality test find it too permissive for student debtors and therefore believe the test risks undermining the integrity of the student loan system.[233] Yet cases in which debtors were denied student debt discharges under the Totality test despite sympathetic personal circumstances somewhat rebut the critic's fears.[234] Additionally, others have argued that application of the

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argument epitomizes how courts employing *Brunner* disregard the fresh start principle in their undue hardship analysis because it presumes the debtor does not deserve a new financial opportunity after bankruptcy. *See id.*

229 *See infra* notes 230–232 and accompanying text (comparing the Totality test, which focuses on one central question, with the other multifactorial tests).

230 *Compare* Gharavi v. U.S. Dep't of Educ. (*In re* Gharavi), 335 B.R. 492, 497 (Bankr. E.D. Mass. 2006) (stating that the Totality test examines "the Debtor's past, present, and likely future income and reasonably necessary living expenses, as well as other relevant circumstances, to determine whether the Debtor is capable of earning enough to sustain herself and her dependents while repaying her educational debt"), *with* Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *59–61 (E.D. Pa. June 27, 1979) (stating the three-prong undue hardship test, one prong of which includes eleven subordinate factual considerations).

231 *See* Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394, 397 (Bankr. D. Mass. 2001) (calculating the debtor's net income based on her wages, rent, utilities bills, grocery costs, and car payments, and also accounting for the debtor's spinal cord injury, in assessing her ability to work).

232 *See* Brondson v. Educ. Credit Mgmt. Corp. (*In re* Brondson), 435 B.R. 791, 804 (B.A.P. 1st Cir. 2010) (holding that courts may consider whether a debtor utilized the Income Contingent Repayment Plan to consolidate her loans under the Totality test); Smith v. U.S. Dep't of Educ. (*In re* Smith), 582 B.R. 556, 559–60 (Bankr. D. Mass. 2018) (evaluating the debtor's financial situation in relation to his treatment for numerous psychiatric disorders).

233 *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 455 (5th Cir. 2019) (characterizing the Totality test as a weaker standard than the *Brunner* test).

234 Brunell v. Citibank (S.D.) (*In re* Brunell), 356 B.R. 567, 580 (Bankr. D. Mass. 2006) ("I am not unsympathetic to the Debtor's difficulty in raising three children while working full-time. But because her current income and expenses necessary to provide for herself and her children, with some small adjustments to her expenses, demonstrate that she holds a surplus from which a monthly payment toward her student loan obligations can be made, I do not find that she face[s] an undue hardship . . . ."); Paul v. Suffolk Univ. (*In re* Paul), 337 B.R. 730, 732, 739 (Bankr. D. Mass. 2006) (refusing to discharge student debt for mother of three who emigrated from Haiti and spoke English as a second language); Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 32, 38 (Bankr. D. Mass. 2005) (denying discharge to debtor despite her multiple sclerosis).

Totality test produces non-uniform results.[235] In *Hicks v. Educational Credit Management Corp.*(*In re Hicks*), decided in 2005, Judge Henry J. Boroff of the U.S. Bankruptcy Court for the District of Massachusetts responded directly to this criticism, arguing that the Totality test is no less uniform in application than the *Brunner* test because *Brunner* only creates the illusion of consistency.[236] Although it is the minority view today, the Totality test may be effective because it adopts a broader policy perspective, trusts in the discretion of the bankruptcy judges to enact this policy, and leads to more equitable results.[237]

III. Perspectives on the Future: Crisis and Moderate Reform

The history of student debt in bankruptcy is a story of stagnation, not change.[238] Congress introduced the term undue hardship when it amended the Higher Education Act of 1965, then imported it into the Bankruptcy Code in 1978, and thereafter left it on the shelf, gathering proverbial dust.[239] As a result, judges must do the lion's share of the work, creating the undue hardship tests without the benefit of a compass bearing from Congress.[240]

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[235] *In re Thomas*, 931 F.3d at 455 (arguing that the totality standard creates inconsistent results); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 874 n.8 (Bankr. D.N.H. 2000) (advocating for the *Brunner* test over the Totality test for the sake of uniformity). The U.S. Court of Appeals for the Fifth Circuit in *Thomas v. Department of Education* (*In re Thomas*) in 2019 argued that the Totality test is a standard rather than a bright-line rule, which would result in courts-reaching different conclusions on similar facts. 931 F.3d at 455. The court, however, failed to provide any examples of these inconsistent results. *Id.*

[236] *In re Hicks*, 331 B.R. at 30–31 (noting that courts have modified the *Brunner* test and often apply similar facts to different prongs of the test). For example, Judge Boroff of the U.S. Bankruptcy Court for the District of Massachusetts argued that courts purport to apply the same *Brunner* test, but treat the same types of facts differently across jurisdictions. *See id.* at 30 (stating that "different courts and different circuits" apply the *Brunner* test in variable ways, creating confusion as to which specific test within the *Brunner* framework should be adopted). Specifically, Judge Boroff argued that facts related to the debtor's net income maximization can fall under any of the three *Brunner* prongs. *Id.* at 30–31 nn.15–17 (collecting cases that illustrate the non-uniform application of the *Brunner* test); *see also* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (stating that a debtor's attempts to increase income belong under the second prong of the *Brunner* test); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1312 (10th Cir. 2004) (citing the debtor's attempts to maximize income as evidence of good faith under *Brunner*'s third prong); Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1088 (9th Cir. 2001) (listing the debtor's opportunity to reduce her budget under the first *Brunner* prong).

[237] *See supra* notes 221–236 and accompanying text (emphasizing that the Totality test's fact-based focus and flexibility will create fairer outcomes for student debtors in undue hardship cases).

[238] *See infra* notes 239–240 and accompanying text.

[239] 11 U.S.C. § 523(a)(8) (requiring an undue hardship to discharge student loans at bankruptcy); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532) (preventing student debt discharge within five years unless the debtor can demonstrate an undue hardship); Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (repealed 1978) (amending the Higher Education Act of 1965, coining the term undue hardship, and laying the groundwork for subsequent inclusion of the term in the Bankruptcy Code).

[240] *See* Andresen v. Neb. Student Loan Program (*In re* Andresen), 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999) (reaffirming the Eighth Circuit Court of Appeals' totality of the circumstances approach to

Section A of this Part offers competing perspectives on the student debt discharge exception and concludes that either viewpoint can support a strict or permissive approach to the treatment of student debt in bankruptcy.[241] Section B proposes reforms to the treatment of student debt in bankruptcy in response to the modern student debt crisis.[242] Ultimately, this Part argues that Congress must define the term "undue hardship" by codifying the Totality test, which would remove the burden from judges and ensure consistency across courts in the United States.[243]

A. Government and Student Debt: An Identity Crisis

When contemplating how to change the undue hardship jurisprudence to mitigate the student debt crisis, it is helpful to consider what role the U.S. government should play in student lending.[244] From the creditor perspective, courts should treat the government like any other creditor at bankruptcy because it is simply entering into voluntary lending agreements with students.[245] From the investor perspective, courts should treat the government differently because its role as an investor in the American education transcends the traditional lender-borrower relationship.[246]

Under the above-mentioned *creditor* perspective, a strong argument exists in favor of adopting a stringent undue hardship test in bankruptcy.[247] American bankruptcy law, influenced by English bankruptcy and insolvency law, is historically rooted in the idea that creditors must have recourse against debtors who are unwilling or unable to pay.[248] Today, many Bankruptcy Code provi-

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undue hardship); Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985) (creating the influential *Brunner* three-part undue hardship test), *aff'd*, 831 F.2d 395 (2d Cir. 1987); Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *59–61 (E.D. Pa. June 27, 1979) (stating the tripartite *Johnson* test for undue hardship).

[241] *See infra* notes 244–264 and accompanying text.

[242] *See infra* notes 265–288 and accompanying text.

[243] *See infra* notes 244–288 and accompanying text.

[244] *See infra* notes 245–264 and accompanying text (contending that viewing the federal government as a creditor or an investor in students' futures affects policy considerations around the undue hardship test).

[245] *See In re* Roberson, 999 F.2d 1132, 1136–37 (7th Cir. 1993) (emphasizing that the relationship between the student and government is that of creditor-debtor, not insurer-policyholder); *In re Brunner*, 46 B.R. at 755 n.3 (stating that the government is not the "insurer of educational value").

[246] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

[247] *See infra* notes 248–252 and accompanying text.

[248] Marcia S. Krieger, *"The Bankruptcy Court Is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275, 282–286 (1999) (describing the influence of English bankruptcy and insolvency law on early American bankruptcy jurisprudence). Colonial bankruptcy law afforded creditors significant

sions protect creditors from the unscrupulous actions of debtors, such as restrictions on fraudulent transfers and avoidable preferences.[249] Thus, if the government is to be treated like any other creditor, adopting the strictest undue hardship test is merely a continuance of the Bankruptcy Code's historical pro-creditor orientation.[250] For example, a demanding undue hardship test protects the student loan system from depletion in a similar way to fraudulent transfer provisions protecting the property of the estate from being depleted by sham transactions.[251] Adherents of this view would also argue that student borrowing is a voluntary transaction and therefore, students should bear the risk of non-repayment, not the government.[252]

There is, however, a strong counterargument to these points: if the government is just like any other creditor, then there should be no discharge exception for student loans in the first place.[253] If the government is in fact just another creditor, then it does not deserve the special treatment of a student debt discharge exception.[254] Further, if the government receives the benefit of this

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latitude in collecting from debtors, even imprisonment for nonpayment in some cases. *Id.* at 286. This historical favoritism towards creditors dates to the drafting of the United States Constitution, when most authorities understood that bankruptcy was a tool for creditor protection rather than debtor relief. *See* James Monroe Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 830–31 (1901) (reviewing the early history of American bankruptcy law).

[249] *See* 11 U.S.C. § 547(b) (empowering the bankruptcy trustee to recapture assets transferred from the bankruptcy estate that shows a preference for one creditor over the others); *id.* § 548(a)(1) (stating that the bankruptcy trustee has the power to avoid a debtor's fraudulent transfers).

[250] *See In re Brunner*, 46 B.R. at 756 (providing the most challenging undue hardship test for debtors, which has become the majority rule among bankruptcy courts). A rebuttal to this argument is that, although the earliest history of bankruptcy favors creditors, the codification of the general discharge for individual debtors represents a shift to a pro-debtor standpoint within Chapter 7 of the Bankruptcy Code. *Compare* Krieger, *supra* note 248, at 282–86 (emphasizing the pro-creditor nature of early Anglo-American bankruptcy law), *with* 11 U.S.C. § 727(a) (providing honest debtors subject to Chapter 7 bankruptcy a general discharge of their debts, which favors debtors over their unsecured creditors).

[251] *See* 11 U.S.C. § 523(a)(8) (requiring a debtor to demonstrate an undue hardship to discharge student debt, enacted in response to Congress's fear of debtors using the bankruptcy system); *id.* § 548(a)(1) (restricting debtors from engaging in fraudulent transfers that conceal assets from disposition to creditors); REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 94–95 (1973) (recognizing debtor abuses of the discharge system as an important concern).

[252] *See In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993) ("The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual . . . ."). The U.S. Court of Appeals for the Seventh Circuit in 1993 in *In re Roberson* argued that because student borrowing is entirely voluntary, the risk should lie with the student, not the taxpayer. *Id.*

[253] *See infra* notes 254–255 and accompanying text.

[254] *See* 11 U.S.C. § 523(a)(8) (stating that student debt is non-dischargeable unless the debtor can demonstrate an undue hardship).

exception, congress should implement a permissive undue hardship test as a counterbalance.[255]

Alternatively, viewing the government as an *investor* in American education leads to different conclusions about how student debt should be treated in bankruptcy.[256] American education is inextricably tied to the American dream.[257] Presidential speeches and Supreme Court decisions have reinforced the idea that government must play a key role in helping students access education.[258]

Under this view, the government's duty to promote American education necessitates a more permissive bankruptcy regime under which more students who failed to complete their education can discharge their loans.[259] Thus, debtors like Vera Francis Thomas, of the 2019 U.S. Court of Appeals for the Fifth Circuit's case *Thomas v. Department of Education* (*In re Thomas*), who sought the American dream through higher education would not be left in penury because illness, disability, or personal tragedy rendered loan repayment impossible.[260]

Conversely, this "investor" view of the government can also support an argument in favor of a more stringent undue hardship test: if the government is

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[255] *See id.*; Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 24 (Bankr. D. Mass. 2005) (arguing in favor of the Totality test for undue hardship because it allows balance between the student debt discharge exception and fresh start policy, thus creating fairer results). *See generally* 11 U.S.C. § 727(a) (describing the general discharge of debts at bankruptcy, absent fraud); *id.* § 523 (listing the limited exceptions to the general discharge).

[256] *See infra* notes 257–260 and accompanying text.

[257] *See* Obama, *supra* note 19 (describing the experience of then-presidential candidate Obama's mother to emphasize the connection between the American dream and access to higher education). The most impactful moment of the speech occurred when then-presidential candidate Obama recounted his mother's experience as an American, saying that as

> [a] single mom—even while relying on food stamps as she finished her education, she followed her passion for helping others, and raised my sister and me to believe that in America there are no barriers to success—no matter what color you are, no matter where you're from, no matter how much money you have.

Id.

[258] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 843 (2007) (Breyer, J., dissenting) (characterizing the role of education as "help[ing] create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees"); United States v. Virginia, 518 U.S. 515, 557–58 (1996) (striking down the Virginia Military Institute's male-only admissions program as unconstitutional, thereby allowing women the same right to attend as males); *supra* note 257 and accompanying text (describing the connection between education and the American dream).

[259] *Compare* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (describing promotion of education as a paramount function of government), *with In re* Roberson, 999 F.2d 1132, 1136–37 (7th Cir. 1993) (arguing that the government is not an insurer of student education).

[260] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450, 453 (5th Cir. 2019) (denying the debtor a student loan discharge even though the debtor's physical illnesses prevented her from maintaining three consecutive jobs).

the dream maker for the American student, then the government requires maximum protection from the abuses of opportunistic debtors.[261] Thus, a harsh undue hardship test actually provides greater protection for students because abusive student debtors cannot divert valuable financial resources from the system as a whole.[262]

In conclusion, neither the perspective of the government as a creditor nor as an investor points unequivocally towards affirmation of the current student debt regime or complete systemic overhaul.[263] Considering all of the foregoing perspectives, effective reform should balance the need for student debtor protections against the risk of rendering student debt discharge so easy that it threatens the integrity of the system as a whole.[264]

B. Responding to a Crisis: The Need for Congressional Bankruptcy Reform

Reform that balances debtor protection against systemic protection requires recalibration, not revolution.[265] The task of striking this balance rests with Congress, the political body best positioned to create effective, uniform change.[266] Recent events have increased public scrutiny of the American education system, thereby providing an impetus to create change in the near future.[267]

Current events and the public responses to them have put the American education system squarely in the crosshairs of the public consciousness.[268] The student debt crisis and college admissions scandals of 2018 and 2019 respectively shed light on widespread systemic inequalities from elementary school to universities.[269] The staggering amount of student debt permeates the public

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[261] *See id.* at 453 (describing one of the aims of the student debt discharge exception as preventing the student loan system from "fiscal doom"); *In re* Pelkowski, 990 F.2d 737, 743 (3d Cir. 1993) (same).

[262] *See In re Pelkowski*, 990 F.2d at 743 (arguing that the undue hardship test promotes the solvency of the loan system by preventing student debtors with promising financial opportunities from discharging debt).

[263] *See supra* notes 244–262 and accompanying text (positing that neither the creditor nor investor view of government in student lending is dispositive on the issue of student debt discharge reform).

[264] *See supra* notes 244–262 and accompanying text (same).

[265] *See infra* notes 266–288 and accompanying text.

[266] *See infra* notes 276–277 and accompanying text.

[267] *See infra* notes 271–273 and accompanying text.

[268] *See infra* notes 269–273 and accompanying text.

[269] *See College Admissions Scandal: Your Questions Answered*, N.Y. TIMES (Mar. 14, 2019), https://www.nytimes.com/2019/03/14/us/college-admissions-scandal-questions.html [https://perma.cc/JH6P-WE3S] (summarizing charges brought by federal prosecutors against fifty defendants who were accused of using bribes and deceit to gain admission to American universities); Heather Long, *Hidden Crisis: D.C.-Area Students Owe Nearly Half a Million in K-12 School Lunch Debt*, WASH. POST (Dec. 28, 2018), https://www.washingtonpost.com/business/2018/12/28/hidden-crisis-dc-area-students-owe-nearly-half-million-k-school-lunch-debt/?arc404=true [https://perma.cc/7FHE-JMSN] (describing

discourse, and commentators have dubbed it the "student loan crisis."[270] The 2020 presidential election served as a microphone for these issues, with Democratic candidates debating educational reform on national television.[271] The debate has persisted even after President Joseph R. Biden Jr. election, with the new administration considering cancellation of some federal student debt.[272] Together, these events show that education is a relevant issue for Americans, typically a precondition to reform.[273]

Congress is in the best position to reform the student debt system by revising the Bankruptcy Code.[274] Congress adopted the term undue hardship in

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how Washington, D.C. students owed approximately $500,000 to schools after failing to pay for school lunches, resulting in those students receiving substandard lunches). The public response to these crises demonstrates how much scrutiny the American education system currently faces. *See* Kara Baskin, *Students Are Being Shamed and Punished Over Lunch Debt, and It May Take Legislation to Stop It*, BOS. GLOBE (June 13, 2019), https://www.bostonglobe.com/lifestyle/food-dining/2019/06/13/students-are-being-shamed-and-punished-over-lunch-debt-and-may-take-legislation-stop/MByJQuX2u15NHBG7H4WLoM/story.html [https://perma.cc/MQ36-X6PZ] (describing parents' anger over students being "shamed" for meal debt); Dan Levin et al., *'So Disheartening': At Colleges Embroiled in Scandal, a Sense of Outrage and Scandal*, N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/us/college-admissions-scandal-students.html [https://perma.cc/XJ8U-3A7B] (describing the sense of astonishment and anger among college students after the college admissions scandal).

[270] *See* Patrick B. Healey, *We Should All Be Concerned About the Student Debt Crisis*, CNBC (Nov. 4, 2019), https://www.cnbc.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html [https://perma.cc/G79B-W6JH] (drawing parallels between the 2008 subprime mortgage crisis and current level of student debt); Elissa Nadworny, *Families, Not Just Students, Feel the Weight of the Student Loan Crisis*, NPR (Sept. 4, 2019), https://www.npr.org/2019/09/04/755221033/families-not-just-students-feel-the-weight-of-the-student-loan-crisis [https://perma.cc/6NWX-KNZ3] (analyzing how student debt adversely impacts family values and finances).

[271] Lauren Camera, *Democratic Candidates Spar Over Free College at Debate*, U.S. NEWS (Dec. 19, 2019), https://www.usnews.com/news/elections/articles/2019-12-19/democratic-candidates-spar-over-free-college-at-debate [https://perma.cc/228F-X93N] (reporting that democratic candidates have put forward plans to make college more affordable, including free tuition). For example, during the 2020 South Carolina Democratic Debate, Senator Elizabeth Warren argued that cancelling student loan debt would benefit teachers and close racial wealth disparities. *Read the Full Transcript of the South Carolina Democratic Debate*, CBS News (Feb. 25, 2020), https://www.cbsnews.com/news/south-carolina-democratic-debate-full-transcript-text/ [https://perma.cc/NE7T-BVEX]. Alternatively, Senator Amy Klobuchar argued for a more moderate plan, focusing on making one- and two-year degrees free, and developing other loan repayment programs rather than wholesale debt cancellation. *Id.*

[272] Erica L. Green et al., *Student Loan Cancellation Sets Up Clash Between Biden and the Left*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/us/politics/biden-student-loans.html [https://perma.cc/P454-ZBA3] (reporting that President Biden has considered forgiving $10,000 for student debtors). Various groups including the National Association for the Advancement of Colored People and the American Federation of Teachers have supported this proposal. *Id.* Others, including economists, have criticized the plan as "inefficient" because it focuses on forgiving long-term debt rather than assisting with short-term needs, such as eviction protection. *Id.*

[273] *See supra* notes 269–271 and accompanying text.

[274] *See* U.S. CONST. art I., § 8, cl. 4 (empowering Congress to establish uniform bankruptcy laws in the United States). One could argue that federal circuit judges are in a better position to create reform because they created the undue hardship tests and apply them in practice today. *See* U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (adopting the *Brunner* test for

the 1978 amendments and continued to leave it undefined in the 2005 amendments.[275] Not only is Congress responsible for the current undue hardship jurisprudential landscape, it also sits in the best position to remedy its faults.[276] Congress should do now what it should have done half a century ago and define the term undue hardship in a way that aligns with, or codifies, the Totality test.[277] Defining undue hardship would create uniformity among the federal circuits and ensure that a debtor who files for bankruptcy in the Fifth Circuit is treated the same as one who files in the U.S. Court of Appeals for the First Circuit.[278]

The Totality test is the most effective undue hardship test because it prevents opportunistic student debtors from abusing the student loan system and balances this interest against the fresh start principle.[279] Moreover, the Totality test gives bankruptcy judges greater flexibility than the *Brunner* test to grant discharges to honest student debtors, thereby achieving more equitable results.[280] Congress should define undue hardship in the Bankruptcy Code to codify the Totality test.[281] This would settle the debate about which test is most effective and would rubber stamp case law from First and Eighth Circuit federal judges who have championed the totality approach.[282] In light of the severity

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undue hardship in the U.S. Court of Appeals for the Fifth Circuit); Brunner v. N.Y. Higher Educ. Servs. Corp., 831 F.2d 395, 396–97 (2d Cir. 1987) (creating the three-part *Brunner* undue hardship test). In circuits that have adopted the *Brunner* test, however, judges may be bound to follow circuit precedent rather than changing to the Totality test. *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 452 (5th Cir. 2019) (stating that the court is bound to apply the *Brunner* test because of the Fifth Circuit's decision in *United States Department of Education v. Gerhardt* (*In re Gerhardt*)); *In re Gerhardt*, 348 F.3d at 91.

[275] *See supra* notes 69–71 and accompanying text (tracing the history of the term undue hardship and highlighting Congress's continued refusal to define it, despite numerous other amendments to the Bankruptcy Code).

[276] *See supra* notes 69–71 and accompanying text (describing Congress's past revisions of the Bankruptcy Code to emphasize that it has the power and experience to create meaningful reform today).

[277] *See* 11 U.S.C. § 101 (listing Bankruptcy Code definitions but omitting undue hardship); *In re Thomas*, 931 F.3d at 454 (citing the *Oxford Dictionary* definitions of the terms "undue" and "hardship" because "undue hardship" is undefined in the Bankruptcy Code).

[278] *Compare* Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 32 (Bankr. D. Mass. 2005) (applying the Totality test after noting that Congress chose to leave undue hardship undefined in the Code), *with In re Gerhardt*, 348 F.3d at 91 (adopting the *Brunner* test for undue hardship). Greater uniformity that would result from a single undue hardship definition would also comport with the constitutional mandate of establishing uniform bankruptcy laws. U.S. CONST. art I., § 8, cl. 4.

[279] *See supra* notes 221–228 and accompanying text (discussing how the Totality test gives judges the discretion to enact Congress's policy goals for student debt discharges).

[280] *See supra* notes 229–232 and accompanying text (stating that the Totality test's fact-based inquiry gives judges more discretion than under the more restrictive *Brunner* test).

[281] *See supra* note 277 and accompanying text (arguing that Congress should define undue hardship in the Bankruptcy Code to effectively codify the Totality test).

[282] *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003) (rejecting the *Brunner* test in favor of the Totality test for undue hardship); Kopf v. U.S. Dep't of Educ. (*In*

of the student debt crisis and the long-term, deleterious effects that burdensome debt will have on a generation of Americans, the time has come to enact this reform.[283]

If Congress fails to define undue hardship in the Bankruptcy Code, school officials must put students on notice about the potential financial consequences of their educational decisions.[284] Guidance counselors and high school teachers should broaden their advice from *how* to get admitted to college to *what happens* if plans for higher education go awry.[285] Students must be made aware that taking on student debt creates a risk of a financial burden that, under the current bankruptcy regime, is effectively non-dischargeable.[286] Students advised of this risk could adjust their career plans accordingly by choosing majors associated with high-paying jobs, applying for grants to fund their education instead of loans, or forgoing higher education altogether to enter the workforce.[287] Without congressional change, students will continue to fall victim to the *Brunner* test's harsh undue hardship barrier to student loan discharge; putting students on notice about the stark reality of the current system will at least give those students the opportunity to plan accordingly.[288]

CONCLUSION

Chapter 7 bankruptcy allows honest debtors to discharge their pre-petition debt and emerge from the bankruptcy proceeding with a financial fresh start. Congress abridged student debtors' access to a fresh start when it adopted a student loan discharge exception under 11 U.S.C. § 523(a)(8). On the one hand, Congress limited student debtors' ability to discharge their student loans out of concern that opportunistic student debtors would abuse the system and bring about its financial ruin. On the other hand, Congress provided some protection for the exceptional student debtors who could demonstrate an undue hardship. Congress, in leaving this term undefined in the Bankruptcy Code,

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re Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) (endorsing the Totality test and contending that the *Brunner* and *Johnson* tests are flawed).

[283] *See supra* notes 25–27 and accompanying text (citing student loan statistics to indicate how student debt has burdened a generation of student borrowers).

[284] *See generally* Jeffrey J. Selingo, *Who Advises Best, Pros or Profs?*, N.Y. TIMES (Apr. 11, 2014), https://www.nytimes.com/2014/04/13/education/edlife/who-advises-best-pros-or-profs.html [https://perma.cc/2XM7-CYP2] (describing the effectiveness of professors and professionals in academic advising of college students).

[285] *See* James S. Murphy, *The Undervaluing of School Counselors*, THE ATLANTIC (Sept. 16, 2016), https://www.theatlantic.com/education/archive/2016/09/the-neglected-link-in-the-high-school-to-college-pipeline/500213/ [https://perma.cc/4G9E-NN4L] (emphasizing the important role that guidance counselors play in advising students about college choices and lamenting the lack of funding for these positions).

[286] *See supra* note 139 and accompanying text.

[287] *See supra* note 139 and accompanying text.

[288] *See supra* notes 284–287 and accompanying text.

has left judges with the task of creating tests to operationalize undue hardship. Over time, judges created four prominent undue hardship tests: the *Johnson*, *Bryant*, *Brunner*, and Totality test. The *Brunner* test, the majority view today, imposes an extremely high bar for student debtors to demonstrate an undue hardship, effectively making most student loans in the United States non-dischargeable. The Totality test, adopted by a minority of courts, gives judges additional discretion to grant discharges of student loans in extreme cases. In the context of the modern student debt crisis, in which student debt and tuition costs have reached unprecedented levels, the time has come for Congress to define the term undue hardship based on the case law developed in jurisdictions that apply the Totality test. This moderate reform would result in greater uniformity among bankruptcy courts, and more equitable results for student debtors who seek bankruptcy as their last resort. Absent this reform, school officials should inform their students about this strict legal standard so that they can make prudent decisions about their financial futures.

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