Student Loan Purpose and the *Brunner* Test

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This Article offers a new rationale for making student loans more readily dischargeable in bankruptcy: Doing so advances Congress's purpose in creating federal student loan programs in the first place. Empirical research indicates that if it is too hard to discharge loans in bankruptcy, students are less likely to pursue higher education, more likely to drop out, less likely to consider lower-income but valuable career paths, and more likely to be harmed rather than aided by their student loans. All these effects undermine Congress's express aims for the student loan programs.

Courts have ignored Congress's larger purpose in setting the standard for student-loan dischargeability. Specifically, in construing the Bankruptcy Code's requirement that a debtor show "undue hardship" to get a discharge of student loans, the court that announced the prevailing Brunner *test and many courts following it have focused narrowly on furthering the purposes of the specific provision that makes student loans harder to discharge than most other debts. They have not, in interpreting the open-ended "undue hardship" requirement, been guided by the overarching purposes of the student loan programs.*

As a result, "undue hardship" is often interpreted too harshly, hindering federal student loan programs from accomplishing their purposes. The Article proposes a replacement for the Brunner *test that would align the interpretation of "undue hardship" more closely with Congress's goals. The Article suggests that undue hardship should be presumed to exist when the debtor cannot repay student loans in a reasonable (10-20 year) period of time while maintaining a middle-class standard of living. The presumption could be rebutted by a showing that the debtor is engaged in the opportunistic abuse that Congress tried to combat by restricting discharge. The proposal would further Congress's student-loan program goals of expanding the middle class and moderating the length of time borrowers are in repayment.*

The Article concludes by observing that considering the overarching purposes of the student-loan programs as it proposes does not just support its specific suggestion, but also offers a new basis for adopting other recent proposals for liberalizing student-loan dischargeability.

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Introduction

"While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program."[1] These words, drawn from the most influential student-loan bankruptcy opinion of all time,[2] are bracing and candid—and correct only until you get to the comma. The "draconian" decision in *Brunner v. New York State Higher Education Services Corp.*, which purported to "strip [student-loan debtors] of the refuge of bankruptcy in all but the most extreme circumstances,"[3] is in fact based on no evidence of any student loan program's purposes.[4] This Article undertakes the task that *Brunner* incorrectly claimed to have completed: fashioning a general test for bankruptcy discharge of student loans that takes account of the overall purposes of the federal student loan programs.

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[1] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

[2] *Brunner* sets out a test for whether repayment of student loans would create an "undue hardship," which is the central question in student-loan bankruptcy law. Nine federal circuits have adopted the *Brunner* test. *See* Dear Colleague Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings from Lynn Mahaffie, Deputy Assistant Sec'y for Policy, Planning, and Innovation, Office of Postsecondary Educ., U.S. Dep't of Educ. 16 (July 7, 2015), https://ifap.ed.gov/sites/default/files/attachments/dpcletters/GEN1513.pdf [https://perma.cc/HE9F-9DR7] [hereinafter 2015 Dear Colleague Letter] (reporting that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have adopted the *Brunner* test).

[3] *Brunner*, 46 B.R. at 756.

[4] Although the *Brunner* opinion discusses the legislative history of the specific provision restricting student-loan dischargeability, 11 U.S.C. § 523(a)(8) (2019), *see Brunner*, 46 B.R. at 753–54, it supplies no basis for its claim about the "purposes" of the student loan program generally.

Many scholars have advocated liberalization of student-loan bankruptcy law,[5] and *Brunner* itself has come under fire from many quarters.[6] This Article contributes to the literature in two ways.

First, it offers a new rationale for attacking the *Brunner* test, at least as it was conceived and is often applied: that "undue hardship" should be interpreted to promote the overarching purposes of the federal student loan programs themselves.[7] The Article demonstrates that making student loans very difficult to discharge, as the *Brunner* test was designed to do and often has

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[5] *See, e.g.*, Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 33–43 (2010); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329 (2013); Douglas J. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549, 556 (1995); Matthew Bruckner et al., *A No-Contest Discharge for Uncollectable Student Loans*, 91 COLO. L. REV. 183 (2020); Linda E. Coco, *Mortgaging Human Potential: Student Indebtedness and the Practices of the Neoliberal State*, 42 SW. L. REV. 565, 599–600 (2013); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1774 (2004); Richard Fossey, *The "Certainty of Hopelessness": Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J. L. & EDUC. 29 (1997); John Patrick Hunt, *Consent to Student-Loan Bankruptcy Discharge*, 95 IND. L.J. 1137 (2020) [hereinafter Hunt, *Consent*]; John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287 (2018) [hereinafter Hunt, *Help*]; John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725 (2019) [hereinafter Hunt, *Tempering*]; Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 391 (2016); Dalié Jiménez et al., *Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114, 115 (2018); C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 107 (2007); C. Ray Mullins et al., *Consumer Bankruptcy Panel Undue Hardship: An Analysis of Student Loan Debt Discharge in Bankruptcy*, 31 EMORY BANKR. DEV. J. 215 (2015); Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115 (2016); Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101 (2014); Rafael I. Pardo, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139 (1996); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185 (2012); Anne E. Wells, *Replacing Undue Hardship with Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy,* 33 CAL. BANKR. J. 313 (2016).

[6] *See, e.g.*, Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2002) ("We prefer a less restrictive approach [than *Brunner*] . . . ."); Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920–23 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) (stating that the *Brunner* test "is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit when it has the opportunity to do so"); Kevin J. Smith, *Defining the* Brunner *Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251 (2013); Kurtis K. Wiard, Brunner's *Folly*: *The Road to Discharging Student Loans Is Paved with Unfounded Optimism*, 52 WASHBURN L.J. 357, 385-87 (2013); Ryan Freeman, Comment, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(a)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 147, 158–59 (2013); Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html [https://perma.cc/MEW8-PRQH] (quoting statements of several judges and law professors to the effect that the *Brunner* test is too harsh).

[7] *See* discussion *infra* Sections II.A–II.B.

done, is in conflict with the reasons the federal government issues and guarantees student loans in the first place.[8]

Second, the Article offers a concrete replacement for *Brunner*.[9] The Article's proposal supports the overall aims of the student loan programs by making the test for discharge easier to meet.[10] It also ties to specific goals Congress articulated in the course of enacting the programs.[11]

By way of background, student loans cannot be found dischargeable in a bankruptcy case unless the borrower shows that repayment would "impose an undue hardship."[12] *Brunner* set forth a test for undue hardship that the federal courts of appeals for nine circuits have explicitly adopted.[13] These circuits cover territory where nearly 90% of the population of the United States resides.[14] The *Brunner* test provides that a student-loan debtor can get a bankruptcy discharge only by showing that (1) the debtor cannot maintain a "minimal" standard of living while repaying based on "current income and expenses"; (2) "additional circumstances" indicate that this situation is "likely to persist for a significant portion of the repayment period;" and (3) the debtor has made "good faith efforts to repay the loans."[15]

The Article starts in Section I.A by describing the facts and reasoning of *Brunner* itself and the reasons courts have given for adopting its test. The *Brunner* test has been applied with varying degrees of stringency in different

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[8] *See* discussion *infra* Sections II.B.

[9] *See* discussion *infra* Sections III.A.

[10] *See* discussion *infra* Sections III.A.

[11] *See* discussion *infra* Sections III.A.1–3.

[12] 11 U.S.C. § 523(a)(8) (2018). Describing Section 523(a)(8) as covering "student loans" is shorthand. The provision defines its scope in a somewhat cumbersome way, *see* 11 U.S.C. § 523(a)(8)(A)–(B) (2018), that has been the subject of litigation, *see, e.g.*, Crocker v. Navient Sol'ns, L.L.C. (*In re* Crocker*)*, 941 F.3d 206, 217–24 (5th Cir. 2019) (concluding that the provision did not cover a private bar review loan). Scholars also have discussed the sweep of Section 523. *See, e.g.*, Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 Am. Bankr. L.J. 277, 277-81 (2019). Among other things, the provision covers any "educational . . . loan" that is "made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by any governmental unit." 11 U.S.C. § 523(a)(8)(A) (2018). This language covers the federal student loans discussed in this Article.

[13] In addition to the Second Circuit, the *Brunner* test has been adopted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1308–09 (10th Cir. 2004); Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305 (3d Cir. 1995); *In re* Roberson, 999 F.3d 1132, 1135 (7th Cir. 1993). A minority test, the totality-of-the-circumstances test, is followed in the Eighth Circuit. *See* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 703–04 (8th Cir. 1981), and, reportedly, by most courts in the First Circuit. *See* Brown v. Educ. Credit Mgmt. Corp., 581 B.R. 695, 699 (D. Me. 2017).

[14] *United States Courts of Appeals*, Wikipedia, https://en.wikipedia.org/wiki/United_States_courts_of_appeals [https://perma.cc/PN6D-2XYS] (giving population residing within the territory of each federal circuit using 2010 census figures, indicating that over 88% of U.S. population lives in circuits that have adopted *Brunner*).

[15] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

cases across the country, with the recent *Rosenberg* decision from the Southern District of New York standing as an important recent example of leniency. Nevertheless, many courts have applied *Brunner* quite harshly, as described in Section I.B. The Fifth Circuit's recent decision in *Thomas* is a stunning example.[16] The court held there that a 62-year-old debtor with incurable diabetic neuropathy who had not worked steadily in nearly three years and had an income consisting entirely of under $200 per month in food stamps could not discharge her student loans in bankruptcy.[17] The panel wrote that circuit precedent applying *Brunner* compelled its decision.[18]

With this and other severe applications of *Brunner* as motivation, the Article then turns to what the text of the Bankruptcy Code actually requires. Section II.A shows that "undue hardship" does not necessarily entail suffering that is exceptionally dire in comparison to that of other bankrupt debtors, as *Thomas* and other decisions have held.[19] Instead, the statutory text permits "undue hardship" to be understood simply as unjustifiable difficulty.[20]

Section II.B considers this exceptionally open-ended requirement in light of two sets of statutory purposes. The first set of purposes is the overall goals of the student loan programs. These global goals include providing equality of access to higher education, educating the population for the benefit of the country, enabling free choice of career for students, and benefiting students.[21] Excessive and unmanageable student debt undermines each and every one of these goals. For example, such indebtedness deters further education, pushes students to choose work based on pay without regard to personal interest or societal value, and is robustly associated with direct harms such as increased risk of mental illness, drug and alcohol problems, and suicide.[22] By preventing escape from unmanageable debt, unduly narrow interpretations of "undue hardship" likely do the same things.[23]

The second set of purposes is the narrow goals of nondischargeability taken in isolation. These are fighting abuse of the bankruptcy system and ensuring financial recoveries for student lenders.[24] Narrow interpretations of undue hardship may help advance these goals, although the evidence for that appears scant and the anti-abuse goal in particular is poorly defined.[25]

Courts have made extensive use of the second set of goals in interpreting "undue hardship" but have in effect completely ignored the counter-

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[16] *See* discussion *infra* Part I.

[17] The account of Thomas's condition comes from the bankruptcy court's findings of fact, which were not disturbed on appeal. *See* Thomas v. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 483–84 (Bankr. N.D. Tex. 2017).

[18] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 452–53 (5th Cir. 2019).

[19] *Id.* at 454.

[20] *See* discussion *infra* Section II.A.

[21] *See* discussion *infra* Section II.B.1.

[22] *See* discussion *infra* Section II.B.1.

[23] *See* discussion *infra* Section II.B.1.

[24] *See* discussion *infra* Section II.B.2.

[25] *See* discussion *infra* Sections II.B.2–3.

vailing first set.[26] By ignoring one side of the scale, courts have constructed an unbalanced doctrine that badly needs to be righted.[27]

Section III.A offers a proposal for defining "undue hardship" in light of these conflicting sets of goals: the debtor should be able to make out a prima facie case of undue hardship by showing an inability to repay the student debt in a reasonable (10-20 year) time while maintaining a middle-class standard of living.[28] If discharge would be granted in the first five years of repayment, the opposing creditor or servicer should be able to rebut the prima facie case by showing that the debtor is engaged in the type of abusive opportunism that nondischargeability was enacted to combat.

Section III.A also shows that the overall goals of the student loan programs, specific aspects of the programs' legislative history, and general societal expectations around higher education support the middle-class and reasonable-time aspects of the proposal.[29] The five-year limit on the creditor's ability to defeat undue hardship by showing abusive opportunism arises from the fact that Congress's special concern about abuse by student borrowers was limited to such a five-year period.[30]

Section III.B explains how the Article's proposal interacts with income-driven repayment (IDR) programs. These programs base repayment on the borrower's income and hold out the promise of loan forgiveness if the income-driven payments do not pay off the balance.[31] Although these programs can reduce the hardship of repayment, they entail risks and burdens that make them an imperfect substitute for bankruptcy discharge. These risks and burdens include extension of repayment, potentially increasing loan balances while in IDR, administrative burdens of the programs, uncertainty about whether the loan balance will actually be forgiven on completion of the program, and potential tax liability if the debt is in fact forgiven.[32]

The Article argues that borrowers who cannot maintain a middle-class standard of living while making IDR payments suffer undue hardship.[33] Importantly, this is true when the debtor's income is so low that the IDR payment would be zero. Because a zero IDR payment produces no financial recovery, there is no reason to subject the debtor to the risks and burdens IDR programs entail.[34]

Some debtors may be able to maintain a middle-class standard of living while making IDR payments but would not be able to do so on a full-repayment plan. In such cases, courts should carefully weigh how much the poten-

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[26] *See* discussion *infra* Section II.B.3.
[27] *See* discussion *infra* Section II.C.
[28] *See* discussion *infra* Section III.A.
[29] *See* discussion *infra* Sections III.A.1–2.
[30] *See* discussion *infra* Section III.A.3.
[31] *See* discussion *infra* Section III.B.
[32] *See* discussion *infra* Section III.B.
[33] *See* discussion *infra* Section III.B.
[34] *See* discussion *infra* Section III.B.

tial drawbacks of IDR affect the particular debtor in question in determining whether repayment entails undue hardship.[35]

Section III.C discusses how the Article's proposal could be implemented under current precedent. It notes that only some actors, such as Courts of Appeals sitting en banc, are free to completely reformulate *Brunner*.[36] However, existing precedent does not foreclose adoption of the proposed test in some *Brunner* jurisdictions, such as the Second Circuit.[37]

The Article closes by noting, in Section III.D, that the overarching purpose of the loan programs supports reform proposals other than the specific one the Article presents. Diverse parties—an American Bankruptcy Institute commission,[38] a pair of public interest law firms,[39] and a group of law professors[40]—have recently put forward proposals for easing the harsh effects of the *Brunner* test as it is often applied. This piece's discussion of the purpose of the student loan programs provides additional support for each of these valuable suggestions.[41] The overall direction of change is more important than the particular form it takes.

I. The *Brunner* Test: Origin, Adoption, and Outcomes

This Part first describes in Section I.A how the *Brunner* test came into being and the reasons courts have given for adopting it. Section I.B then discusses recent illustrative cases to show how the *Brunner* test's interpretation of "undue hardship" has led to harsh results. In particular, it highlights a 2019 decision of the Fifth Circuit Court of Appeals that applied the *Brunner* standard with almost unbelievable severity.

A. The Origin and Adoption of the Brunner *Test*

Marie Brunner, namesake of the *Brunner* test, faced in late 1982 and early 1983 what appears to be a daunting plight. Suffering from depression and anxiety,[42] she was surviving on a monthly income of $258 in public assistance and $49 in food stamps, plus Medicaid.[43] Her rent was $200 per month.[44] She had sent out over a hundred resumes seeking a job at which she could use the master's degree in social work she received in May 1982,

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[35] *See* discussion *infra* Section III.B.
[36] *See* discussion *infra* Section III.C.
[37] *See* discussion *infra* Section III.C.
[38] *See* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., Final Report of the ABI Commission on Consumer Bankruptcy 2 (2019).
[39] *See* Brief of Amici Curiae National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys at 21, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019) (No. 18-11091).
[40] *See* Bruckner et al., *supra* note 5, at 6–7; Jiménez et al., *supra* note 5, at 115.
[41] *See* discussion *infra* Section III.D.
[42] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 757 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).
[43] *See id.*
[44] *See id.*

but had been unable to find a job.[45] She had been pursuing higher education since 1972.[46] In the intervening decade she had, in the court's words "supported herself . . . through a variety of full- and part-time jobs, student loans, and educational stipends."[47] During that time she had never earned more than $9,000 per year.[48] Coincidentally, she owed about $9,000 in student loans.[49]

Brunner filed bankruptcy and ultimately received a discharge of her student loans from the bankruptcy court.[50] The New York State Higher Education Services Corporation, which had guaranteed Brunner's loans and assumed the loans from her original lender,[51] appealed the decision to the district court. There, as that court wrote, Brunner's counsel, "apparently deserted her, for no responsive brief was filed on her behalf."[52] The creditor unsurprisingly prevailed in this one-sided contest, and the district court reversed the bankruptcy court's grant of discharge.[53] Brunner appealed the decision to the Second Circuit, again without a lawyer,[54] and predictably lost again: the appellate court affirmed the district court "[f]or the reasons set forth in the district court's order."[55]

The district court set forth those reasons in a fairly detailed opinion. It started by finding that "the existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient excuse"[56] but that "the statute otherwise gives no hint of the phrase's intended meaning."[57] It therefore turned to the legislative history of the undue-hardship requirement, specifically the 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, which formally proposed restricting student-loan dischargeability.[58] The report asserted that "a loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt."[59] It therefore proposed that student loans be nondischargeable during the first five years of repayment absent a showing of "undue hardship."[60] As for the definition of "undue hardship" itself,

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[45] *See id.*
[46] *See id.* at 756–57.
[47] *Id.* at 757.
[48] *See id.*
[49] *See id.* at 753.
[50] *See id.*
[51] *See id.*
[52] *Id.*
[53] *See id.* at 757.
[54] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987).
[55] *Id.*
[56] *Brunner*, 46 B.R. at 753. This Article disputes the court's conclusion. *See* discussion *infra* Section II.A.
[57] *Id.*
[58] H.R. Doc. No. 93-137 (1973).
[59] *Brunner*, 46 B.R. at 753 (quoting H.R. Doc. No. 93-137, at 140, n.15).
[60] *See id.* Congress enacted the Commission's suggestion in 1976. *Id.*

the report called for assessing whether the debtor could maintain a "minimal standard of living" into the future while repaying the loans.[61] The first element of the *Brunner* test, the debtor's present inability to maintain a minimal standard of living while repaying, thus comes from the Commission's report.

The second element of the test, that additional circumstances indicate that the debtor's inability to repay is likely to persist for a significant portion of the repayment period, reflects a greater degree of judicial editorializing. Although the Commission's report contemplated considering future inability to repay, the additional-circumstances requirement comes from the court's view that bankrupt student-loan debtors typically "have only recently ended their education,"[62] so that "they are in all likelihood at the nadir of their earning power."[63] The court thus thought it inappropriate to determine future ability to pay by extrapolating current income, hence the requirement that the debtor show additional circumstances such as "illness," "lack of usable job skills," and/or "the existence of a large number of dependents," indicating likely future incapacity to repay.[64] It was in this connection that the *Brunner* court endorsed the unfortunate phrase "certainty of hopelessness."[65]

The third element of the *Brunner* test, the debtor's good-faith efforts to repay, has an even weaker basis. The court acknowledged that "[t]here is no specific authority for this requirement,"[66] but found indirect support for it in the Commission report. The court said the report justified free dischargeability of student loans after five years on the ground that a debtor might be "unable to repay his or her debts due to 'factors beyond his reasonable control'"[67] and inferred from that idea that only "external circumstances"[68] should be "permitted to justify discharge prior to that time."[69] In addition to this dubious inference, the court relied on "the stated purpose for § 523(a)(8)": curbing abuse of the bankruptcy system in imposing the good-faith-efforts requirement.[70]

The court buttressed its specific arguments for adopting each factor with a general justification for the "draconian" result that student loans were to become a "very difficult burden to shake."[71] As mentioned in the Introduction, the court's ground for this outcome was that it "plainly serves the purposes of the guaranteed student loan program."[72] The court explained its

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[61] *Id.*
[62] *Id.* at 754.
[63] *Id.*
[64] *Id.* at 755.
[65] *Id.* (stating that the phrase, which appeared in an earlier decision, was "perhaps the best articulation" of the idea that courts should require "more than a showing on the basis of current finances that loan repayment will be difficult or impossible").
[66] *Id.*
[67] *Id.* (quoting H.R. Doc. No. 93–137, pt. 1, at 140 n.16 (1973))
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 756.
[72] *Id.*

view—unsupported by citations—that the "quid pro quo" that the government "exacts" for extending credit without considering the student borrower's creditworthiness is "strip[ping] [borrowers] of the refuge of bankruptcy in all but extreme circumstances."[73] Thus, the court's view of the purposes of nondischargeability underlay both its announcement of the individual elements of its test and its general defense of making bankruptcy discharge of student loans very difficult.

As for Marie Brunner, the court found that she "at most proved that she . . . was at the time of the hearing . . . unable both to meet her minimal expenses and pay off her loans."[74] She failed to meet the additional-circumstances element because she was "skilled, apparently capable, well, and without dependents."[75] She failed the good-faith-efforts element because she "filed for discharge within a month of the date the first payment of her loans came due," had "made virtually no attempt to repay," and had not requested deferment of payment.[76] Whether these observations reflect a full or fair account of the situation of the debtor, a pro se litigant who did not know she had to meet the two elements she failed, will probably never be known.

As noted, the *Brunner* test has enjoyed great success in the appellate courts and is followed in eight circuits other than the Second Circuit.[77] In giving reasons for adopting the *Brunner* test, courts have stressed the simplicity and perceived workability of its three-element formulation,[78] as well as the view that *Brunner's* formulation is broad enough to take account of many potentially relevant factors.[79] As the test became better established, courts adopting it began to mention its wide adoption and the importance of uniformity across circuits.[80]

Courts adopting *Brunner* have also relied on their conception of the nature and needs of the student-loan programs. In discarding a test that took account of whether the student actually benefited from the loan-funded education, the Seventh Circuit pronounced that this consideration "conflicts with the basic concept of government-backed student loans."[81] The court did not back its big-picture pronouncement with citations to record or other empirical evidence or grapple with Congress's purpose in creating the student-loan programs.[82]

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[73] *Id.* at 756.
[74] *Id.* at 757.
[75] *Id.* at 758.
[76] *Id.*
[77] *See supra* note 13 and accompanying text.
[78] *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Pa. Higher Educ. Assistance Auth. v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995).
[79] *See Oyler*, 397 F.3d at 385; Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1309 (10th Cir. 2004).
[80] *See Oyler*, 397 F.3d at 385; Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); *Polleys*, 356 F.3d at 1307; *Gerhardt*, 348 F.3d at 91; Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003).
[81] *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).
[82] *See id.* at 1136–37. The *Roberson* court stated in conclusory fashion that "Congress' decision to increase the availability of higher education through student loans does not neces-

Other courts have considered evidence of congressional purpose, but have looked solely at the nondischargeability provision without considering the overall purposes of the programs.[83] This narrow focus was part of what led the Fourth Circuit, for example, to conclude that any student-loan bankruptcy test should promote the congressional purpose of narrowing discharge.[84] Section II.B.3 discusses the error of this out-of-context analysis of statutory purpose.

B. Harsh Results Under the Brunner *Test*

The text of the *Brunner* test is open-ended enough to support reasonable outcomes in some cases. One high-profile example is the recent decision of the Bankruptcy Court for the Southern District of New York in *In re Rosenberg*.[85] In that case, the court—despite being bound by *Brunner*—allowed a distressed debtor to discharge over $220,000 in law-school and undergraduate debt.[86] More broadly, it appears that some 40–60% of student-loan debtors who complete the burdensome process of seeking relief from their student loans in bankruptcy court enjoy at least some degree of success.[87]

Even so, as this Section demonstrates, the text of the *Brunner* test also supports extremely harsh outcomes. Beyond just permitting pitiless results, *Brunner* encourages them in at least two ways. First, a certain degree of harshness is probably inherent in the *Brunner* test. For example, *Brunner* requires the bankrupt debtor to try to repay even if doing so entails a subminimal standard of living, as long as the debtor cannot prove that "additional circumstances" show that the period of penury will cover a "significant portion" of the repayment period.[88] Second, the expressed intent of *Brunner* is to create a that reserves bankruptcy relief for "extreme circumstances," de-

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sarily equate to a decision to insure the future success of each student taking advantage of that opportunity." *Id.* at 1136. It did not explain the basis for this assertion or explain why it did not further pursue the possibility that Congress's purposes for the programs might be relevant to interpreting "undue hardship" even if they did not "necessarily equate" to a decision to "insure" students. *Id.*

[83] *See Frushour*, 433 F.3d at 399–400; *Polleys*, 356 F.3d at 1306–07; *Faish*, 72 F.3d at 304–05. *Faish* cited "our recognition of the Congressional objectives of preventing abuse of the bankruptcy process and protecting the financial integrity of the student loan program." *Faish*, 72 F.3d at 303. It cited *In re Pelkowski*, 990 F.2d 737 (3d Cir. 1993), which considered the legislative history of the nondischargeability provision in isolation. *See* 72 F.3d at 303 (citing *Pelkowski*, 990 F.2d at 740–43).

[84] *See Frushour*, 433 F.3d at 400 (adopting the *Brunner* test in part because it "best incorporates the Congressional mandate to allow discharge of student loans only in limited circumstances"). The *Frushour* opinion also contains a textual argument for limiting dischargeability. *See* discussion *infra* Section II.A.

[85] 610 B.R. 454 (Bankr. S.D.N.Y. 2020).

[86] *See id.* at 457.

[87] *See* Hunt, *Consent, supra* note 5, at 15 n.109 (reviewing studies that have found rates of relief from 39–57%).

[88] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (enumerating the minimal standard of living and additional circumstances/significant portion requirements as separate elements of the test).

spite the fact that that result "may seem draconian."[89] Thus, *Brunner* always encourages, and may sometimes require, great stringency in evaluating applications for discharge.

Many courts have taken up *Brunner*'s invitation to extreme strictness. It is common, for example, to require that the debtor live in or near poverty to satisfy the "minimal standard of living" element of the test.[90] Accounts of some particularly noteworthy cases reaching harsh outcomes follow.

The Fifth Circuit's recent decision in *Thomas v. Department of Education* (*In re Thomas*)[91] illustrates just how heavy-handed application of the *Brunner* test can be. In *Thomas*, the debtor was 62 years old[92] and suffered from incurable diabetic neuropathy, which made it impossible for her to stand for extended periods of time.[93] Her only income was $194 per month in food stamps;[94] her monthly living expenses were $640.[95] Her car had been repossessed[96] and she faced eviction.[97] She had lost her job as a customer service representative in September 2016 for wearing headphones and listening to music during her lunch break,[98] and she had not been able to find a job that did not require standing between then and the bankruptcy court's decision in December 2017.[99]

The bankruptcy court repeatedly expressed sympathy for her situation,[100] but denied discharge. Fifth Circuit precedent had interpreted the *Brunner* test to require the debtor to show that circumstances beyond her control created a "total incapacity" to repay the loan in the future[101]—a standard so demanding, the bankruptcy judge noted, that he had not discharged a single student loan over a lender's objection in 15 years on the bench.[102]

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[89] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

[90] *See* Tingling v. U.S. Dep't of Educ., No. 19-CV-2307, 2020 U.S. Dist. LEXIS 16428, at *26 (E.D.N.Y. Jan. 30, 2020) (stating that the *Brunner* test requires "poverty or near poverty with little possibility of supplemental income" (quoting *In re* Williams, 296 B.R. 298, 303 (Bankr. S.D.N.Y. 2003))); Southard v. Educ. Credit Mgmt. Corp. (*In re* Southard), 337 B.R. 416, 420 (Bankr. M.D. Fla. 2006) ("[A] debtor, 'must show that her financial resources will allow her to live only at a poverty level standard for the foreseeable future if she is obligated to repay her student loan.'" (quoting *In re* Webb, 132 B.R. 199, 202 (Bankr. M.D. Fla. 2006))). Other courts have required poverty without applying the *Brunner* test. *See In re* Medeiros, 86 B.R. 284, 286 (Bankr. M.D. Fla. 1988); *In re* Frech, 62 B.R. 235, 241 (Bankr. D. Minn. 1986); *In re* Erickson, 52 B.R. 154, 157 (Bankr. D.N.D. 1985) (requiring "subsistence or poverty level standard of living").

[91] 931 F.3d 449 (5th Cir. 2019).

[92] *See* Thomas v. Dep't of Educ., 581 B.R. 481, 483 (Bankr. N.D. Tex. 2017), *aff'd*, 931 F.3d 449, 450 (5th Cir. 2019). The Bankruptcy Court's factual findings were not disturbed on appeal.

[93] *See id.*

[94] *See id.* at 484.

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.* at 483.

[99] *See id.*; Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450 (5th Cir. 2019).

[100] *See Thomas*, 581 B.R. at 482, 485.

[101] *Id.*

[102] *See id.* at 482.

The debtor "conceded that she [was] unable to show she is completely incapable of any employment now or in the future,"[103] so she failed to meet the "very high hurdle"[104] created by the "taxing"[105] standard of *Brunner*, at least as interpreted in the Fifth Circuit.

The district court affirmed on the same ground,[106] and the appeal came before a panel of the Fifth Circuit. Like the bankruptcy court, the panel also found Ms. Thomas a "sympathetic debtor[ ]."[107] But based on the possibility that she could work a sedentary job, the panel—ignoring the fact that Thomas had not been able to work steadily for over two years—found "no evidence that Ms. Thomas's present circumstances, difficult as they are, are likely to persist throughout a significant portion of the loans' repayment period"[108] and affirmed the denial of discharge.[109] Significantly, the panel thought that the *Brunner* test compelled the harsh result[110] and that under existing Fifth Circuit precedent it had no authority to depart from that test.[111]

Despite its statement that precedent bound its hands, the panel nevertheless went on to defend the position that the in-its-view draconian *Brunner* test is correct. It presented a textual argument that "undue hardship" must mean hardship "greater than the ordinary circumstances that might force one to seek bankruptcy relief."[112] The Article explains why this argument is incorrect in Section II.A, which addresses the ordinary meaning of "undue hardship."

The panel also argued that because Congress had expanded the set of loans subject to the "undue hardship" requirement several times, that "clearly evince[d] an intent to limit bankruptcy's use as a means of offloading student loan debt except in the most compelling circumstances."[113] The court did not explain why expanding the subject matter a requirement covers is relevant to the stringency of the requirement itself.

The decision in *Thomas* confirmed that the Fifth Circuit could be just as severe as the bankruptcy court in *Ward v. United States* (*In re Ward*)[114] apprehended. In that case, the court found that the debtors—a married couple with two children and a third on the way who lived in a 530 square-foot house[115] and were running a monthly deficit[116]—could not maintain a "minimal" standard of living while repaying student loans and therefore met

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[103] *Id.* at 485.
[104] *Id.*
[105] *Id.*
[106] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 451 (5th Cir. 2019).
[107] *Id.* at 454.
[108] *Id.* at 452.
[109] *See id.* at 455.
[110] *See id.* at 452–53.
[111] *See id.*
[112] *Id.* at 454.
[113] *Id.* at 453.
[114] No. 02-34594-H4-7, slip op. (Bankr. S.D. Tex. May 25, 2004).
[115] *See id.* at 4.
[116] *See id.*

the first element of the *Brunner* test.[117] However, the court denied discharge, finding that their decision "to have children and start a family," though "normal and understandable," was after all within the couple's control.[118] They thus failed to demonstrate that they met the second and third elements of *Brunner* as interpreted in the Fifth Circuit: that circumstances beyond their control indicated that their difficulties would persist[119] or that they had made good-faith efforts to repay the loan.[120] The court concluded: "[T]he Fifth Circuit's view of the choices made by the debtors in this case would not be a sympathetic one."[121] *Thomas* suggests the court's assessment was accurate.

Harsh decisions under *Brunner* are by no means limited to the Fifth Circuit. In the Maryland case of *Stitt v. U.S. Department of Education*,[122] for example, the district court upheld the bankruptcy court's 2014 denial of discharge to a debtor,[123] certified with a disability by the Social Security Administration, who had not worked since 2008,[124] owned personal property valued at $210,[125] and had total annual income, derived from various forms of public assistance,[126] of $10,068,[127] or less than 150% of the poverty level.[128] It upheld the denial even though it apparently assumed for the sake of argument that her disability caused her unemployment.[129] The stated reason was that she had not made a good-faith effort to repay the loans because she did not voluntarily use any of her $11,000 income in 2008 for repayment. That she in fact did pay $774.47 (or 7 percent of her gross income) on the loans that year did not move the court because the government had withheld the amount from her pay: The $774.47 was not paid voluntarily, and as the court chided her, she "used none of the remaining $10,225.53 . . . to repay any portion of her loans."[130]

Although the text of the *Brunner* test allows for both harsh and relatively lenient application, these decisions illustrate that courts frequently apply the test as the *Brunner* court contemplated, so that only the bleakest of life prospects lead to discharge. The Article now turns to whether the statutory text and purpose support such oppressive outcomes.

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[117] *Id.* at 6.
[118] *Id.* at 6–7.
[119] *See id.* at 7.
[120] *See id.*
[121] *Id.*
[122] 532 B.R. 638 (D. Md. 2015).
[123] *See id.* at 645.
[124] She had not been employed since 2008, *see* 532 B.R. at 640, and the bankruptcy court's decision denying discharge was dated February 12, 2014, *see id.* at 641.
[125] *See id.* at 641.
[126] *See id.*
[127] *See id.* at 643.
[128] *See id.*
[129] *See id.* at 644.
[130] *Id.* The court also found that the debtor's failure to consolidate her loans and participate in an income-driven repayment program contributed to the finding of bad faith, but acknowledged that "it is not *per se* lack of good faith to fail to consider such a plan." *Id.* at 643. The failure to repay more than $774.47 of her $11,000 income in 2008 appears necessary to the judgment. *See id.*

C. Summing Up: The Brunner *Test Lends Itself to Harsh Outcomes*

The district court's opinion in *Brunner* proclaims the court's desire to impose a strict, even "draconian," test on student borrowers seeking bankruptcy discharge. Appellate courts across the country have adopted the test in part because they have seen it as simple and workable, but also because it comports with overall views, sometimes derived from the legislative history of the discharge provision taken in isolation, that student-loan discharge should be exceptionally difficult.

To be sure, lower courts bound by *Brunner* often grant relief to student-loan debtors. Nevertheless, the test pushes courts to deny relief to suffering debtors. To some extent, this is inherent in the test itself, which denies relief if the repayment imposes a sub-minimal lifestyle on the debtor, as long as the debtor cannot prove that additional circumstances indicate that the condition will continue for a significant portion of the repayment period and that the debtor has made good-faith efforts to repay. Perhaps more important, the spirit and intent of the test is to reserve relief for the direst cases, thus countenancing harsh results.

And courts continue to reach such outcomes; the Fifth Circuit's *Thomas* case is an important recent example. Cases like *Thomas* raise the question whether a proper interpretation of the statute yields a test that would discourage or even prevent such harsh outcomes, rather than definitely permitting and probably encouraging them.

II. "Undue Hardship" and the Federal Student loan programs: Text and Purpose

This Part discusses how the statutory text "undue hardship" has been and should be interpreted in light of legislative purpose. It first demonstrates that the statutory text is open-ended so that inquiry into legislative purpose is necessary. Then it discusses both the overall purposes of the student loan programs and the narrow purposes of the bankruptcy nondischargeability provision, arguing that the text should be interpreted in light of both sets of purposes and that the general purposes of the programs favor a broad interpretation of the undue-hardship exception to nondischargeability. Finally, Part II demonstrates that courts have ignored the broad purposes of the programs, indicating that judicial interpretation of "undue hardship" has typically been too narrow.

A. The Text of the Statute

The statutory phrase "undue hardship" is not further defined in the Code.[131] Critically, as courts have recognized,[132] the text itself is open-ended and imposes little constraint on judicial discretion.

1. The Ordinary Meaning of "Undue Hardship"

The ordinary meaning of "hardship" does not require a particularly high degree of suffering. The *Oxford English Dictionary* defines "hardship" simply as "something which is hard to bear."[133] Other dictionaries define the term variously as "a condition of life that causes difficulty or suffering,"[134] "a condition that is difficult to endure,"[135] and as "something that makes your life difficult or unpleasant, especially a lack of money, or the condition of having a difficult life."[136] Although other definitions equate "hardship" with "privation" and thus may be more demanding,[137] it is well within the range of normal meanings simply to find that simple difficulty amounts to "hardship."

As previous work has noted,[138] the usual meaning of "undue" is "unjustifiably great."[139] Thus, a showing of hardship, coupled with a showing that

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[131] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 648 (11th Cir. 2017); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358 (6th Cir. 2007); Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 943 (9th Cir. 2006); Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190 (1st Cir. 2006) (noting that "Congress did not attempt to give specific guidance" as to how to apply the undue-hardship standard).

[132] *See, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 759 (7th Cir. 2015) (describing undue-hardship standard as "open-ended"); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 885 (7th Cir. 2013) (same).

[133] *Hardship*, Oxford English Dictionary (3d ed. 2015), https://www.oed.com/view/Entry/84192?rskey=BQfSKs&result=1&isAdvanced=false#eid [https://perma.cc/36E3-BC2B].

[134] *Hardship*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/hardship [https://perma.cc/MVK3-ZZM8].

[135] *Hardship*, Dictionary.com, https://www.dictionary.com/browse/hardship [https://perma.cc/R7RD-F5FW].

[136] *Hardship*, Longman Dictionary of Contemporary English, https://www.ldoceonline.com/dictionary/hardship [https://perma.cc/4TQD-W5SQ]; *see also Hardship*, Macmillan Dictionary https://www.macmillandictionary.com/us/dictionary/american/hardship [https://perma.cc/4RQ4-A8AL] ("something that makes your life more difficult or unpleasant"); *Hardship*, American Heritage Dictionary of the English Language (5th ed. 2011) ("[t]he condition of lacking necessities or comforts; privation or suffering").

[137] *Undue*, Black's Law Dictionary (11th ed. 2019) ("privation; suffering or adversity").

[138] *See* Hunt, *Tempering*, *supra* note 5, at 764–65.

[139] *See Undue*, Black's Law Dictionary (10th ed. 2014) ("excessive or unwarranted"); *Undue*, Oxford English Dictionary (3d ed. 2015), https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid [https://perma.cc/E4GN-WGNM] ("not appropriate or suitable; improper"; "not in accordance with what is just and right; unjustifiable; illegal"; "going beyond what is appropriate, warranted, or natural; excessive"); *Undue*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/undue [https://perma.cc/TQ9K-D3CM] ("more than is necessary, acceptable, or reasonable"); *Undue*, Longman Dictionary of Contemporary English, https://www.ldoceonline.com/dictionary/

the hardship is unjustifiable, would seem to satisfy the ordinary meaning of the statutory phrase "undue hardship."[140] The use of the modifier "undue" indicates that hardship is not inherently unacceptable under the statute.[141] But beyond that, courts and the Department of Education are left to themselves, armed with legislative purpose and other tools of statutory interpretation, to determine what counts as a hardship and what hardships are unjustifiable.

The Bankruptcy Code uses the formulation "undue hardship" in one context other than student loan nondischargeability.[142] When a debtor seeks to reaffirm a debt, so that it will be enforceable after discharge, the debtor's attorney must file an affidavit stating that the reaffirmed loan will not impose an undue hardship on the debtor.[143] If the debtor is not represented by an attorney, the court generally must determine whether reaffirmation will cause undue hardship.[144] The author's search for a case in which a court has stated that the modifier "undue" means that "undue hardship" under this provision is inherently "uncommon," "rare," "infrequent," "unusual," or other than "garden variety," to list the search terms used, has turned up nothing.

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undue [https://perma.cc/PS9D-K4AJ] ("more than is reasonable, suitable, or necessary"); *Undue*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/undue [https://perma.cc/VPE9-M2S3] ("not necessary or reasonable"); *Undue*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/undue [https://perma.cc/45DG-ZQSQ] ("exceeding or violating propriety or fitness: excessive"). A Google search on "define undue" returned the result "unwarranted or inappropriate because excessive or disproportionate." Search for "Define Undue," GOOGLE, https://www.google.com/ [https://perma.cc/6AMQ-QGL4] (search "define undue").

[140] The author found no relevant dictionary definition of "undue" that omitted the element of justifiability. ("Undue" can also mean "not properly owing or payable," *Undue*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid [https://perma.cc/C8U4-6QFF], which is irrelevant here.) The *Oxford English Dictionary*'s "going beyond that which is . . . natural" seems, based on the quotations it cites, to use "natural" in a normative sense, not one that purely denotes frequency. *See id.* ("He seems to own they are both chargeable with some instances of undue Warmth and Zeal;" "Pleasure admitted in undue degree, Enslaves the will."). At least one appellate court recognized that the "ordinary meaning" of "undue" is "unwarranted" or "excessive," but, curiously, immediately thereafter stated that "[b]ecause Congress selected the word 'undue,' the required hardship . . . must be more than the usual hardship that accompanies bankruptcy." *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399 (4th Cir. 2005).

[141] Interpreting "undue hardship" to mean "any hardship" arguably renders the word "undue" surplus. As one leading treatise puts it, courts "usually" state that they "assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally," although "[c]ourts may eliminate or disregard words in a statute to effect legislative intent or meaning." 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:37 (7th ed. 2018). The argument that "undue" must be given some meaning excludes only those interpretations that define all hardship as inherently undue. As long as an interpretation of "undue hardship" allows for the possibility that some hardship may be acceptable, the interpretation may encompass all actually existing hardships as "undue."

[142] *See* Ashley M. Bykerk, Comment, *Student Loan Discharge: Reevaluating Undue Hardship Under a Presumption of Consistent Usage*, 35 EMORY BANKR. DEV. J. 509, 519 (2019).

[143] *See* 11 U.S.C. § 524(c)(3)(B) (2018 & Supp. I 2019).

[144] *See id.* § 524(c)(6)(A)(i). The judicial-determination requirement of Section 524(c)(6) does not apply to reaffirmation of consumer debts secured by real property. *See id.* § 524(c)(6)(B).

Thus, the notion that "undue" hardship is by its nature uncommon does not appear to be applied consistently in the bankruptcy context. The phrase "undue hardship" does not require that discharge be granted only for unusual or extreme hardships. As noted, the ordinary meaning of "undue" is "unjustifiable," not "uncommon."[145] Unjustifiable hardships may be common or uncommon.

2. Courts' Misplaced Textual Arguments

Thus, the district court in *Brunner* erred when it pronounced that Congress's use of the word "undue" in itself means "Congress viewed garden-variety hardship as insufficient."[146] The Fourth Circuit made the same mistake when it adopted the *Brunner* test in *Educational Credit Management Corp. v. Frushour* (In re *Frushour*).[147] After a promising start, stating that "undue" means "unwarranted," the court passed without explanation to the assertion that "[b]ecause Congress selected the word 'undue,' the required hardship under § 523(a)(8) must be more than the usual hardship that accompanies bankruptcy."[148]

The Fifth Circuit's recent *Thomas* decision, discussed above, propagated the error. It also relied on the "plain text" of Section 523(a)(8), apparently believing that the *Oxford English Dictionary*'s definitions of "undue" as "going beyond what is appropriate, warranted, or natural" or "excessive" and of "[h]ardship" as a "state of want or privation" compelled the following conclusion:

> The threshold by definition must be greater than the ordinary circumstances that might force one to seek bankruptcy relief. As the *Frushour* court explained, "Inability to pay one's debts by itself cannot be sufficient; otherwise all bankruptcy litigants would have undue hardship. The exception would swallow the rule, and Congress's restriction would be meaningless."[149]

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[145] One dictionary does give a definition of "undue" as "exceeding what is appropriate or normal," thus incorporating the concepts both of unjustifiability and infrequency. *See Undue*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011). This is the only dictionary the author has located that includes the concept of infrequency, as such, at all, and it does not exclude the idea of unjustifiability. It thus provides no support for the proposition that "undue" *must* mean "infrequent," as some courts have held. *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 454 (5th Cir. 2019) ("The threshold by definition must be greater than the ordinary circumstances that might force one to seek bankruptcy relief."); *Frushour*, 433 F.3d at 399. Moreover, this dictionary provides only very limited support for the proposition that "undue" even *can* mean "infrequent," divorced from any idea of justifiability: the term "normal" connotes a favorable evaluation, that is, a positive normative judgment. *See Normal*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www-oed-com.ezp-prod1.hul.harvard.edu/view/Entry/128269?redirectedFromNºrmal#eid [https://perma.cc/6446-TC8Y] (defining "normal" as "[c]onstituting or conforming to a type or standard").

[146] Brunner v. N.Y. State Higher Educ. Servs. Corp. *(In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[147] 433 F.3d at 400 ("We now adopt the *Brunner* test for Chapter 7.").

[148] *Id.* at 399.

[149] 931 F.3d at 454 (citation omitted).

Thus, at least two circuit courts have cited the text for an infrequency requirement that it simply does not provide. In fact, the ordinary meaning of the text contains very little to guide or constrain courts or the U.S. Department of Education[150] in deciding what hardships are "undue." These actors should therefore look to statutory purpose to aid in interpretation.[151] The Article now turns to that issue.

B. The Purposes of the Statute

In selecting from the many possible definitions of "undue hardship" that are consistent with the statutory text, courts and the Department of Education should be guided not just by the narrow purpose of the nondischargeability provision itself, but also the broader purpose of the overall statutory scheme, that is, the overarching purposes of the student loan programs.[152] Unfortunately, to date courts have concentrated narrowly on the purposes of the nondischargeability provision in isolation, which naturally disfavor discharge. They have largely ignored the overall purposes of the student loan program, which favor discharge. For its part, the Department has given only cursory explanations of its discharge consent policies and has ignored statutory purpose altogether.[153]

1. Broad Goals of the Federal Student Loan Programs

As previous research has demonstrated, Congress has, at various times, embraced at least four overarching goals in designing the federal student loan programs. These are providing equality of access to higher education,[154]

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[150] The Department of Education has a role in interpreting "undue hardship" insofar as it creates the rules governing when federal student-loan holders will consent to bankruptcy discharge, and those regulations use the concept of "undue hardship." *See* John Patrick Hunt, *The Development of Federal Student Loan Bankruptcy Policy*, 45 J.C. & U.L. 85, 88 (2020) (tracing the Department of Education's regulations governing bankruptcy of debtors in federal student loan programs). The Department has said that Congress "has not delegated to the Department the authority to" define undue hardship and that the phrase in its regulations invokes the "legal standard" that "[f]ederal courts have established." 2015 Dear Colleague Letter, *supra* note 2, at 3. Nevertheless, the Department interprets the statutory term when it makes decisions to consent to or to oppose discharge under its own regulations, which use the statutory phrase. *See* Hunt, *Consent, supra* note 5, at 1173-74. However, records of these decisions and their basis are not to the author's knowledge made public.

[151] *See* Stephen Breyer, Making Our Democracy Work: A Judge's View 81 (2010) (nothing that judges "faced with open-ended language and a difficult interpretive question rely heavily on purposes and related consequences."); John F. Manning, *The New Purposivism*, 2013 Sup. Ct. Rev. 113, 173 ("Certainly . . . when an interpreter makes sense of an open-ended statute, it is appropriate if not necessary to read such a statute in light of the broad purposes that inspired its enactment."); *see also* Hunt, *Tempering, supra* note 5, at 763–66 (arguing that "undue hardship" requirement should be interpreted in light of statutory purpose).

[152] *See* Hunt, *Tempering, supra* note 5, at 764–65. In general, key arguments of this section are outlined in *id.* at 763–66. They are developed here in somewhat more detail with additional support.

[153] *See* Hunt, *supra* note 150, at 111–12 (2020).

[154] *See* Hunt, *Tempering, supra* note 5, at 732–36.

educating the population for the benefit of the country,[155] enabling free choice of career for students,[156] and benefiting students.[157]

Likewise, previous research has demonstrated that expansive student-loan nondischargeability[158] likely interferes with achieving each of these goals.[159] Each goal is discussed briefly here in turn.

Nondischargeability probably interferes with equality of access to education. Low-income,[160] Latinx,[161] and possibly Asian-American[162] students exhibit greater reluctance than other groups to incur student debt that might make higher education possible.[163] Nondischargeability exacerbates the pain of educational expenses that do not lead to economic success, so it stands to reason that nondischargeability not only reduces access directly, but also makes access to education less meaningful for members of these groups. As Professor Jonathan Glater has written, "[a]ccess is meaningful when education opportunity extends beyond enabling matriculation to encompass the chance both to excel while enrolled and to pursue a career unburdened by excessive debt."[164]

A broad interpretation of nondischargeability reduces education's benefit to the country not only because the fear of unmanageable and nondischargeable debt probably deters students from pursuing education in the first place, but also because unmanageable debt has been linked to dropping out

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[155] *See id.* at 736–38.

[156] *See id.* at 738–40.

[157] *See id.* at 740–42.

[158] As noted, student loans are dischargeable in bankruptcy if, and only if, the borrower demonstrates that repayment would impose an undue hardship. *See* 11 U.S.C. § 523(a)(8) (2018 & Supp. I 2019). This article uses the shorthand term "nondischargeability" to refer to this conditional nondischargeability of student-loan in debt.

[159] The empirical research that is the basis for the claim that an overly restrictive interpretation of "undue hardship" undermines the goals of the student loan programs is discussed in more detail in previous work. *See* Hunt, *Tempering, supra* note 5, at 742–62.

[160] *See* THOMAS G. MORTENSON, ACT STUDENT FINANCIAL AID RESEARCH REPORT SER. 88-2, ATTITUDES OF AMERICANS TOWARD BORROWING TO FINANCE EDUCATIONAL EXPENSES 1959–1983, at 14 (1988) ("The group that thinks least favorably toward loans is the lowest income population."); Claire Callender & Geoff Mason, *Does Student Loan Deter Higher Education Participation? New Evidence from England*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 20 (2017) ("Debt-averse attitudes remain much stronger among lower-class students than among upper-class students."); Claire Callender & Jonathan Jackson, *Does the Fear of Debt Deter Students from Higher Education?*, 34 J. SOC. POL'Y 509, 509 (2005) ("[T]hose from low social classes are more debt averse than those from other social classes.").

[161] *See* MORTENSON, *supra* note 160, at 21; Angela Boatman et al., *Understanding Loan Aversion in Education: Evidence from High School Seniors, Community College Students, and Adults*, 3 AERA OPEN 1, 1 (2017); *see also* ALISA F. CUNNINGHAM & DEBORAH A. SANTIAGO, INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T? 18 (2008) (reporting Latinx students have lower-than-average rates of borrowing).

[162] *See* CUNNINGHAM & SANTIAGO, *supra* note 161, at 18 (reporting that Asian-American students have lower-than-average rates of borrowing and reporting debt-averse attitudes expressed in focus groups).

[163] *See* Hunt, *Tempering, supra* note 5, at 743–45 (reporting in detail on empirical studies of debt aversion and its relationship to access to higher education).

[164] Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 LAW & CONTEMP. PROBS. 89, 91 (2016).

of educational programs once enrolled.[165] High undergraduate debts also have been found to cause students not to attend graduate school.[166] Moreover, a basic proposition of American bankruptcy law is that unmanageable debts deter full participation in the economy and society.[167] Inability to escape student debts in bankruptcy perpetuates such "debt overhang" and prevents educated debtors from using their learning to benefit the nation.

Overly far-reaching interpretations of nondischargeability undermine freedom of career choice. Student debt leads students not to choose lower-paying public interest careers,[168] and nondischargeability increases the risk of doing so.[169] Moreover, courts routinely tell bankrupt debtors that they should abandon low-paying fields for which they have been trained in order to make more money to service debt.[170] Finally, if an overwhelmed debtor gives up in despair because debt payments make it pointless to work—in other words, because of debt overhang—the debtor is not meaningfully exercising freedom of career choice.[171]

And broad nondischargeability renders much student debt harmful rather than helpful for students. Much research documents that unmanageable consumer debt in general[172] and unmanageable student-loan debt in

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[165] *See* Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133, 1146 fig. 2 (2012) (reporting that for students at four-year public universities, increases in debt beyond $10,000 were associated with a lower probability of graduation, especially for students from families in the bottom 75% of the income distribution); *see also* Holtorf v. Ill. Student Assistance Comm'n (*In re* Holtorf), 204 B.R. 567, 568 (Bankr. S.D. Cal. 1997) (reporting, in findings of uncontested fact, that depression over prospects of repaying student loans contributed to debtor's dropping out of medical school); Hunt, *Tempering*, *supra* note 5, at 747–48 (describing studies in more detail).

[166] *See* Vyaceslav Fos et al., Debt and Human Capital: Evidence from Student Loans 1, 3 (Aug. 2017), https://site.stanford.edu/sites/g/files/sbiybj8706/f/debt_humancapital_v14.pdf (reporting that study of 265,000 student debtors "strongly supports a causal interpretation" of the association between high undergraduate student debt and not enrolling in graduate school).

[167] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934); *see also* Hunt, *Tempering*, *supra* note 5, at 753–56 (developing this argument in further detail).

[168] *See* Jesse Rothstein & Cecelia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. PUB. ECON. 149, 149 (2011) (finding based on study of one college's transition from loan-based to grant-based aid that "debt causes graduates to choose substantially higher-salary jobs and reduces the probability that students choose low-paid 'public interest' jobs").

[169] *See* Hunt, *Tempering*, *supra* note 5, at 749–50.

[170] *See, e.g.*, U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92–93 (5th Cir. 2003); Matthews-Hamad v. Educ. Credit Mgmt. Corp. (*In re* Matthews-Hamad), 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007); *see also* Hunt, *Tempering*, *supra* note 5, at 751–53 (describing such cases in more detail).

[171] *See* Hunt, *Tempering*, *supra* note 5, at 753.

[172] *See, e.g.*, Thomas Richardson et al., *The Relationship Between Personal Unsecured Debt and Mental and Physical Health*, 33 CLINICAL PSYCH. REV. 1148, 1153 (2013) (reporting, based on meta-analysis of sixty-five studies with a pooled sample size of 34,000, that debt is associated with "presence of a mental disorder, depression, suicide completion, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders . . . and psychotic disorders"); *see also* Hunt, *Tempering*, *supra* note 5, at 758-59 (describing this body of research in more detail).

particular[173] can cause harm and that such harm is distributed along racial and ethnic lines,[174] although little addresses whether the benefits of debt-funded education outweigh the harms of debt.[175] The scant findings that do exist seems to suggest that debt-funded education is beneficial on net in most cases.[176] But for student-loan debtors who seek bankruptcy protection, it is much more likely that the harm of debt outweighs the benefits of education. Nondischargeability perpetuates such net harms.

Thus, overbroad nondischargeability appears to be in conflict with the overall goals of the federal student loan programs. That is not a reason to read Section 523(a)(8) out of the statute, but it is a reason to interpret the nondischargeability provision more narrowly than would be the case if these broader purposes did not exist.

2. The Narrow Purposes of the Nondischargeability Provision

Congress had two major purposes in enacting student-loan nondischargeability: preventing abuse of the bankruptcy system and promoting financial recovery from debtors.[177] Each is discussed in turn.

Student-loan nondischargeability has an unmistakable moralistic basis. Scholars[178] and courts[179] agree that part of nondischargeability's purpose is to

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[173] *See* Hunt, *Tempering*, *supra* note 5, at 759–60 (describing studies linking student-loan debt to lower post-graduation income, lower future net worth (excluding student loans from net worth), lower satisfaction with personal finances, lower probability of owning a house or car or of getting married, higher risk of future financial difficulties, lower probability of pursuing further education, lower self-reported mental health, greater risk of material and healthcare hardship and of financial difficulty, and lower life satisfaction and overall well-being).

[174] *See, e.g.*, JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION 1 (2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf [https://perma.cc/TBC9-4JP5] (reporting that upon graduation, African American college graduates owe $7,400 more on average than White graduates); Michal Grinstein-Weiss et al., *Racial Disparities in Education Debt Burden Among Low- and Moderate-Income Households*, 65 CHILDREN & YOUTH SERVS. REV. 166, 166 (2016) (finding based on a study of a low- and medium-income sample that "the odds of student loan indebtedness are twice as high for LMI Black students as for White students"); Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS tbl. 4 (Oct. 16, 2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/ [https://perma.cc/8SW4-DGND] (reporting that among students who entered college in 2003–2004 and took out federal loans for undergraduate education, 49% of African American borrowers and 21% of White borrowers defaulted within twelve years after entry); *see also* Hunt, *Tempering, supra* note 5, at 760–61 (describing empirical research on this subject in more detail). Moreover, higher education seems less likely to protect African-American people from bankruptcy than White people. *See* Atkinson, *supra* note 5, at 11–12.

[175] *See* Hunt, *Tempering, supra* note 5, at 761.

[176] *See* Hunt, *Tempering, supra* note 5, at 761–62.

[177] *See* Hunt, *Help*, *supra* note 5, at 1310–11 (summarizing results of review of legislative history).

[178] *See* Hunt, *Help*, *supra* note 5, at 1310 (purpose of countering "abuse"); Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 419–32 (discussing the "stereotype of the abusive student loan debtor" and its importance to the enactment of the dischargeability limit); John A.E. Pottow, *The Nondischargeability of Student Loans in Bankruptcy: The Search for a Theory*, 44 CAN. BUS.

block some form of abusive behavior by student-loan borrowers. However, just what behavior is "abusive," and therefore is to be curbed by nondischargeability, is less clear.

Based on the legislative history of student-loan nondischargeability, scholars have concluded that the core abuse Congress was determined to prohibit was the use of bankruptcy to discharge student-loan debt soon after graduation and early in a high-paying career that the education loans themselves made possible.[180] Accordingly, we might define a "core opportunist" as someone who seeks to discharge loans at or around graduation before starting out on a career that (a) was made possible by the loans and (b) pays more than the career the debtor could have pursued without the loans. Even under a narrow construction of undue hardship, any hardship core opportunists suffer arguably is not undue.

Beyond such core cases, the legislative history gives only general guidance about what conduct counted as the "abuse" Congress intended to prohibit. The Bankruptcy Commission report that introduced the idea of limiting student-loan discharge expressed concern over the discharge of student loans "without any real attempt to repay"[181] and without "extenuating circumstance."[182] The House committee report on the first statute limiting student-loan dischargeability expressed a concern with crafting a limit that reflected the "student's ability to repay."[183] In the House debate over student-loan dischargeability in the 1978 Bankruptcy Reform Act, Representative Michel viewed the "moral" issue as being combating "irresponsibility."[184] Together, these statements add up to an unmistakable, if vague, sense that students who have the "ability" to repay have a "moral" duty not to be "irresponsible" and to make a "real attempt" to repay—at least absent "extenuating circumstances."[185]

L.J. 245, 248 n.16 (2006) (noting concern of Bankruptcy Commission with "potential abuses").

[179] *See* 4 Collier on Bankruptcy ¶ 523.14 (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2020) (stating that "preventing abuses of the educational loan system by restricting the ability to discharge a student loan shortly after graduation" is one of two purposes courts have focused on in applying student-loan nondischargeability).

[180] *See* Hunt, *Help*, *supra* note 5, at 1310–11; Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 427 (discussing the importance to nondischargeability of "the stereotype of the abusive student loan debtor—that is, the recent graduate on the eve of a lucrative career."); Pottow, *supra* note 5, at 276 (stating the theory for student-loan nondischargeability that "comes closest to persuasion" is "that of the opportunistic debtor, 'softly' defrauding the system if she walks away from publicly subsidized debt that enables a high-income career").

[181] H.R. Doc. No. 93-137, pt. 1, at 170 (1973).

[182] *Id.* at 177.

[183] H.R. Rep. No. 94-1232, at 14 (1976).

[184] 124 Cong. Rec. 1,795 (1978) (statement of Rep. Michel).

[185] For more complete accounts of the legislative record, consistent with the description given in the text, see Hunt, *Help*, *supra* note 5, at 1300–12; Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 419–28.

3. Courts' Promotion of Narrow Statutory Goals But Not Broad Ones

In interpreting the statutory phrase "undue hardship," courts have relied extensively on the narrow purpose of the student-loan nondischargeability provision, including on its legislative history.[186] Most notably, the district court's reasoning in *Brunner* itself was "[b]ased on legislative history,"[187] specifically the legislative history of the nondischargeability provision.[188] The appellate opinion in *Brunner* "explicitly incorporated the reasoning of the district court *in toto*,"[189] and many other appellate decisions interpreting Section 523(a)(8) have relied on its legislative history.[190]

By contrast, courts generally have not considered how nondischargeability relates to the federal student loan programs' broad purposes when they have construed "undue hardship." To be sure, courts often state (without citing evidence) that nondischargeability helps ensure the programs' survival,[191] and at least two have explicitly drawn the connection between

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[186] *See* Hunt, *Tempering, supra* note 5, at 763 & n.265 (collecting cases). For recent examples, see Holguin v. Nat'l Collegiate Student Loan Tr. 2006-2 (*In re* Holguin), 609 B.R. 878, 884 (Bankr. D.N.M. 2019) ("Making student loans non-dischargeable in bankruptcy serves the purpose of 'safeguarding the financial integrity of government entities and nonprofit institutions that participating in educational loan programs." (quoting 4 COLLIER ON BANKRUPTCY ¶ 523.14(1) (Richard Levin & Henry J. Sommer eds., 16th ed.))); Juber v. Conklin (*In re* Conklin), 606 B.R. 664, 678 (Bankr. W.D.N.C 2019) (concluding that the "congressional purpose of § 523(a)(8)" is "to ensure the availability of educational financing"). A less detailed version of the argument in this section appears in Hunt, *Tempering, supra* note 5, at 765–66.

[187] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

[188] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753–54 (Bankr. S.D.N.Y. 1985) (reviewing legislative history of nondischargeability provision), *aff'd*, 831 F.2d 395 (2d Cir. 1987); *id.* at 755 (citing legislative history as justification for imposing good-faith requirement on debtor). The *Brunner* court asserted that nondischargeability "plainly serves the purposes of the guaranteed student loan program," 46 B.R. at 756, but did not actually explain why this was the case. Its subsequent discussion explains that the government "exacts a *quid pro quo*" in return for its "largesse" in making loans available to students who otherwise wouldn't be able to get them. *Id.* The court's argument attempts to show that nondischargeability is fair to the borrower, not that it serves the purposes of the loan program.

[189] Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 943 (9th Cir. 2006).

[190] *See, e.g.*, *id.* at 943 ("[B]ecause the legislative history was influential in the development of the *Brunner* test, we discuss it again here."); Boston Univ. v. Mehta (*In re* Mehta), 310 F.3d 308, 315 (3d Cir. 2002) (relying on a previous decision's analysis of the legislative history of Section 523(a)(8)); Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86–88 (2d Cir. 2000); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 302 (3d Cir. 1995) (adopting *Brunner* test based in part on Congressional intent as revealed by legislative history of Section 523(a)(8)); Santa Fe Med. Servs. v. Segal (*In re* Segal), 57 F.3d 342, 348–49 (3d Cir. 1995); Hiatt v. Indiana State Student Assistance Comm'n, 36 F.3d 21, 23–24 (7th Cir. 1994); United States v. Wood, 925 F.2d 1580, 1583 (7th Cir. 1991); Nunn v. Washington (*In re* Nunn), 788 F.2d 617, 618–19 (9th Cir. 1986); Johnson v. Edinboro State Coll., 728 F.2d 163, 164–65 (3d Cir. 1984); Wis. Higher Educ. Aids Bd. v. Hogan (*In re* Hogan), 707 F.2d 209, 211 (5th Cir. 1983); Bd. of Regents of the Univ. Sys. of Ga. v. Williamson (*In re* Williamson), 665 F.2d 683, 685 (5th Cir. 1982); Wis. Higher Educ. Aids Bd. v. Lipke, 630 F.2d 1225, 1229–31 (7th Cir. 1980); N.Y. State Higher Educ. Servs. Corp. v. Adamo (*In re* Adamo), 619 F.2d 216, 219–21 (2d Cir. 1980).

[191] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399–400 (4th Cir. 2005) (citing avoiding "fiscal doom" and "ensuring public support" as rea-

survival and accomplishing the programs' purposes.[192] But beyond the generic assertion that nondischargeability advances the student loan programs' purposes by helping them survive, courts apparently have not considered overarching purpose at all.[193] Much less have they addressed the conflict between nondischargeability and the programs' overall goals discussed in this Article.

The argument that nondischargeability helps secure the programs' existence is speculative: No court seems to have cited any evidence that nondischargeability actually improves the financial health or public standing of the loan programs, much less that full dischargeability would actually imperil their survival. Nor is the author aware of such evidence. Moreover, even assuming that nondischargeability aids the programs' viability, courts should weigh the countervailing effects on achieving the programs' purposes discussed here.

As a practical matter, courts probably cannot require rigorous scientific proof for every empirical proposition they rely on. The assumptions that nondischargeability builds public support for student loan programs and increases collections may be within the range of reasonable inference. But courts that are willing to entertain such propositions on the ground that they are plausible certainly should not insist on unrealistically exacting standards of empirical proof for more plausible propositions on the other side of the scale: that nondischargeability interferes with equality of access, benefiting society through education, freedom of career choice, and conferring aid on students.[194] As previous work has shown, the existing empirical case for these effects is strong, even if more work would further confirm them.[195] The evidence for them already clears the low bar that courts have set for considering consequences of student-loan nondischargeability.

C. Summing Up: One-Sided Consideration of Purpose Warps Doctrine

To sum up, Congress acted to combat abuse and promote financial recovery by creating an undue-hardship requirement, the stringency of which is unclear. In setting the difficulty of meeting the requirement, courts have

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sons for nondischargeability). The discussion in *Frushour* has been cited repeatedly, including by courts outside the Fourth Circuit. *See* Doernte v. Educ. Credit Mgmt. Corp. (*In re* Doernte), Bankr. No. 10-24280-JAD, 2017 WL 2312226, at *2 (Bankr. W.D. Pa. May 25, 2017); Jones v. Educ. Credit Mgmt. Corp. (*In re* Jones), 495 B.R. 674, 684 (Bankr. E.D Pa. 2013).

[192] *See, e.g.*, Williams v. N.Y. State Higher Educ. Servs. Corp. (*In re* Williams), 296 B.R. 298, 302 (S.D.N.Y. 2003) (concluding Congress intended nondischargeability "to reduce bankruptcy defaults, and thereby advance the original purposes of student loan programs, *i.e.* to assure that students . . . would have . . . access to low interest rate loans" (quoting Elmore v. Mass. Higher Educ. Assistance Corp. (*In re* Elmore), 230 B.R. 22, 25 (Bankr. D. Conn. 1999))).

[193] This conclusion is based on the author's review of the 113 results of the following search in Westlaw's federal cases database on January 23, 2020: "student loan" and "undue hardship" and (purpose /s "student loan" /s program).

[194] *See* discussion *supra* Section II.B.1.

[195] *See* discussion *supra* Section II.B.1; *see also* Hunt, *Tempering*, *supra* note 5, at 742–62.

fixed on controlling abuse and recovering money—the narrow goals of nondischargeability taken in isolation. They have not considered how the difficulty level they set might affect achievement of the overall goals of the federal student loan programs: equality of access, promotion of higher education, freedom of career choice, and benefiting students. Making it too difficult to discharge student loans interferes with all these goals, as previous research has shown.[196] Considering Congressional purposes that suggest that discharge should be difficult while ignoring those that suggest that discharge should not be difficult has led to a body of doctrine that, while varied, on the whole makes it too difficult to escape student loans in bankruptcy.

III. Reformulating or Reinterpreting *Brunner*

The overall purposes of the student loan programs counsel a narrow application of student-loan bankruptcy nondischargeability. Previous work has addressed how this idea should play out in certain specific factual settings.[197] However, scholars (and courts and the Department of Education) have not addressed how taking the broad purposes of the student loan programs affects the overall formulation of the undue-hardship standard.

This Part undertakes that task. It puts forth a proposal for defining "undue hardship" and shows how the proposed standard effectuates Congress's purpose, then discusses how income-driven repayment programs would figure into the analysis under the proposal, and then addresses how the suggested standard could be implemented. The Part then shows that the call for leniency here supports not just the Article's specific recommendations, but also other recent calls for re-envisioning "undue hardship" under the Code. It closes by summarizing the argument.

A. A Proposal for Defining "Undue Hardship"

This Article proposes that a student-loan borrower who can show by a preponderance of the evidence[198] that they cannot entirely repay their loans

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[196] *See* discussion s*upra* Section II.B.1; *see also* Hunt, *Tempering*, *supra* note 5, at 742–62.

[197] These settings include situations where borrowers have been educated in low-paying fields, have especially high debt-income ratios, or are particularly likely to have been harmed by their student loans. *See* Hunt, *Tempering*, *supra* note 5, at 773–83.

[198] The appellate courts that have addressed the burden of proof under the *Brunner* test have stated that the debtor must meet each element by a preponderance of the evidence. *See* Educ. Credit Mgmt. Corp. v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 649 (11th Cir. 2017); Lepre v. Dep't of Educ. (*In re* Lepre), 530 F. App'x 121, 123 (3d Cir. 2013); Traversa v. Educ. Credit Mgmt. Corp (*In re* Traversa), 444 F. App'x 472, 474 (2d Cir. 2011); Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 543–44 (4th Cir. 2008); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358–59 (6th Cir. 2007); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559, 565 (7th Cir. 2003); *see also* Walker v. Sallie Mae Serv'g Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011) (preponderance-of-the-evidence burden of proof applies where the totality-of-the-circumstances standard is applicable).

in a reasonable period while maintaining a middle-class standard of living has made a prima facie case of undue hardship. If discharge would take effect during the first five years in repayment, the creditor or servicer could rebut the borrower's showing by proving that the borrower did not engage in good-faith efforts to repay. The inquiry into good-faith efforts to repay would focus on whether the debtor is or closely resembles a "core opportunist" as this Article has defined the term,[199] and would therefore be much more closely tailored to Congress's purpose in enacting the undue-hardship requirement than it is under some applications of the *Brunner* test today. As described in more detail in Section III.B, making the proposed showing would be sufficient to show undue hardship, but not necessary.

The test has three open-ended terms: "middle-class standard of living," "reasonable period," and "good-faith efforts to repay." Each is explained in further detail below. With these terms fleshed out as described, the proposed test exhibits the supposed virtues that have made the *Brunner* test so attractive to appellate courts: it is just as simple[200] as the *Brunner* test, is more determinate,[201] and gives due regard to Congress's purpose in enacting nondischargeability.[202] And it has one major advantage over the *Brunner* test from the standpoint of statutory purpose: by taking account of how nondischargeability interferes with the overall goals of the student loan programs, it honors the global purpose of the statutory scheme rather than focusing narrowly on the purpose of nondischargeability in isolation.

Although this Article focuses on congressional purpose as the primary justification for adopting the new test, there are other good reasons to make bankruptcy relief more readily available. A critical one is that doing so stands to alleviate the racial disparities in the harm of excessive student debt. Professors Dalié Jiménez and Jonathan Glater have recently completed a major study of student debt as a civil rights issue. They observe that African-American students "are disproportionately likely to borrow, to borrow larger amounts, to take out student loans to attend for-profit schools with worse career outcomes, and to default on their loans relative to their White peers."[203] Latinx student borrowers borrow nearly as much as White students, and are more likely to attend a for-profit institution and more likely to default than White students.[204] The for-profit schools African-American and Latinx students are more likely to attend have lower graduation rates

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[199] *See* discussion *supra* Section II.B.2.

[200] *See, e.g.*, Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005) ("[W]e opt to join other circuits in adopting the simpler rubric of the *Brunner* test.").

[201] *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 455 (5th Cir. 2019) (nothing that using *Brunner* standard avoids risk of "intolerable inconsistency of results").

[202] *See, e.g.*, *id.* at 454 ("Congress intended to make student loan debt harder to discharge than other types of consumer debt [and *Brunner* standard] fulfills that intent.").

[203] *See* Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 132–33 (2020).

[204] *See id.* at 133.

than other institutions,[205] and many for-profit institutions have closed amidst lawsuits and investigations.[206]

Thus, the evidence suggests that African-American and Latinx borrowers can benefit disproportionately from a more forgiving bankruptcy standard. Easing bankruptcy relief by reformulating the undue-hardship standard is, like the measures Jiménez and Glater propose in their article, a "socioeconomically egalitarian reform that [is] facially race-neutral but . . . disproportionately benefit[s] members of historically subordinated groups."[207]

1. "Middle-Class Standard of Living"

The proposed standard ties to the statutory text through the notion that living a sub-middle-class lifestyle, or being saddled with student loans for too long a period, is "hardship." This notion has support in the scholarly literature; Robert Salvin argued in 1996 (on different grounds) that borrowers should be eligible for discharge if they cannot maintain a middle-class lifestyle while repaying student loans.[208]

As noted, nondischargeability perpetuates unmanageable debt and therefore interferes with the student loan programs' goals of providing equal access, increasing the nation's educational level, promoting freedom of career choice, and benefiting students. The higher the income level at which discharge is possible, the smaller these effects are likely to be: if borrowers know that loans will not sentence them to penury, it is reasonable to assume they will be more willing to invest in themselves,[209] not discontinue their education because of hopeless debt,[210] and take on useful careers that promise fewer financial rewards.[211] Moreover, raising the income level for which discharge is possible will directly reduce the harm student loans inflict on some unfortunate debtors.[212] These heretofore ignored benefits are as relevant to congressional purpose and the proper construction of "undue hardship" as are the countervailing values of combating abuse and promoting financial recovery.

Courts and the Department of Education should balance these countervailing values when they set a specific threshold for bankruptcy relief. In

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[205] *See id.* at 145, 147.
[206] *See id.* at 147.
[207] *Id.* at 140.
[208] *See* Salvin, *supra* note 5, at 139 (arguing that because of bankruptcy's general fresh-start policy, "undue hardship should be found to exist for any debtor who will not be able to maintain a middle-class lifestyle and at the same time repay student debt"). Salvin's argument is not, however, based on the purposes of the federal student-loan programs.
[209] *See, e.g.*, Fos et. al., *supra* note 166, at 3.
[210] *See, e.g.*, Dwyer et. al., *supra* note 165, at 1146 fig.2.
[211] *See* Rothstein & Rouse, *supra* note 168, at 149.
[212] *See* Richardson et al., *supra* note 172, at 1153 (reporting, based on meta-analysis of sixty-five studies with a pooled sample size of 34,000, that debt is associated with "presence of a mental disorder, depression, suicide completion, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders . . . and psychotic disorders").

doing so, they should take heed of the fact that Congress has designed the student-programs with a distinct purpose of helping students "make it to the middle class,"[213] to quote a senator who spoke in support of the 2007 legislation that eased repayment.[214] As amended by that legislation, federal student loan programs are designed to "expand[ ]"[215] or "grow[ ],"[216] and to "strengthen[ ],"[217] the middle class by making college more affordable for student borrowers.[218] In supporting the legislation, one senator made repeated reference to the G.I. Bill, which he said "helped establish the middle class . . . . We built the middle class on the pillars of education, on the pillars of educational opportunity."[219] This description ignores the fact that the G.I. Bill's educational benefits were—to say the least—unequally distributed along racial lines,[220] but nevertheless indicates congressional purpose that student loans pave the way to the middle class. One senator expressed her support for the repayment-easing legislation as follows:

> It is no coincidence that the rise of the American middle class coincided with the explosion of college attendance. It unlocks eco-

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[213] 153 CONG. REC. S9,447 (daily ed. July 17, 2007) (statement of Sen. Sanders).

[214] The 2007 College Cost Reduction and Access Act cut student-loan interest rates, *see* Pub. L. No. 110-84, § 201, 121 Stat. 784, 790–92 (2007); it also expanded income-driven repayment by creating the Income-Based Repayment program, *see id.* § 203, 121 Stat. at 792–95; and it created the Public Service Loan Forgiveness program, designed to forgive public servants' student loans after ten years of employment, *see id.* § 401, 121 Stat. at 800–01.

[215] 153 CONG. REC. H7,535 (daily ed. July 11, 2007) (statement of Rep. Pelosi).

[216] 153 CONG. REC. H7,530 (daily ed. July 11, 2007) (statement of Rep. Miller).

[217] *See* H.R. REP. 110-210, at 43 (2007) (describing Income-Based Repayment under the heading "Strengthening the Middle Class by Making College More Affordable"); *see also* 153 CONG. REC. H7,530 (daily ed. July 11, 2007) (statement of Rep. Miller); 153 CONG. REC. H7,532 (daily ed. July 11, 2007) (statement of Rep. Green); *id.* H7,535 (daily ed. July 11, 2007) (statement of Rep. Pelosi); *id.* H7,540 (daily ed. July 11, 2007) (statement of Rep. Shea-Porter); *id.* H7,541 (daily ed. July 11, 2007) (statement of Rep. Maloney); *id.* H7,552 (statement of Rep. Jackson-Lee); *id.* H10,268 (daily ed. Sept. 7, 2007) (statement of Rep. Jackson-Lee) ("This bill strengthens the middle class by making college more affordable.").

[218] *See* 153 CONG. REC. S9,442 (daily ed. July 17, 2007) (statement of Sen. Kennedy) ("[W]e are providing assistance to the middle class in relieving them of a good deal of the pressure they have in paying off student loans in the future . . . ."); 153 CONG. REC. S11,255 (daily ed. Sept. 7, 2007) (statement of Sen. Kennedy) (supporting "loan forgiveness for students who want to go into public service careers, for some relief for the middle class").

[219] 153 CONG. REC. 23,862 (2007) (statement of Sen. Kennedy). Kennedy made the point several times in the course of the debates. *See* 153 CONG. REC. S9,553 (daily ed. July 17, 2007); *id.* S9,461; *id.* S,9570; *id.* S11,255 (daily ed. Sept. 7, 2007); *id.* S11,255; *see also* 153 CONG. REC. H7,540 (daily ed. July 11, 2007) (statement of Rep. Shea-Porter) (noting that the G.I. Bill "built the middle class in this country").

[220] *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 128–34 (2005) (explaining that although the G.I. Bill was facially neutral with respect to educational benefits, it did nothing to challenge racial segregation in higher education, with the results that there were far fewer places available per capita for African Americans and that the institutions they could attend had far fewer resources). Katznelson also cites research concluding that the G.I. Bill "exacerbated rather than narrowed the economic and educational differences between blacks and whites," at least for people "more likely to be limited to the South in their collegiate choices." *Id.* at 134 (citing Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145 (2003)).

> nomic potential, and it gives students access to the American dream—to a career and a life that they, then, can build.[221]

Saddling student borrowers with loan payments that keep them out of the middle class or further depress their economic situation below a middle-class level runs directly counter to the congressional purpose just discussed. Congress's purpose to create, or at least, ease, the path to middle-class life reflects a larger cultural belief that higher education is the "entry ticket"[222] or the "clearest pathway,"[223] to the middle class. The Department of Education itself—which reportedly holds 92% of outstanding U.S. student loans[224]—communicates this belief to the public, including prospective students.[225] That the belief appears largely grounded in fact only strengthens the point.[226] The brutal truth that postsecondary education may increasingly be a necessary, but not sufficient, condition for middle-class lifestyles[227] does little to assuage the harm to student borrowers who find themselves locked out of the middle class despite having "done everything right."[228]

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[221] 153 CONG. REC. S9,451 (daily ed. July 17, 2007) (statement of Sen. Clinton).

[222] RICHARD V. REEVES ET AL., BROOKINGS INST., GOWN TOWNS: A CASE STUDY OF SAY YES TO EDUCATION 5 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180612_Gown-Towns-Reeves.pdf [https://perma.cc/XW35-QHMU] ("Postsecondary education is the entry ticket to the middle class.").

[223] *Higher Education*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/issues/education/higher-education [https://perma.cc/2B5X-9UFH] ("With the average earnings of college graduates at a level that is twice as high as that of workers with only a high school diploma, higher education is now the clearest pathway into the middle class.").

[224] *See* MEASUREONE, THE MEASUREONE PRIVATE STUDENT LOAN REPORT 7 (2019).

[225] *See* Press Release, U.S. Dep't of Educ., Fact Sheet: Increasing College Access by Making Loans Easier to Pay (Mar. 18, 2016), https://www.ed.gov/news/press-releases/fact-sheet-increasing-college-access-making-loans-easier-pay [https://perma.cc/3AQW-ESTS] ("Higher education continues to be the single most important investment students can make in themselves and the surest engine to enter the middle class."); *see also* Ted Mitchell, *America's College Promise: A Ticket to the Middle Class*, U.S. DEP'T OF EDUC.: HOMEROOM (Jan. 21, 2015), https://blog.ed.gov/2015/01/americas-college-promise-a-ticket-to-the-middle-class/ [https://perma.cc/XD4L-EZUT].

[226] *See The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), https://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/ [https://perma.cc/SC54-S4TZ] ("On virtually every measure of economic well-being and career attainment—from personal earnings to job satisfaction to the share employed full time—young college graduates are outperforming their peers with less education."); *see also* Josh Boak & Emily Swanson, *Many College Grads Feel Their Grip on the Middle Class Loosening*, AP NEWS (May 1, 2019), https://apnews.com/0a3584abcadb4482974a19fbdc42bfff [https://perma.cc/9XYC-VSGW] (reporting that 35% of college graduates and 60% of Americans without a college degree described themselves as working or lower class).

[227] *See, e.g.*, David Karen & Kevin J. Dougherty, *Necessary But Not Sufficient: Higher Education as a Strategy of Social Mobility*, *in* HIGHER EDUCATION AND THE COLOR LINE 33 (Gary Orfield et. al. eds., 2005); Boak & Swanson, *supra* note 226 (reporting analysis of 2018 General Social Survey data indicating that 35% of college graduates described themselves as working or lower class, up from 20% in 1983).

[228] Journalist and author Alissa Quart described this encountering this phenomenon in her reporting in a Wharton School interview: "'Shame' is a word that comes up. People are blaming themselves, saying, 'What did I do wrong? I did everything right. I got these degrees. I worked hard. Why is this not coming together?" *Why Middle-Class Families Can No Longer Afford America*, KNOWLEDGE@WHARTON (Aug. 15, 2018), https://knowledge.wharton.up

Assuming bankruptcy relief is appropriate for those who cannot otherwise repay their loans while remaining in the middle class, it remains to define the term "middle class" more precisely. The concept is notoriously elusive, but courts have used it on occasion in defining what is too generous for student-loan debtors to be allowed, suggesting that judges think they know what it is.[229] *Collier on Bankruptcy*, a leading treatise, equates another bankruptcy standard, that of "reasonably necessary" expense under Chapter 13, to what is "enjoyed by an average American family."[230] This parallel suggests that Chapter 13 precedents under that section could be relevant in deciding what is a "middle-class" lifestyle.[231] Another possible benchmark is the Economic Policy Institute's calculator, based on government and nonprofit data, that provides the income needed for a "modest yet adequate standard of living" by locality and family size.[232]

2. Repayment in a "Reasonable Length of Time"

The second major element of the Article's proposal is that debtors should be able to get a discharge if they cannot, while maintaining a middle-class lifestyle, pay off their debts in a reasonable length of time. The basic

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enn.edu/article/why-is-the-middle-class-in-such-a-precarious-position/ [https://perma.cc/XJN2-NCUK].

[229] *See* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005) ("[A] minimal standard of living under § 523(a)(8) does not equate to a middle-class standard of living."); McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 375 B.R. 666, 674 (M.D. Ala. 2007) ("[A] minimal standard of living lies somewhere between poverty and mere difficulty." (citation omitted)); Hunt, *Help*, *supra* note 5, at 1336 n.335 (collecting six additional cases from courts in the Ninth Circuit following *Howe* in holding that a "middle-class" standard of living is in excess of a "minimal" standard of living). In addition, a number of decisions deny discharge on the ground that the debtor has a middle-class lifestyle. *See* Johnson v. Sallie Mae (*In re* Johnson), 577 B.R. 895, 903 & n.21 (Bankr. D. Kan. 2017) (debtors with "firmly middle class" status "could easily" make payments on student loans while maintaining a minimal standard of living); *In re* Clarke, Bankr. No. 99-16596DAS, 1999 Bankr. LEXIS 1842, at *2–3 (Bankr. E.D. Pa. Dec. 10, 1999) (concluding that "middle-class standard of living" precluded student-loan bankruptcy discharge); Myers v. Pa. Higher Educ. Assistance Auth. (*In re* Myers), 150 B.R. 139, 141 (Bankr. W.D. Pa. 1993) (noting debtor "is well-dressed and coifed and appears to enjoy the amenities available to a middle class professional" in denying discharge); N.D. State Bd. of Higher Educ. v. Frech (*In re* Frech), 62 B.R. 235, 242 (Bankr. D. Minn. 1986) (denying discharge to debtor who "has derived salaries which have enabled him to live an adequate middle-class existence"). Under the test proposed here, a middle-class standard of living would not disqualify a debtor from discharge unless the debtor could maintain that standard while repaying the debts in a reasonable time.

[230] 8 COLLIER ON BANKRUPTCY ¶ 1325.11(4)(c)(ii) (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2020).

[231] Courts have considerable experience applying the "reasonably necessary" standard. A search on "('reasonably necessary' /s expens!) and 'Chapter 13'" carried out on February 7, 2020 in the All Federal Cases database on LEXIS retrieved 941 results.

[232] *See* Elise Gould, Zane Mokhiber, & Kathleen Bryant, *The Economic Policy Institute's Family Budget Calculator: Technical Documentation* ECON. POL'Y INST., (March 13, 2018) *https://www.epi.org/publication/family-budget-calculator-documentation/* [https://perma.cc/LUL5-TVYT]. In some respects the EPI's calculator seems to provide for a middle-class standard of living: its estimates of housing costs are set at the 40th percentile of expenditures in the relevant market. *Id.* In other respects the calculator seems to fall short of the middle-class standard, for example in its assumption that the family almost never eats out. *Id.*

reason is simple: remaining in debt prolongs the empirically demonstrated harms of unmanageable indebtedness.[233] By making financially unsuccessful investments in education less tolerable, prolonging unmanageable debt undermines the overall goals of the student loan programs in much the same way as affording relief only for very low standards of living does: it makes investing in education less attractive, exacerbates debt-induced hopelessness that can lead to dropping out, makes socially valuable but financially unrewarding careers more risky, and directly harms borrowers.[234]

As with the middle-class threshold for the debtor's standard of living, there is support for the Article's proposal in the student loan programs' legislative record. These materials reflect a longstanding concern that loans might hang over students' heads for too long.[235] For example, the House version of legislation that created the first IDR program provided for an unlimited repayment period.[236] Several witnesses then criticized this aspect of the proposal in Senate hearings. For example, a college president testified that an unlimited repayment period would "threaten . . . the rationality of the proposal"[237] and a college student asked, "Will I be using my Social Security checks to pay off my student loans after I retire?"[238] The Clinton administration proposed loan cancellation after twenty-five years of IDR,[239] and the enacted statute provided for the Secretary of Education to set the repayment period, with a maximum term of twenty-five years.[240]

A lower bound for the "reasonable period" in which borrowers ought to be able to repay their debts might be the 10-year period offered for the government's "standard" repayment program.[241] Apart from this program's designation as "standard," the ten-year repayment period it offers is the shortest available for federal student loans.[242] It seems at least arguably reasonable for student borrowers to expect that it might take at least ten years to repay. An upper bound, reflecting the longest period borrowers should be expected to struggle with their debts, might be the twenty-year period of-

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[233] *See* Thomas Richardson et al., *supra* note 172, at 1153; Hunt, *Tempering*, *supra* note 5, at 758–62 (collecting empirical studies documenting harms inflicted by debt in general and student debt in particular).

[234] *See supra* notes 209–12 (citing studies providing empirical support for each of these effects).

[235] *See* Hunt, *Help*, *supra* note 5, at 1315–16 (describing 1993 Senate testimony opposing too-long repayment periods).

[236] *See* H.R. Rep. No. 103-213, at 447 (1993) (Conf. Rep.).

[237] *Student Loan Reform: Hearing on S. 920 Before the S. Comm. on Labor & Human Res.*, 103d Cong. 54 (1993) (statement of Rev. Bartley MacPhaidin, President, Stonehill College).

[238] *Id.* at 62 (statement of J.L. Nelson, Student, Iowa State University).

[239] *See id.* at 67 (statement of Sen. Nancy Kassebaum).

[240] *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 312, 348 (codified at 20 U.S.C. § 1087e(d)(1)(D)).

[241] *See Standard Plan*, Fed. Student Aid, https://studentaid.ed.gov/sa/repay-loans/understand/plans/standard [https://perma.cc/29R4-LZNM] (providing for payments of "up to ten years" on standard repayment plan for federal loans other than consolidation loans).

[242] *See Repayment Plans*, Fed. Student Aid, https://studentaid.gov/manage-loans/repayment/plans [https://perma.cc/KF2X-URME] (giving repayment periods for all federal student loan repayment plans and indicating that ten years is the shortest such period).

fered by the most recently enacted IDR programs.[243] Because the law provides for loan balances to be cancelled after twenty years of IDR, even if a large amount remains to be repaid,[244] the federal government has already decided that borrowers should not have to be in repayment for more than that length of time.

3. "Good-Faith Effort" to Repay

Thus, "hardship" may be defined as the inability to repay loans in a reasonable time while maintaining a middle-class standard of living. It remains to define what hardship is "undue."

Presuming that Congress's goal was not to promote pointless suffering, hardship is "undue" unless it is justifiable.[245] What is justifiable depends on Congress's purpose. As it happens, that purpose in turn depends on how long the loan in question has been in repayment. When the undue-hardship requirement was first enacted, it had a five-year time limit: after five years in repayment student loans were freely dischargeable.[246] Members of Congress advanced an anti-abuse rationale for nondischargeability in this context.[247] Congress later extended the time limit to seven years,[248] then removed the limit altogether.[249] Congress did not take these actions to curb abuse; the only objective put forward for them was promoting creditor recovery.[250]

This shift in reasoning accompanying the removal of the five-year limit suggests that any definition of "undue" tied to heightened suspicion of abuse, such as the good-faith requirement of *Brunner*,[251] should apply only to debtors seeking discharge shortly after entering repayment. If a debtor is a "core

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[243] *See* Hunt, *Help*, *supra* note 5, at 1317 (indicating that the Health Care and Education Reconciliation Act of 2010, the most recent IDR legislation, provided for a maximum repayment period of twenty years).

[244] *See Income-Driven Repayment Plans*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven [https://perma.cc/5WFS-EWJV] ("Under all four [IDR] plans, any remaining loan balance is forgiven if your federal student loans aren't fully repaid at the end of the repayment period.").

[245] *See* discussion *supra* Section II.A.1.

[246] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439(a), 90 Stat. 2081, 2141 (1976) (codified as 20 U.S.C. § 1087-3 (2018)) (enacting conditional nondischargeability of student-loan debt and imposing a five-year limit on nondischargeability); *see also* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590-91 (1978) (codified as 11 U.S.C. §523 (2018)) (incorporating conditional student-loan nondischargeability with a five-year time limit into the new Bankruptcy Code).

[247] *See* Hunt, *Help*, *supra* note 5, at 1311.

[248] *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4965 (1990).

[249] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (1998).

[250] *See* Hunt, *Help*, *supra* note 5, at 1311.

[251] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755-56 (Bankr. S.D.N.Y. 1985) (imposing good-faith requirement despite "no specific authority for this requirement" based on "stated purpose" of Section 523(a)(8) "to forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans"), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

opportunist"— previously defined as someone who seeks to discharge loans at or shortly after actual completion of a program and before starting out on a career that (a) was made possible by the loans and (b) is more remunerative than the career the debtor could have pursued without the loans[252]—then the debtor's hardship presumably would not be undue. Following this line of reasoning, the Article proposes that the creditor or servicer be able, for debts in the first five years of repayment, to rebut the debtor's prima facie case of undue hardship with a showing that the debtor was or closely resembled a "core opportunist."

Any abuse-combating requirement should be tethered closely to the specific ills nondischargeability was intended to combat and should therefore be applied only to debtors who are, or closely resemble, core opportunists. Five years of repayment, the period after which the anti-abuse activists of the 94th and 95th Congresses made student debt freely dischargeable,[253] represents an outer time limit on the application of any such requirement. Moreover, courts should be circumspect in what they require under this prong—someone who cannot make ends meet because of family obligations,[254] low pay,[255] or simple inability to hold down a job[256] is not a core opportunist like a newly minted surgeon laughing all the way to the bank.

For debtors who have been in repayment for a considerable period of time—perhaps the five years of the original nondischargeability provision—the only Congressional purpose nondischargeability serves is financial recovery.[257] Thus, in these cases it is no longer appropriate to ask, "Could the debtor pay if they had made the right choices or would make them in the future?" Instead, the only relevant inquiry is, "Will the debtor actually repay if denied discharge?"

Here, it seems that permitting discharge when the debtor cannot repay the loans in a reasonable time while maintaining a middle-class standard of living appropriately reconciles the narrow interest in financial recovery with

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[252] *See* discussion *supra* Section II.B.2.

[253] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439(a), 90 Stat. 2081, 2141 (1976) (codified as 20 U.S.C. § 1087-3 (2018)) (imposing undue-hardship requirement with five-year time limit); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (1978) (codified as 11 U.S.C. § 523 (2018)) (enacting undue-hardship provision with five-year time limit as part of Bankruptcy Code).

[254] *See, e.g.*, *In re* Ward, No. 02-34594-H4-7, slip op. at 6–7 (Bankr. S.D. Tex. May 25, 2004) (finding that under Fifth Circuit precedent, debtor's decision to have children counted against good-faith efforts at repayment).

[255] Some courts applying the *Brunner* good-faith element require debtors to "maximize income" as a prerequisite to discharge. *See, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 760 (7th Cir. 2015); Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 852 (9th Cir. 2013); Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 227 (3d Cir. 2009); Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544–45 (4th Cir. 2008). Courts applying the totality-of-the-circumstances test have also required the debtor to show efforts to maximize income. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009).

[256] *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450 (5th Cir. 2019) (recounting debtor's inability to keep several jobs).

[257] *See* Hunt, *Help*, *supra* note 5, at 1311.

the broader goals of the programs. Debtors who can repay their loans in a reasonable time while maintaining a middle-class standard of living are precisely those from whom the largest financial recoveries are available. It might be objected that the proposed standard grants discharge to debtors who could pay off a substantial portion of their loans, just not all of them. But, again, the narrow goal of financial recovery must be balanced against the broader goals of equality of access, educating the country, freedom of career choice, and benefiting students. It is reasonable to presume that hardship after a prolonged period of repayment is "undue" and in that case not to impose anti-abuse requirements beyond those generally applicable under the Bankruptcy Code.[258]

The test proposed here would require the debtor to make the required showing by a preponderance of the evidence. This standard is in tension with a statement in the district court's decision in *Brunner* that the debtor must show a "certainty of hopelessness" of repayment.[259] Although neither the district court nor the appellate court used this language in setting forth the test itself,[260] five circuit courts applying *Brunner* have adopted "certainty of hopelessness" as a requirement.[261] Adopting such a burdensome requirement—one at odds with the normal burden of proof in civil proceedings—seems to result from a single-minded fixation on the goals of the nondischargeability provision taken in isolation.[262] It is precisely the kind of distorted result that looking to previously ignored countervailing purposes should correct.

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[258] *See, e.g.*, 11 U.S.C. § 707(b)(1) (2018 & Supp. I 2019) (providing that the court may dismiss a Chapter 7 case if "granting of relief would be an abuse of the provisions of this chapter"); *id.* § 707(b)(3)(A)–(B) (directing the court, in evaluating whether a filing is abusive, to consider whether the debtor filed "in bad faith" and whether the "totality of the circumstances . . . of the debtors financial situation" justifies dismissal).

[259] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[260] *See id.* at 756; Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). The district court did reference the formulation as "[p]erhaps the best articulation" of the idea that undue hardship requires continued inability to pay. 46 B.R. at 755.

[261] *See* Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1326 (11th Cir. 2007); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 401 (4th Cir. 2005); Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 328 (3d Cir. 2001); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).

[262] *Roberson* was the first appellate decision to adopt the certainty-of-hopelessness requirement, and it based its decision to do so on the legislative history of the nondischargeability provision. *See Roberson*, 999 F.2d at 1135–36. Subsequent decisions adopting the test in turn relied on *Roberson*, *see Oyler*, 397 F.3d at 386, or their own view of the purposes of nondischargeability, *see Frushour*, 433 F.3d at 399–400 (citing Congress's "tak[ing] into account the viability of the student-loan program" as a reason for concluding it enacted an "imperative that the debtor's hardship be more than the normal hardship that accompanies any bankruptcy," which in turn undergirded the certainty-of-hopelessness requirement, and basing certainty-of-hopelessness requirement on legislative history of nondischargeability provision). The reference to certainty of hopelessness in the district court's opinion in *Brunner* is inextricably tied to its view of the purpose of nondischargeability. *See Brunner*, 46 B.R. at 754–55.

B. Income-Driven Repayment Plans and the Proposed Definition

Income-driven repayment, or IDR,[263] programs are available for most current student-loan borrowing.[264] These programs base required monthly payments on the debtor's income and promise loan forgiveness if the required payments do not pay off the principal over a specified period. For example, one IDR plan, the Income-Based Repayment program, requires that a debtor make payments of 10% of "discretionary income"[265] and provides for forgiveness of any loan balance remaining after 20 years.[266]

Thus, IDR programs can reduce payments for lower-income borrowers, and they hold out at least the promise of debt cancellation. They potentially offer repayment with less hardship than full-repayment plans. But IDR plans have drawbacks that make them imperfect substitutes for bankruptcy discharge. Despite the availability of IDR, repayment still entails undue hardship for many debtors.

IDR programs come with risks and burdens that a bankruptcy discharge does not. Perhaps the most fundamental is that the debtor does not know that the debt actually will be cancelled upon completion of the IDR period: It is not clear that any debt has yet been cancelled on this basis,[267]

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[263] "Income-driven repayment" is a collective term for several programs that use income to determine monthly payments. These programs include Income-Based Repayment ("IBR"), Income-Contingent Repayment ("ICR"), Pay as You Earn ("PAYE") and Revised Pay as You Earn ("REPAYE"). *See Income-Driven Repayment Plans*, *supra* note 244.

[264] *See Income-Driven Repayment Plans*, *supra* note 244 (indicating that all types of federal student loans displayed are eligible for some form of IDR, at least if consolidated). Not all student borrowing is eligible: IDR is a federal loan program and private loans do not qualify. *See id.* Moreover, Direct PLUS loans made to parents, Federal Family Education Loan Program loans, and Federal Perkins loans are ineligible for IDR unless consolidated. *See id.* The latter two programs are no longer issuing loans. *See* Hunt, *Consent, supra* note 5, at 8–9.

[265] *See Income-Driven Repayment Plans*, *supra* note 244. "Discretionary income" for the IBR plan is defined as income in excess of 150% of the poverty level. *See id.*

[266] *See Income-Driven Repayment Plans*, *supra* note 244. Older IDR programs, such as "old IBR" and Income-Contingent Repayment ("ICR") offer forgiveness only after 25 years. *See id.*

[267] The author has been unable to find information on this question, although it appears possible that the time has come for at least a few cancellations to take place. The statute making ICR generally available was enacted in 1993. *See* Hunt, *Help*, *supra* note 5, at 1313. ICR has a twenty-five-year repayment period, which could suggest that the first debt cancellations under the program should have occurred in 2018. Moreover, Congress provided for a pilot IDR program at a small number of schools in 1992, and borrowers using this program might have been eligible for cancellation before 2018. *See* Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 765 n.149 (2001). On the other hand, the Department apparently adopted the first regulations setting up ICR on July 1, 1994, *see* Federal Direct Student Loan Program, 59 Fed. Reg. 34,278, 34,278, 34,291 (July 1, 1994), and apparently did not become fully effective until September 23, 1994, *see* Federal Direct Student Loan Program, 59 Fed. Reg. 52,704, 52,704 (Oct. 10, 1994). This suggests that borrowers who chose ICR at the earliest opportunity might not have been eligible for cancellation until at least late 2019. Finally, it is not clear that any early ICR borrowers actually stayed in the program for twenty-five years. Very few borrowers took up ICR, at least in early years. *See* Schrag, *supra*, at 831 ("[F]ewer than 1% of new borrowers at schools that offer direct federal loans chooses income-contingent repayment."). It appears that no borrowers will be eligible for cancellation under other IDR programs until at least 2030. *See* Hunt, *Help*, *supra* note 5, at 1312–18 (reviewing dates of enactment and repayment periods for IDR programs and indicating that IDR programs created in 2010 with a 20-

and recent results of other loan-forgiveness programs are not encouraging.[268] Moreover, the future of IDR is currently in flux, as the Trump administration has repeatedly proposed to increase required payments under the program, lengthen the repayment period for graduate borrowers, and eliminate the Public Service Loan Forgiveness Program, which promises forgiveness of federal student loans after ten years of public service.[269] Even if debt is ultimately cancelled at the completion of an IDR program, under current law the debt cancellation apparently would be treated as taxable income, potentially generating a tax liability.[270]

Other risks and burdens relate to the debtor's experience while trying to complete the program. Perhaps the most salient is that IDR typically extends the period of indebtedness.[271] As noted, the condition of being indebted is harmful,[272] so extending the repayment period inflicts a form of hardship on the student-loan debtor. Relatedly, the loan balance will increase during the IDR period if the income-driven payments are not enough to cover the interest on the debt.[273] In light of the literature on the harms of high debt

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year repayment period appear to be the non-ICR programs that promise cancellation at the earliest date).

[268] *See Public Service Loan Forgiveness (PSLF) Program Data*, FED. STUDENT AID (Sept. 29, 2019), https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data [https://perma.cc/QA4Z-7G49] (click "September 2019 PSLF Report") (reporting that out of 109,932 unique borrowers submitting PSLF applications, 1,139 unique borrowers had had PSLF discharges processed, so that success rate was 1.04%). A temporary program set up with broader eligibility requirements designed to give failed PSLF applicants a second chance at forgiveness had an applicant success rate of under one percent through May 2019. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-595, PUBLIC SERVICE LOAN FORGIVENESS: IMPROVING THE TEMPORARY EXPANDED PROCESS COULD HELP REDUCE BORROWER CONFUSION 11 (2019), https://www.gao.gov/assets/710/701157.pdf [https://perma.cc/J73T-JE8U].

[269] Administration budget proposals made in both 2019 and 2020 called for elimination of PSLF and consolidation of existing IDR programs into a single program calling for loan payments of 12.5% of discretionary income and providing debt cancellation after 15 years for undergraduate borrowers and 30 years for graduate borrowers. *See* OFFICE OF MGMT. & BUDGET, A BUDGET FOR AMERICA'S FUTURE: MAJOR SAVINGS AND REFORMS 132, 134 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/msar_fy21.pdf [https://perma.cc/YJ6L-LE9V]; *see also* Robert Farrington, *Trump Proposes to Change Student Loan Repayment for Millions*, FORBES (Mar. 15, 2019), https://www.forbes.com/sites/robertfarrington/2019/03/15/trump-proposes-to-change-student-loan-repayment-for-millions/#54223d727995 [https://perma.cc/25S9-32MU] (reporting that the administration made the same proposals in 2019).

[270] *See* 26 U.S.C. § 61(a)(11) (2019) (defining gross income for tax purposes to include "income from discharge of indebtedness"). Special exemptions exclude such cancellation-of-indebtedness income from taxable income when it results from bankruptcy discharge, *see id.* § 108(a)(1)(A), or from certain types of service such as PSLF, *see id.* § 108(f)(1). No such exemption currently covers forgiveness under IDR. *See* Hunt, *Help*, *supra* note 5, at 1340–42.

[271] The standard repayment plan for student loans made under federal programs is ten years, while the repayment periods for IDR programs range from 20 to 25 years. *See Repayment Plans*, *supra* note 244.

[272] *See supra* notes 177–79 and accompanying text.

[273] *See Income-Driven Plans Questions and Answers*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven/questions [https://perma.cc/Z7JR-V5HR] (describing negative amortization under IDR plans and rules calling for capitalization of all or some interest if borrower leaves an IDR plan).

balances,[274] such "negative amortization" would be another reason not to deny discharge.[275]

Finally, there is the risk that the debtor will not be able to comply with the IDR program's administrative requirements. Debtors in IDR plans are required to recertify income and family size each year.[276] If they fail to do so, they are required to make (generally higher) non-income-based payments going forward.[277] Moreover, accumulated interest is "capitalized," or added to principal, upon failure to recertify.[278] Capitalization increases interest charges going forward.[279] Although failure to recertify can be cured,[280] the recertification requirement makes IDR a less-than-perfect substitute for bankruptcy's fresh start.

Because the IDR programs entail unique risks and burdens, making a monthly payment of, say, $250 under an IDR program is a greater hardship than making a monthly payment of $250 that will lead to complete repayment within the standard repayment period of ten years.

In analyzing how the availability of IDR should affect the analysis of undue hardship under the standard proposed here, debtors can be divided into three broad classes: (1) debtors who can maintain a middle-class standard of living while making monthly payments under either full-repayment or IDR programs, (2) debtors who cannot maintain a middle-class standard living while making monthly payments under either full-repayment or IDR programs, and (3) debtors who can maintain a middle-class standard of living while making payments under an IDR plan, but not while making payments under a full-repayment plan.

The proposed standard is easiest to apply to debtors in the first category: absent circumstances unforeseen by this author, repayment typically would not cause these debtors undue hardship. The analysis is also often simple for debtors in the second category: monthly student-loan debt repayments often push these debtors farther away from a middle-class standard of living and thus work an undue hardship.

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[274] *See* Jinhee Kim & Swarn Chatterjee, *Student Loans, Health, and Life Satisfaction of US Households: Evidence from a Panel Study*, 40 J. FAM. & ECON. ISSUES 36, 36, 46 (2019) (reporting a negative association between the amount of student debt and life satisfaction and well-being in general and a negative association between the amount of student debt and health for Latinx students); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status: Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197, 1211 (2005) (reporting association between high debt-asset ratios and negative health effects); Justin Weidner, Does Student Debt Reduce Earnings? 1 (Nov. 11, 2016) (unpublished manuscript), https://scholar.princeton.edu/sites/default/files/jweidner/files/Weidner_JMP.pdf [https://perma.cc/C5AD-FH3R]) ("I find that graduates with an additional ten thousand dollars of debt have 1-2% lower income one year after graduation.").

[275] *See* Hunt, *Help*, *supra* note 5, at 1339–40 (arguing that negative amortization under IDR weighs in favor of granting discharge).

[276] *See Income-Driven Repayment Plans*, *supra* note 244.

[277] *See id.*

[278] *See id.*

[279] *See id.*

[280] *See id.*

One subcategory of debtors in the second class merits further discussion. These are debtors whose incomes are so low that their IDR payments would be zero. Typically, debtors with incomes of 150% of the poverty level or less would fall into this group.[281] Zero-IDR payments have divided the courts, with some finding that a zero payment in itself inflicts no hardship[282] and others finding it pointless to require the debtor to sign up for a payment plan that entails no payments.[283]

The latter position has greater merit. As previous research has shown, the only interest weighing against discharge when the debtor has been in repayment for more than five years is the interest in creditor recovery.[284] Given that all IDR programs entail repayment periods of more than five years[285] and that zero-repayment IDR produces no creditor recovery, no congressional purpose is served by requiring zero-payment IDR. There is thus no reason in this case to subject the debtor to the risks and burdens of IDR identified above.[286]

Debtors in the third category, those whose monthly payments permit a middle-class standard of living under IDR but not under full repayment, must be analyzed carefully on a case-by-case basis. Because of the risks and burdens of IDR, such debtors may face undue hardship even if they can make monthly student loan payments while maintaining a middle-class standard of living. The situation of debtors in this category illustrates the fact that inability to repay while maintaining a middle-class standard of living is sufficient but not necessary to show undue hardship.

Courts would have to determine whether the risks and burdens of IDR themselves present "undue hardship." Case-specific considerations to be weighed include how much IDR would prolong the repayment period,[287] the

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[281] *See id.* (indicating that "discretionary income" is income above 150% of the poverty level for all IDR programs except ICR, for which the threshold is 100% of the poverty level).

[282] *See, e.g.*, Greene v. Dep't of Educ., No. 4:13cv79, 2013 U.S. Dist. LEXIS 143678, at *12–13 (E.D. Va. Oct. 2, 2013) (noting that the debtor "has put forth no arguments as to how her monthly payment of $0 causes her to fall below her current standard of living"), *aff'd*, 573 F. App'x 300 (4th Cir. 2014).

[283] *See, e.g.*, Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 919–20 (B.A.P. 9th Cir. 2013) (concluding that requiring zero-payment IDR is "futile"); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 803 (B.A.P. 1st Cir. 2010) (concluding that zero-payment IDR is "meaningless").

[284] *See* Hunt, *Help*, *supra* note 5, at 1311–12.

[285] *See Income-Driven Repayment Plans*, *supra* note 244.

[286] It is possible that a debtor's income might rise, so that even if the debtor's IDR payment would currently be zero, future years would yield more for creditors. *See* Nielsen v. ACS, Inc. (*In re* Nielsen), No. 09-04888-als7, 2013 Bankr. LEXIS 2116, at *24–25 (Bankr. S.D. Iowa May 24, 2013) (noting that even with zero current payment, IDR "affords an opportunity for [the creditor] to be repaid if [the debtor's] financial situation changes"), *aff'd*, 518 B.R. 529 (B.A.P. 8th Cir. 2014). It may be rare that a debtor who currently has an IDR payment of zero (and therefore an income below 150% of the poverty line) would be able in the future to maintain a middle-class lifestyle while making substantial IDR payments. However, if a creditor can present evidence that there is a concrete, foreseeable prospect of such improvement, they should be able to present it.

[287] Months in which the debtor made a payment under the standard 10-year repayment plan, made a payment at least as large a standard payment, or was in an economic hardship

extent of likely negative amortization and the extent to which negative amortization is likely to harm the debtor in question,[288] and any particular difficulties the debtor might have in complying with IDR program administrative requirements,[289] as well as the tax considerations mentioned above.[290] Courts should also take into account the uncertainty about whether debt will actually be forgiven at completion of the program.

The defendant's income should be a major factor in the analysis. Higher incomes are associated with less debtor hardship. Moreover, under IDR higher incomes also lead to higher payments, which in turn create higher creditor recoveries and less negative amortization. Thus, for higher incomes there is less reason to grant discharge and at the same time more reason to deny it.

A few words on procedure. In the typical case under current law the debtor is not enrolled in IDR, and the creditor argues that the debtor's failure to enroll evidences lack of good-faith effort to repay the loans.[291] Under this Article's suggestion, the debtor's showing of inability to maintain a middle-class lifestyle while repaying debts in a reasonable time would make a prima facie showing of undue hardship. The creditor would then be able to attempt to rebut the debtor's showing by showing that under IDR the debtor could stay in the middle class while repaying. At a minimum, the creditor would have to show that the debtor is actually eligible for IDR[292] and that

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deferment typically count toward the IDR repayment periods. *See Income-Driven Plans Questions and Answers*, *supra* note 273.

[288] For example, it would be relevant here that the debtor had shown susceptibility to any of the documented problems associated with indebtedness, such as depression, attempted suicide, problem drinking, drug dependence, or neurotic or psychotic disorders. *See* Richardson et al., *supra* note 172, at 1153 (meta-analysis of 65 studies with a pooled sample size of 34,000).

[289] *See, e.g.*, 28 C.F.R. § 35.130(b)(8) (2019) (forbidding public entities from using eligibility criteria "that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity" unless the criteria are "necessary for the provision of the service, program, or activity").

[290] At a minimum, the creditor's attempt to demonstrate that IDR enables the debtor to maintain a middle-class lifestyle while repaying should include a showing that the debtor can amass enough reserve funds to cover the estimated tax liability. *See* Hunt, *Help*, *supra* note 5, at 1347 (describing proposed process for determining if debtor can reserve funds to cover tax liability).

[291] *See, e.g.*, Hedlund v. Educ. Res. Inst., 718 F.3d 848, 853 (9th Cir. 2013); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 883–84 (7th Cir. 2013); Coco v. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 227 (3d Cir. 2009); Roe v. Coll. Access Network (*In re* Roe), 295 F. App'x 927, 931 (10th Cir. 2008); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 363–64 (6th Cir. 2007); Frushour v. Educ. Credit Mgmt. Corp. (*In re* Frushour), 433 F.3d 393, 402–03 (4th Cir. 2005). Cases where the debtor is already enrolled in IDR during the bankruptcy seem less common. In such instances, the debtor would have to show either that they cannot maintain a middle-class lifestyle while repaying under IDR or that the additional risks and burdens of IDR make out an undue hardship.

[292] One important class of debtors who cannot enter an IDR program is those who are currently in default on their student loans. *See Understanding Delinquency and Default*, FED. STUDENT AID, https://studentaid.gov/manage-loans/default [https://perma.cc/6UZG-6SS2]. Depending on the circumstances, debtors may be able to leave default by rehabilitating or consolidating their loans. *See* Nick Dvorscak, *3 Ways to Get Out of Student Loan Default*, U.S.

the debtor more likely than not could maintain a middle-class lifestyle while enrolled in IDR. The debtor and creditor both could present evidence on how the additional risks and burdens of IDR would affect the particular debtor.

C. Implementation of the Proposal in Light of Precedent

This Article has argued that the *Brunner* test was created without due regard for the overall goals of the federal student loan programs and has proposed a replacement. Some actors have the authority to implement the proposed replacement directly. In an en banc sitting, a court of appeals that has adopted the *Brunner* test could revisit the standard,[293] abandoning *Brunner* if it finds that the panel that adopted *Brunner* engaged in a "fundamentally flawed"[294] statutory interpretation. The Department of Education, in making decisions not to oppose discharge in student borrower bankruptcies, could adopt a different definition of "undue hardship" either on the ground that doing so does not overrule the courts' *Brunner* test[295] or on the ground that the Department has authority under various deference doctrines to override the precedent.[296]

In most jurisdictions, however, appellate panels and lower courts are bound to apply the *Brunner* test.[297] As others have noted,[298] the test as written can in fact be applied somewhat flexibly, despite its "draconian" origin.[299] Thus, in many instances appellate panels or lower courts could harmonize the test proposed here with *Brunner*. Courts could find that inability to maintain a middle-class standard of living while repaying student debt in a reasonable time equates to *Brunner's* requirement of inability to maintain a minimal standard of living for a significant portion of the repayment period

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DEP'T OF EDUC.: HOMEROOM (July 31, 2017), https://blog.ed.gov/2017/07/3-ways-to-get-out-of-student-loan-default/ [https://perma.cc/E2EG-5TJ8].

[293] *See* 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3981.1 (5th ed. 2019) ("[O]ne reason to grant en banc consideration is to overrule circuit precedent.").

[294] United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc); *see also* Al Bahlul v. United States, 767 F.3d 1, 11 (2014) (en banc) (citing *Burwell* in reversing prior statutory interpretation).

[295] *See* Hunt, *Consent, supra* note 5, at 40–43 (arguing that the Department can decline to oppose discharge where "undue hardship" is absent).

[296] *See* Hunt, *Consent, supra* note 5, at 38–39 (arguing that the Department may be able to adopt its own interpretation of "undue hardship," which need not conform to the definition adopted by courts).

[297] *See* 16AA WRIGHT & MILLER, *supra* note 293, § 3981.1 ("The courts of appeals generally follow a practice that one panel is bound by the holdings in a prior decision of another panel of that court.").

[298] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 458 (Bankr. S.D.N.Y. 2020) ("The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*."); ABI COMM'N ON CONSUMER BANKRUPTCY, AM. BANKRUPTCY INST., *supra* note 38, at 6 ("If reasonably applied, *Brunner*'s three-factor undue-hardship standard can allow appropriate bankruptcy relief . . . .").

[299] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

while repaying debt. It appears that precedent in many jurisdictions generally does not foreclose discharge to protect a middle-class standard of living.[300] Indeed, some courts have suggested under existing law that the absence of undue hardship entails a middle-class lifestyle.[301]

As for *Brunner*'s good-faith requirement, courts in some jurisdictions could find that a debtor acts in good faith—at least presumptively—when the debtor has not sought discharge in the first five years or repayment or otherwise does not resemble a "core opportunist."[302] Thus, even many courts that must apply the *Brunner* test could adopt the Article's proposal.[303]

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[300] As discussed, some courts have found that a middle-class standard of living is above the minimal standard of living the *Brunner* test requires of the borrower. *See supra* note 232. It appears that only the Ninth Circuit Bankruptcy Appellate Panel and the District Court for the Middle District of Alabama have made pronouncements to this effect that potentially would bind bankruptcy courts within their respective jurisdictions. *See id.* The binding precedential effect of Ninth Circuit Bankruptcy Appellate Panel decisions apparently is "an open question." Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1225 n.3 (9th Cir. 2002); *see also* State Comp. Ins. Fund v. Zamora (*In re* Silverman), 616 F.3d 1001, 1005 (9th Cir. 2016) (noting that the Ninth Circuit has never addressed the issue); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (declining to decide issue). The Ninth Circuit has not decided whether decisions of the Bankruptcy Appellate Panel bind bankruptcy courts throughout the circuit. For its part, the Panel has claimed the authority to bind bankruptcy courts, *see* Phila. Life Ins. Co. v. Proudfoot (*In re* Proudfoot), 144 B.R. 876, 878–79 (B.A.P. 9th Cir. 1992), and some bankruptcy courts have acceded, *see, e.g.*, *In re* Tucker, 479 B.R. 873, 876 (Bankr. D. Or. 2012). *See In re* Grant, 423 B.R. 320, 321 (Bankr. S.D. Cal. 2010) (declining to decide whether it was bound by B.A.P. because it agreed with the B.A.P.'s result).

[301] *See* Pollard v. Superior Cmty. Credit Union (*In re* Pollard), 306 B.R. 637, 645 n.5 (Bankr. D. Minn. 2004) (non-*Brunner* jurisdiction) (granting student-loan discharge and finding that a "powerful personal computer and home Internet access" were "reasonably necessary" to the debtor and her dependent's maintenance because such expenses are "a *de facto* necessity for the maintenance of a middle-class lifestyle, even a modest one"); *see also* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 n.3 (B.A.P. 9th Cir. 2005) (reporting bankruptcy judge's statement that "I don't think it's the intent of Congress to force middle-class people into poverty in order to repay student loans"). The Bankruptcy Appellate Panel itself did reject that contention in *Howe*. *See* 319 B.R. at 889.

[302] *Cf.* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., *supra* note 38, at 2, § 1.01(c)(1)(A)(iii); *id.* at 13 (recommending that the *Brunner* test be interpreted so that the good-faith element is satisfied unless "the debtor has . . . acted in bad faith in failing to pay the loan prior to the bankruptcy filing"). Courts already find on occasion that, when the debtor is otherwise blameless, a "good-faith effort" to repay can be found even if the debtor has actually made no, or minimal, voluntary payments. *See, e.g.*, Hedlund v. Educ. Res. Inst., 718 F.3d 848, 852 (9th Cir. 2013); *id.* at 850, 853, 855 (finding that bankruptcy court did not err in finding that debtor acted in good faith where he had made reasonable efforts to maximize income and minimize expenses, even though his only voluntary payment on loans totaling $85,000 at the beginning of repayment was $950); Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 884 (9th Cir. 2006) ("[A] history of making or not making payments is, by itself, not dispositive . . . .").

[303] The standard proposed here is also consistent with the "totality-of-the-circumstances" test, the leading alternative to *Brunner*. This test has been described as "less restrictive" than *Brunner*. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003). The Eighth Circuit Bankruptcy Appellate Panel identified three factors that are evaluated in applying the totality-of-the-circumstances test: (1) the debtor's past, present, and future financial resources; (2) the debtor's and dependents' reasonably necessary living expenses, and (3) "any other relevant facts and circumstances." Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017). The court listed nine types of such "facts and circumstances" that "may be relevant to determining undue hardship": (a) total incapacity to pay for reasons beyond debtor's control; (b) good-faith effort to negotiate deferment or forbearance;

The Second Circuit is an example of a jurisdiction where the test here could be implemented under existing law, at least if one discounts *Brunner's* extravagant rhetoric and concentrates on the test it actually articulated and on subsequent decisions applying that test. It does not appear that any decision of the Second Circuit Court of Appeals forecloses application of the test proposed here.[304] Bankruptcy judges in that jurisdiction would therefore generally appear free to follow the suggestion presented here.[305] Indeed, the highly publicized *Rosenberg* decision of the Bankruptcy Court for the Southern District of New York, mentioned earlier,"certainty of hopelessness" standard,[306] which this Article criticizes but which some district courts in the circuit had embraced.[307]

To be sure, some courts may not be free to adopt the proposed test. In the Ninth Circuit, for example, the Bankruptcy Appellate Panel has flatly held that the "minimal standard of living" *Brunner* requires does not "equate to a middle class standard of living,"[308] and this ruling may bind bankruptcy courts in the Ninth Circuit.[309] More broadly, five circuits require the debtor to show a "certainty of hopelessness" that they can repay while maintaining a

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(c) whether hardship is long-term; (d) whether the debtor has made payments; (e) permanent or long-term disability; (f) ability to find employment in the field of study; (g) good-faith effort to maximize income and minimize expenses; (h) whether discharging the student loan is the dominant purpose of the bankruptcy; and (i) the ratio of student-loan debt to total indebtedness. *Id.* Evaluating whether the debtor is able to repay the debt in a reasonable time while maintaining a middle-class standard of living will involve analysis of factors (1) and (2), as well as 3(a)–(c), (e), and (f). Evaluating whether the debtor is a core opportunist involves analyzing factors 3(d) and 3(g)–(i).

[304] The assertion in the text is based on review conducted on January 31, 2020 of decisions of the Second Circuit Court of Appeals in LEXIS using the search "('student loan' or 'education loan' and 'undue hardship' and Brunner)."

[305] Some district court decisions in the Second Circuit are arguably inconsistent with the test proposed here. *See In re* Lozada, 604 B.R. 427, 436–37 (S.D.N.Y. 2019) (requiring a showing of "unique or exceptional circumstances" to meet *Brunner*'s additional-circumstances element and a showing that inability to pay arises from "factors beyond [the debtor's] reasonable control" to meet the good-faith element); Mossburg v. N.Y. State Higher Educ. Servs. Corp., No. 07-CV-6195, 2010 U.S. Dist. LEXIS 154893, at *8 (W.D.N.Y. March 31, 2010) (requiring "certainty of hopelessness" to satisfy additional-circumstances element of *Brunner*); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 29–30 (D. Conn. 2006) (requiring "certainty of hopelessness"). Whether these precedents bind bankruptcy courts in those districts is unclear. The stare decisis effect of district-court decisions on bankruptcy courts is unsettled as a general matter. *See* 18 MOORE'S FEDERAL PRACTICE § 134.02 n.22.1 (Matthew Bender ed., 3d ed. 2019). The Court of Appeals for the Second Circuit does not appear to have addressed the issue, although the District Court for the Western District of New York has claimed the authority to set binding precedent for bankruptcy courts. *See* Dorey v. Torsell, 229 B.R. 593, 597 (Bankr. W.D.N.Y. 1999).

[306] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), No. 18-35379, 2020 WL 130302, at *7 (Bankr. S.D.N.Y. Jan. 7, 2020).

[307] *See Mossburg*, 2010 U.S. Dist. LEXIS 154893, at *8; *Curiston*, 351 B.R. at 29–30 (requiring "certainty of hopelessness").

[308] *See* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005). At least one bankruptcy court in the Ninth Circuit seems to have pushed back a bit on the ruling in *Howe*. *See* Coplin v. U.S. Dep't of Educ. (*In re* Coplin), No. 13-46108, 2017 Bankr. LEXIS 4153, at *20 (Bankr. W.D. Wash. Dec. 6, 2017) (concluding that the minimal standard of living includes "some modest amount of diversion or recreation").

[309] *See supra* note 305.

minimal standard of living,[310] which seems inconsistent with the preponderance-of-the-evidence standard suggested here. Thus, replacement of *Brunner* in en banc sittings remains an important part of reform.

D. Support for Existing Proposals

It is important to stress again that the central point of this Article is that the overarching goals of the student loan program favor making discharge more readily available generally than it currently is. The Article has presented and defended its own blueprint for doing so. But analysis here of the student loan programs' purpose and its relevance to the undue-hardship standard is relevant beyond the specific proposal set forth in this Article. The arguments presented here provide additional support for many existing calls for leniency, support in addition to that which the authors of such calls themselves have offered. A few examples follow.

The recent report of the American Bankruptcy Institute Consumer Bankruptcy Commission calls for a finding of undue hardship if the debtor cannot maintain a reasonable standard of living while repaying the loan according to the initial contractual schedule (typically 10 years), as long as the debtor has not acted in bad faith in failing to repay.[311] The arguments in this Article, which are based on the purposes of the student loan programs, complement the ABI Commission's rationale for its recommendations, which does not rely on the overall purposes of the student loan programs and is by and large based on bankruptcy policy.[312]

The National Consumer Bankruptcy Rights Center (NCBC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) argued in the *Thomas* case discussed at the beginning of the Article that the *Brunner* test should reformulated to focus on whether the debtor will unable in the immediate, foreseeable future[313] to maintain a reasonable standard of living while repaying student loans.[314] As these entities note, their recommended approach is more lenient than that courts often follow.[315] NCBC and NACBA did not in their brief make reference to the overall purposes of the student loan programs, and consideration of those overall purposes strengthens their plea for mercy.

Finally, a group of bankruptcy scholars has recently put forth a proposal that the Department of Education consent to student-loan bankruptcy when

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[310] *See supra* note 265.

[311] *See* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., *supra* note 38, at 2.

[312] *See id.* at 6–15 (presenting justifications for Commission recommendations).

[313] *See* Brief of Amici Curiae National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys at 21, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019) (No. 18-11091).

[314] *See id.* at 18.

[315] *See id.* at 16 ("Courts requiring a 'certainty of hopelessness' or 'total incapacity' have simply strayed too far from the statute's plain meaning and its legislative history."); *id.* at 20 (noting that courts "often" adopt such requirements).

certain bright-line criteria are met.[316] The ABI Commission has advanced a similar idea.[317] These scholars propose to "ease the debtor's path to discharge" in such cases,[318] and taking the purpose of the student loan programs into account as suggested here provides further support for the proposition that such easing is appropriate.[319]

E. Summing Up: Inability to Repay While Maintaining a Middle-Class Standard of Living Should Make a Prima Facie Case of Undue Hardship

A borrower who can show an inability to repay student loans within a reasonable time while maintaining a middle-class standard of living should be deemed to have made a prima facie showing of undue hardship. This formulation draws support from the student loan programs' purpose of securing middle-class life for borrowers and from legislative acknowledgment that prolonged indebtedness causes hardship.

More broadly, the proposed test, properly applied, would foreclose unduly harsh applications of *Brunner* and thus more appropriately balance the overall goals of the student loan programs with the narrow purposes of the nondischargeability provision. The proposed test respects the latter goals by providing that opportunistic conduct within the first five years of repayment should bar discharge, thus preserving the anti-abuse purpose of the nondischargeability provision.

Because the test proposed focuses on the debtor's lifestyle during repayment, it does not capture all forms of hardship. In particular, it does not capture the risks and burdens posed by IDR programs, such as the risks that debt will not be cancelled as promised and that any cancellation will bring a hefty tax bill. Thus, if an IDR program would allow a borrower to maintain a middle-class lifestyle, courts should still balance the drawbacks of these programs against the likely monetary recovery from denying discharge on a case-by-case basis.

The test proposed here could be implemented as an interpretation of the *Brunner* test in some jurisdictions, such as the Second Circuit. In such jurisdictions lower courts and appellate panels can adopt the Article's proposal without rejecting *Brunner*. In other jurisdictions, appellate decisions have further restricted discharge under the *Brunner* test. Courts in such jurisdictions may not be able to follow this Article's suggestions absent an en banc rehearing to modify the circuit's gloss on *Brunner* or possibly to reject the *Brunner* test altogether.

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[316] *See* Bruckner et al., *supra* note 5, at 6-7; Jiménez et al., *supra* note 5, at 115.

[317] *See* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., *supra* note 38, at 8–10.

[318] *See* Bruckner et al., *supra* note 5, at 6.

[319] The desirability and legal foundation for bright-line rules such as those proposed by the scholars just mentioned are discussed in Hunt, *Consent*, *supra* note 5, at 22–29.

This Article offers an argument that the attention to the purposes of the student loan programs counsels a relatively lenient approach to bankruptcy discharge. This basic point is relevant beyond the specific formulation of undue hardship offered here and provides for support for other recent proposals for lightening the burden of student borrowers facing unmanageable debt.

Conclusion

The Bankruptcy Code's test for student-loan dischargeability, "undue hardship," is exceptionally open-ended and leaves almost limitless room for interpretation. In construing the provision, the *Brunner* court and many courts following it have considered how to promote the purposes of nondischargeability itself without considering the larger goals of the federal student loan programs.

The narrow construction of "undue hardship" that has resulted is badly out of balance. The empirical evidence indicates that constricting bankruptcy dischargeability deters higher education, particularly among low-income and some nonwhite groups of borrowers; distorts career choice; and harms students. An overly harsh undue-hardship standard thereby undermines the aims Congress sought to achieve in creating the federal student loan programs in the first place.

Thus, the prevailing interpretation of "undue hardship" should move in a more liberal direction. This Article suggests that undue hardship should be presumed to exist when a debtor cannot repay student loans in a reasonable time while maintaining a middle-class standard of living. This interpretation furthers the aims of the federal student loan programs. It encourages pursuing higher education and lower-income but socially worthwhile careers while mitigating the harm excessive debt inflicts on student borrowers. The Article's proposed interpretation also honors Congress's specific goals of using student loans to expand the middle class without imposing too long a repayment period.

To honor Congress's purposes in enacting nondischargeability, a party opposing discharge should be able to rebut the debtor's prima facie case of undue hardship by showing that the debtor is engaging in behavior that closely resembles the abusive conduct Congress feared: seeking discharge shortly after graduation and before embarking on a lucrative career the student loans made possible.

The availability of income-driven repayment (IDR) programs generally should not bar discharge if the debtor cannot lead a middle-class life while making the IDR payments. If, on the other hand, reduced payments under IDR would make a middle-class lifestyle possible, discharge should be evaluated on a case-by-case basis that takes account both of how the risks and burdens of IDR are likely to affect the particular debtor and of the debtor's income.

That the overall purposes of the student-loan programs favor a broad interpretation of undue hardship supports not just this Article's proposal, but also other recent proposals for reconceiving the statutory test. Regardless of the specific form change takes, some reformulation of "undue hardship" to protect excessively indebted student borrowers is long overdue.