Bankruptcy's Thalidomide: Repurposing a Defunct Family Law Doctrine to Address Student Loans in Bankruptcy

Weldon Sloan[*]

The American bankruptcy system needs a thalidomide—a creative and innovative solution to a nationwide crisis brought on by the widespread proliferation of student loan debt. This crisis has only been exacerbated by the inability of the current consumer bankruptcy regime to deal with what is increasingly becoming a larger and larger share of consumer debt. Partisan proposals have stagnated; a middle-way solution that stands a real chance of passing is desperately needed. This Note proposes just such a solution—an amendment to the Bankruptcy Code replacing the currently inadequate undue hardship standard with a standard for discharge based on the actual value added of higher education. This proposed rule, based on a defunct family law doctrine, looks to determine whether a debtor has achieved an "enhanced earning capacity" as a result of the education purchased with the loan. Creditors are only paid when they can show that their student loan actually increased the earning capacity of a debtor; otherwise, the loan will be automatically discharged. This results in a system which aligns the interests of debtors and creditors—creditors get paid back only when debtors are successful. The proposed rule harnesses this interest alignment and uses it to ensure that creditors have every incentive to help debtors succeed, providing debtors not only with a greater chance of discharge but also with a greater chance to avoid bankruptcy altogether. Just as thalidomide, a once-failed drug, has been repurposed to treat modern illnesses, so too can enhanced earning capacity be revived from family law's history books to solve the modern student loan crisis.

Introduction

For many, hearing the word "thalidomide" conjures up horrific images of one of the worst pharmaceutical scandals of the twentieth century. In the late 1950s and early 1960s, thalidomide burst onto the international medical scene as a sedative and quickly became an oft-prescribed solution for pregnancy-induced morning sickness.[1] Tragically, it was soon apparent that

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1. Bara Fintel, Athena T. Samaras & Edson Carias, *The Thalidomide Tragedy: Lessons for Drug Safety and Regulation*, HELIX (July 28, 2009), https://www.helix.northwestern.edu/2009/07/28/the-thalidomide-tragedy-lessons-for-drug-safety-and-regulation/ [https://perma.cc/7HMR-YRZH].

thalidomide use was inextricably linked to disastrous birth defects.[2] Worldwide there were over 10,000 cases of birth defects related to thalidomide, 40% of which ultimately resulted in infant deaths.[3] While the drug was never formally approved for use in the United States, the international scandal ultimately resulted in drastic changes to U.S. drug policy and internal shifts at the FDA.[4] In fact, the drug's failure so damaged the American psyche that Billy Joel referenced the scandal in *We Didn't Start the Fire*,[5] his 1989 hit that chronicled recent American history.

However, this drug, once seen worldwide as an example of pharmaceutical malpractice,[6] is now a major revenue stream for a U.S. drug company.[7] By the 1990s doctors had found new uses for the troubled drug[8] and at present, thalidomide is an FDA-sanctioned treatment for both leprosy and multiple myeloma.[9] But how did thalidomide experience such a drastic renaissance? The answer lies in "drug repurposing," a pharmaceutical practice of which thalidomide is today considered a "poster child."[10] Drug repurposing seeks to take advantage of the research and testing done on earlier drugs, whether successful or unsuccessful, and utilize that research and testing as a cost-saving mechanism for the creation of new drug

2. Michael Winerip, *The Death and Afterlife of Thalidomide*, N.Y. TIMES (Sept. 23, 2013), https://www.nytimes.com/2013/09/23/booming/the-death-and-afterlife-of-thalidomide.html [https://perma.cc/SE3D-HKUS].

3. Neil Vargesson, *Thalidomine-Induced Teratogenesis: History and Mechanisms*, 105 BIRTH DEFECTS RESEARCH (PART C) EMBRYO TODAY 140, 142 (2015); *see also* Nick Triggle, *Apology to Thalidomide Survivors*, BBC NEWS, http://news.bbc.co.uk/2/hi/health/8458855.stm [https://perma.cc/MZ7N-JTKV] (Jan. 14, 2010, 1:13 PM) (reporting that 2,000 babies were born with thalidomide-linked problems in the U.K. and half of them died within the first few months after birth); Marilyn T. Miller, *Thalidomide Embryopathy: A Model for the Study of Congenital Incomitant Horizontal Strabismus*, 89 TRANSACTIONS AM. OPHTHALMOLOGICAL SOC'Y 623, 630, 632 (1991), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1298636/pdf/taos00010-0642.pdf [https://perma.cc/3AMQ-UADU] (reporting that there were 10,000 embryos affected by thalidomide and the survival rate is thought to be between 40 and 70%).

4. Fintel, *supra* note 1.

5. BILLY JOEL, *We Didn't Start the Fire*, *on* STORM FRONT at 02:08 (Columbia Records 1989) ("Starkweather Homicide, Children of Thalidomide.").

6. *See* Triggle, *supra* note 3 (explaining that a manufacturer of the drug has paid out millions in legal battles in the U.K.).

7. Sarah Houlton, *Fit for Repurpose*, CHEMISTRY WORLD (Mar. 23, 2018), https://www.chemistryworld.com/news/fit-for-repurpose/3008789.article [https://perma.cc/CFE9-WUJ9].

8. Winerip, *supra* note 2.

9. Houlton, *supra* note 7.

10. Mahshid Rahmat, Romanos Sklavenitis Pistofidis & Irene M. Ghobrial, *Repositioning the Repurposed Drug, a Structural Study of Thalidomide Analogs*, HEMATOLOGIST (Apr. 11, 2019), https://ashpublications.org/thehematologist/article/doi/10.1182/hem.V16.3.9556/463096 /Repositioning-the-Repurposed-Drug-a-Structural [https://perma.cc/T9RA-BUCL].

protocols.[11] Indeed, drug repurposing has recently been heralded as a potentially useful mechanism for crafting COVID-19 treatments.[12] And just as a troubled drug may be repurposed to treat new conditions, so too may a legal doctrine, defunct in one setting, be rehashed and retailored to solve a fresh legal problem.

Today, it is American bankruptcy law that could use a thalidomide, an innovative solution pulled from another area of law to solve a pervasive problem. Specifically, the treatment of student loans in bankruptcy, an integral part of the nationwide student loan epidemic, yearns for a creative legislative solution. Indeed, both sides of the political aisle recognize this problem. The left advocates for treating student loans as typical unsecured debt in bankruptcy and for the mass cancellation of current student debt obligations.[13] The right, meanwhile, opposes radical reforms—preferring to focus on the unfairness and cost of reform and proposing targeted relief that would leave the Bankruptcy Code largely unchanged as an alternative.[14]

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11. *See generally* Sudeep Pushpakom, Francesco Iorio, Patrick A. Eyers, K. Jane Escott, Shirley Hopper, Andrew Wells, Andrew Doig, Tim Guilliams, Joanna Latimer, Christine McNamee, Alan Norris, Philippe Sanseau, David Cavalla & Munir Pirmohamed, *Drug Repurposing: Progress, Challenges and Recommendations*, 18 NATURE REVS. DRUG DISCOVERY 41 (2019), https://www.nature.com/articles/nrd.2018.168 [https://perma.cc/DMV8-GMQH] (discussing the advantages of drug repurposing).

12. Yadi Zhou, Fei Wang, Jian Tang, Ruth Nussinov & Feixiong Cheng, *Artificial Intelligence in COVID-19 Drug Repurposing*, 2 LANCET DIGIT. HEALTH e667, e667 (2020), https://www.thelancet.com/action/showPdf?pii=S2589-7500%2820%2930192-8 [https://perma.cc/GN67-XAF7].

13. Aarthi Swaminathan, *'The Bankruptcy System Is Broken' for Student Loan Borrowers, and Democrats Are Proposing a Reform Bill*, YAHOO! FINANCE (Dec. 9, 2020) [hereinafter Swaminathan, *'The Bankruptcy System Is Broken'*], https://finance.yahoo.com/amphtml/news/bankruptcy-system-student-loans-reform-bill-210233519.html?guccounter=1 [https://perma.cc/NC66-3TG9]; Aarthi Swaminathan, *Senator Warren: U.S. Bankruptcy System Is 'Fundamentally Wrong' on Student Debt*, YAHOO!FINANCE (Apr. 15, 2021) [hereinafter Swaminathan, *Senator Warren*], https://finance.yahoo.com/news/warren-bankruptcy-student-debt-161841090.html [https://perma.cc/VKP2-9W2C].

14. *See* Jonathan Nicholson & Jillian Berman, *No Income, No Student Loan Payment? GOP Proposal Draws Skepticism*, MARKETWATCH (July 28, 2020, 1:57 PM), https://www.marketwatch.com/story/no-income-no-student-loan-payment-gop-proposal-draws-skepticism-11595959043 [https://perma.cc/HTS5-MT8Z] (explaining one Republican proposal, which would not change the bankruptcy process); Kristyn Pilgrim, *Republican Party's 2020 Presidential Election Student Policy Guide*, COLLEGEFINANCE, https://collegefinance.com/student-loans/republican-partys-2020-presidential-election-student-policy-guide [https://perma.cc/RGF8-E68Z] (Aug. 31, 2020) (explaining how the Republican Party aims to address student loan debt, which does not include an overhaul of the bankruptcy system); Megan Leonhardt, *We Asked More Than 500 Congress Members About Student Loan Forgiveness—Here's What We Found*, CNBC (Apr. 22, 2021, 11:51 AM), https://www.cnbc.com/2021/04/22/student-loan-forgiveness-where-members-of-congress-stand.html [https://perma.cc/W6R5-3SKE] (reporting that the congressional Republicans surveyed did not support student loan forgiveness); Benjamin Fearnow, *Student Loan Debt 'Your Own Fault': Conservatives Blast Biden Forgiveness Proposals*, NEWSWEEK (Nov. 21, 2020, 7:22 PM), https://www.newsweek.com/student-loan-debt-your-own-

Given the distance between the two sides, a middle-way proposal that builds consensus is in order.

This paper identifies a defunct legal doctrine, innovated and abandoned in divorce law, which, when repurposed, could provide just such a middle-way solution: the valuation of college degrees by a student loan debtor's "enhanced earning capacity" (EEC). This endeavor begins in Part I with an examination of the student loan crisis and an explanation of the inadequacy of the current bankruptcy regime to remedy that crisis. Part II analyzes the history and machinations of a law, which, when repurposed, may aid in mitigating the crisis: the EEC method of degree valuation. Part III then proposes an amendment to the Bankruptcy Code, drawn from family law's EEC method of student loan valuation, and analyzes some of its positive and negative implications. Part IV examines the potential of the proposed amendment to serve as a middle-way, bipartisan solution to the student loan crisis, examining current partisan proposals and comparing them to the proposed amendment. A brief conclusion follows.

I. The Student Loan Crisis and Where the Bankruptcy System Falls Short

This Part looks at today's student loan crisis and examines bankruptcy's role in perpetuating it. Subpart I(A) analyzes the current problem with student debt, looking at its recent proliferation and the economic and social results of that proliferation. Subpart I(B) then demonstrates how the current bankruptcy process for discharging student loans has failed to aid or even mitigate that problem.

A. The Student Loan Problem

The rising tide of student loan debt is a nationwide catastrophe with far reaching economic and social implications. Recent data from the St. Louis Federal Reserve shows that the total burden of student loan debt nationwide has surpassed $1.7 trillion.[15] Even though relief provided by the CARES Act has positively affected default rates, it is estimated that approximately 15% of the over 43 million individual borrowers who owe student debt are

fault-conservatives-blast-biden-forgiveness-proposals-1549279 [https://perma.cc/5U7Z-D73D] (reporting that conservative politicians are generally against Biden's proposals for student loan forgiveness).

15. *Student Loans Owned and Securitized*, FED. RSRV. BANK ST. LOUIS: FRED, https://fred.stlouisfed.org/series/SLOAS [https://perma.cc/M5PX-RWXD] (Nov. 5, 2021) (providing updated statistics quarterly to reflect most recent data available).

currently in default.[16] However, this number likely fails to scratch the surface of debtors in crisis, for more than 56% of the debtors not already in default only recently left forbearance—meaning payments were not required until the beginning of 2022.[17] And the proliferation of student debt is unlikely to abate in the near future—while going to college has become more expensive, it has also become more potentially lucrative, with "college graduates earn[ing] 80% more than those with just a high school diploma, on average."[18] The result is more students who are increasingly willing to take on larger and larger debt obligations in order to reap the potential economic benefits of going to college.[19]

This vast pool of student loan debt has produced severe economic consequences. Initially, graduates carrying large student loan burdens may face pressure to take "lower-paying, lower-skill jobs just so they can start paying their loan bills right away."[20] As a result, young college graduates are increasingly less likely to purchase big ticket items, such as houses or cars, and may even be eschewing consumer credit in general[21]—leaving them to spend as if living in a perpetual recession.[22] These graduates are also increasingly less likely to start saving for retirement.[23] Finally, and perhaps most distressingly, at least one study has found that the increase in student

16. *See* Melanie Hanson, *Student Loan Default Rate*, EDUC. DATA INITIATIVE, https://educationdata.org/student-loan-default-rate [https://perma.cc/GE8B-KZRU] (July 10, 2021) (reporting that an average of 15% of student loans are in default at any given time); Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE [hereinafter Hanson, *Student Loan Debt*], https://educationdata.org/student-loan-debt-statistics [https://perma.cc/9FNY-XPTU] (Sept. 27, 2021) (reporting that "43.2 million student borrowers are in debt").

17. Hanson, *Student Loan Debt*, *supra* note 16.

18. Abigail Johnson Hess, *How Student Debt Became a $1.6 Trillion Crisis*, CNBC MAKE IT (June 12, 2020, 11:33 AM), https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html [https://perma.cc/TK7W-M5WE].

19. *Id.*

20. *The Far-Reaching Impact of the Student Debt Crisis*, SCHOLARSHIP AM., https://scholarshipamerica.org/blog/the-far-reaching-impact-of-the-student-debt-crisis/ [https://perma.cc/L8RE-YK49] (Jan. 2021).

21. Rebecca Lake, *Student Loan Debt Crisis Breakdown*, BALANCE, https://www.thebalance.com/student-loan-debt-crisis-breakdown-4171739 [https://perma.cc/J9LZ-GQQU] (May 10, 2021).

22. *Cf. The Impact of Student Loan Debt on the Economy*, SOFI: LEARN (Nov. 13, 2020), https://www.sofi.com/learn/content/impact-of-student-loan-debt/ [https://perma.cc/V6RP-SHMV] (noting that "[if] someone is struggling to pay off their student loans, they'll have less money to spend on purchases that help fuel the economy," which can be harmful in periods of economic recession).

23. *Cf.* Christopher Ingraham, *7 Ways $1.6 Trillion in Student Loan Debt Affects the U.S. Economy*, WASH. POST (June 25, 2019), https://www.washingtonpost.com/business/2019/06/25/heres-what-trillion-student-loan-debt-is-doing-us-economy/ [https://perma.cc/8HCR-JCW3] (explaining that "[s]tudent loan debt is preventing young people from saving for retirement").

debt has led to a decline in entrepreneurship and a stagnation of small business growth.[24]

However, these serious economic detriments are not the only consequences of the student loan crisis—for it has also contributed to serious social problems. For example, a recent survey found that 56% of graduates "aged 18 to 29 have put off major life events like getting married" as a result of their student loan debt.[25] Similarly, young people are waiting longer to start families—with the birth rate for women in their twenties now "at a record low."[26] There is also ample evidence that rising levels of student debt have exacerbated racial inequality—the "racial wealth gap is both the biggest and has grown the fastest among those with a college education."[27] Similarly, evidence shows that the student debt crisis has disproportionately affected women, who hold approximately 64% of outstanding student debt despite being only around half of the body of former college students.[28]

B. *Bankruptcy's Inadequate Treatment of Student Loans*

The current bankruptcy system has only exacerbated the student loan crisis. Given the widespread proliferation of student debt and the relatively common occurrence of consumer bankruptcy,[29] one might assume that student loans are some of the most commonly discharged debts in consumer bankruptcy. But investigation reveals that of the more than 250,000 student loan debtors who annually seek bankruptcy, only about three hundred actually receive discharge of their student loans.[30] Indeed, in 2019, fewer than

24. *See generally* Brent W. Ambrose, Larry Cordell & Shuwei Ma, *The Impact of Student Loan Debt on Small Business Formation* (Rsch. Dept., Fed. Rsrv. Bank of Phila., Working Paper No. 15-26, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633951# [https://perma.cc/L2EX-SG2F] (finding that "an increase of one standard deviation in student debt reduced the number of businesses with one to four employees by 14% on average between 2000 and 2010").

25. Tom Anderson, *Debt-Locked: Student Loans Force Millennials to Delay Life Milestones*, NBC NEWS: BETTER BY TODAY (Aug. 5, 2015, 1:14 PM), https://www.nbcnews.com/better/money/debt-locked-student-loans-force-millennials-delay-life-milestones-n404636 [https://perma.cc/2Z7M-HCQQ].

26. Kelley Holland, *The High Economic and Social Costs of Student Loan Debt*, CNBC (June 15, 2015, 4:52 PM), https://www.cnbc.com/2015/06/15/the-high-economic-and-social-costs-of-student-loan-debt.html [https://perma.cc/4BEP-P4BH].

27. Annie Nova, *The Student Debt Crisis Has Hit Black Students Especially Hard. Here's How*, CNBC (July 27, 2019, 10:36 AM), https://www.cnbc.com/2019/07/27/how-the-student-debt-crisis-has-hit-black-students-especially-hard.html [https://perma.cc/QSL6-WHJZ].

28. AAUW, DEEPER IN DEBT: WOMEN AND STUDENT LOANS 35–36 (2017), https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf [https://perma.cc/4SWV-EFK9].

29. *See* Ron Lieber & Tara Siegel Bernard, *For Millions Deep in Student Loan Debt, Bankruptcy Is No Easy Fix*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2020/11/07/your-money/student-loans-bankruptcy.html [https://perma.cc/N44T-NKZY] ("Bankruptcy gives over 700,000 debtors a fresh start every year.").

30. Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 498 (2020).

three hundred debtors even sought discharge of their student loans—less than 1% of eligible filers.[31] This trepidation on the part of student loan debtors to even ask for student loan discharge is a striking example of how difficult a standard of discharge is currently in place for student loans.

At present, U.S. bankruptcy law states that student loans are only dischargeable if "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[32] However, the Bankruptcy Code makes no effort to define "undue hardship," apparently leaving that definition up to the federal judiciary.[33] Of course, the courts have obliged in providing a myriad of definitions, resulting in two competing tests for what constitutes undue hardship.

The first test represents the minority view—only followed in the First and Eighth Circuits—known as the "totality of the circumstances" test.[34] This test asks bankruptcy courts to consider the following factors before granting discharge: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[35] The Eighth Circuit has effectively reduced the test to the following maxim: "if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged."[36] In making this determination, courts have looked to "the effect of discharge or nondischarge of the student loan debt upon the mental health of the debtor, physical conditions that impair the debtor's ability to maintain employment, and a debtor's good faith or bad faith effort to repay the loan."[37]

31. *See id.* at 525–26 (finding that in 2019 only 273 bankruptcy filers with student loan debt sought adversary proceedings even though approximately 64,000 filers with student loan debt were eligible to discharge their student loan debt).

32. 11 U.S.C. § 523(a)(8).

33. Terrence L. Michael & Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 74 (2005).

34. *See Student Loan Bankruptcy*, CAPPEX, https://www.cappex.com/articles/money/student-loan-bankruptcy [https://perma.cc/D252-D3HA] (explaining that the Eighth Circuit follows the totality of the circumstances test); *Student Loans Discharged Under Totality-of-Circumstances Test*, NAT'L CONSUMER BANKR. RTS. CTR. (May 29, 2018), https://www.ncbrc.org/blog/2018/05/29/student-loans-discharged-under-totality-of-circumstances-test/ [https://perma.cc/2R92-Q463] (noting that the First Circuit has used the totality of the circumstances test on two recent occasions).

35. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

36. *Id.* at 554–55.

37. Michael & Phelps, *supra* note 33, at 84 (footnotes omitted).

The second test, followed in every other circuit,[38] is derived from a 1987 Second Circuit case, *Brunner v. New York State Higher Education Services Corp.*[39] The so-called "*Brunner* Test" has been rearticulated numerous times but is generally formed of the same three prongs originally articulated in *Brunner*, requiring that each of the following be shown in order to indicate undue hardship: "(1) that the debtor cannot maintain . . . a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that . . . this state of affairs is likely to persist . . . and (3) that the debtor has made good faith efforts to repay the loans."[40] While these prongs are generally applied quite strictly (as is demonstrated below), the Tenth Circuit has articulated an additional favor towards "fresh start" that should be embodied in the test, stating quite clearly that "debtors who truly cannot afford to repay their loans may have their loans discharged."[41]

In so doing, the Tenth Circuit rejected what many view as the most onerous wrinkle of the bankruptcy's treatment of student loans—the so-called "certainty of hopelessness" requirement.[42] This feature, found in both totality of the circumstances and *Brunner* Test jurisdictions,[43] requires that a debtor show that both in the "present and in the foreseeable future, . . . the expectation of repayment is virtually non-existent, unless by that effort the bankrupt strips himself of all that makes life worth living."[44]

These standards have generated fierce criticism. Scholars, professionals, students, and debtors alike have criticized elements of each of the tests implemented to determine undue hardship. Additionally, there is an ever-increasing body of writing that decries the undue hardship test in and of itself and criticizes the ability of the current regime to deal with contemporary levels of student debt. Indeed, even President Biden's Justice Department has asked the Supreme Court to deny an appeal criticizing the undue hardship standard because "the Department of Education is evaluating whether to relax

38. CAPPEX, *supra* note 34.

39. 831 F.2d 395 (2d Cir. 1987).

40. *Id.* at 396. It should also be noted that courts in totality of the circumstances jurisdictions also utilize these specific factors, in addition to many more, in assessing whether student debt should be discharged. *See, e.g.*, Faktor v. United States (*In re* Faktor), 306 B.R. 256, 264 (Bankr. N.D. Iowa 2004) (explaining that while the Eighth Circuit has rejected the *Brunner* test, the factors in the *Brunner* test could arguably be "one circumstance among the totality of circumstances").

41. Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

42. *See, e.g.*, Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), https://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html [https://perma.cc/PT7D-B2JA] (explaining that the certainty of hopelessness requirement is often difficult to meet).

43. G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1833 (2014).

44. Barrows v. Ill. Student Assistance Comm'n (*In re* Barrows), 182 B.R. 640, 648 (Bankr. D.N.H. 1994).

the government's stance on when borrowers should be able to discharge student loans."[45] Examples of such criticisms are examined in turn below.

One of the most scrutinized elements of this regime is the incredibly stringent certainty of hopelessness requirement. It requires debtors to show, with certainty, that their future prospects are so dire as to foreclose the possibility of repayment.[46] This puts debtors in the awkward position of advocating for their own future ineptitude and forces judges to become something like fortune tellers.[47] One bankruptcy attorney articulated the difficulty of proving this requirement quite well, saying: "What I say to the judge is that as long as we've got a lottery, there is no certainty of hopelessness . . . . They smile, and then they rule against you."[48]

Debtors are likely to face an even more invasive inquiry from the court when forced to prove that they cannot afford a "minimal standard of living." Debtors report that their daily budgets have been heavily scrutinized by bankruptcy judges, with one judge apparently finding that lunch purchases of less than $15 at chain restaurants were "excessive"—effectively saying that those who can afford a $12 lunch at Olive Garden are well above a minimal standard of living.[49] Indeed, the case law reveals that such banalities as cell-phone service, cable television, and dry-cleaning services are expenses that exceed a minimum standard of living,[50] and some courts have even found religious tithing to be beyond a minimal standard of living.[51] The indication of many bankruptcy courts seems to be that debtors seeking an undue hardship discharge must find the least expensive alternative to their every expense—including housing.[52] Worse, even if a debtor is lucky enough to have her loans discharged, she may face a subsequent creditor challenge to that discharge if she later achieves a minimal standard of living.[53]

45. Jonathan Randles, *Biden Administration Urges Supreme Court to Pass on Student-Loan Bankruptcy Case*, WALL ST. J.: PRO BANKRUPTCY (May 10, 2021, 5:21 PM), https://www.wsj.com/articles/biden-administration-urges-supreme-court-to-pass-on-student-loan-bankruptcy-case-11620681713 [https://perma.cc/4SRK-SVG5]. Ultimately, the Supreme Court declined to take up the case. McCoy v. United States, 141 S. Ct. 2794, 2794 (2021) (mem.).

46. Bedinger, *supra* note 43, at 1825–26.

47. *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004) (criticizing the degree of speculation required by the certainty of hopelessness requirement).

48. Lieber & Bernard, *supra* note 42.

49. Lieber & Siegel Bernard, *supra* note 29.

50. Samantha Alfano, Research Memorandum, *The High Burden of a "Minimal Standard of Living" Under the First Prong of the* Brunner *Test*, 12 ST. JOHN'S BANKR. RSCH. LIBR., no. 2, 2020, https://www.stjohns.edu/sites/default/files/2020-07/Alfano_Memo_2.pdf [https://perma.cc/9JFZ-MULJ].

51. KEVIN M. LEWIS, CONG. RSCH. SERV., R45113, BANKRUPTCY AND STUDENT LOANS 14 (2019).

52. Perkins v. Pa. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 307–09 (Bankr. M.D.N.C. 2004) (scrutinizing the amenities at the debtor's current apartment complex and proposing a drastically reduced monthly budget for virtually all personal expenses).

53. Lieber & Siegel Bernard, *supra* note 29.

These difficulties demonstrate why so few debtors are able to secure student loan discharge each year. And while it may seem that those debtors in totality of the circumstances jurisdictions might fare better than those in *Brunner* Test jurisdictions, it appears that debtors face similarly poor chances of discharge under either test.[54] Furthermore, the problem is that the undue hardship test, no matter how interpreted, will never offer a sufficient solution to the student loan problem—there are just too many debtors holding too much debt.[55] The next Part looks at a defunct family law doctrine of college-degree valuation which can aid in providing a viable alternative to the current bankruptcy regime.

II. Bankruptcy's Potential Thalidomide: Enhanced Earning Capacity at Divorce

Bankruptcy is not the only area of the law that has struggled to deal with student loans. Throughout the twentieth century, state family law courts, in the face of increasing rates of both higher education and divorce, began to encounter what would eventually be called the "student spouse/working spouse" problem.[56] Essentially, the problem arises when one spouse works to support the other spouse's education. When the couple ultimately divorces, the working spouse argues that the student spouse's education should be considered a marital asset for purposes of property division. This, of course, presents a problem of valuation—a college degree is after all not a traditional piece of property with an ascertainable resale value. A few states, most notably and most prolifically New York, solved this problem by valuing the degree according to the student spouse's "enhanced earning capacity."[57] Enhanced Earning Capacity (EEC) refers to the difference in the student spouse's projected earnings before and after earning the degree.[58] This difference is then multiplied by the student spouse's projected remaining professional life and added in lump-sum form to the marital estate for

54. *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) ("[T]he totality of circumstances test better considers the debtor's situation in light of 'fresh start' policies . . . . [but does] not necessarily . . . [avoid] the harshness of the *Brunner* analysis." (citations omitted)).

55. Kevin J. Smith, *The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?*, 32 GA. ST. U. L. REV. 603, 637–38 (2016).

56. *See* Joel R. Brandes, *The Demise of 'O'Brien': Student/Working Spouse Equitable Distribution*, N.Y.L.J. (Sept. 15, 2020, 1:56 PM), https://www.law.com/newyorklawjournal/2020/09/15/the-demise-of-obrien-studentworking-spouse-equitable-distribution/ [https://perma.cc/TNQ4-7R9P] (discussing the emergence of the "student spouse/working spouse problem").

57. *See infra* notes 60–66 and accompanying text.

58. O'Brien v. O'Brien, 489 N.E.2d 712, 717 (N.Y. 1985).

distribution.[59] This Part examines New York's example as the most prolific utilizer of the EEC method of valuation and tracks how it fell into disfavor in the family law setting—initially in other states but eventually in New York as well.

A. EEC's Early Popularity in New York

In 1985 the New York Court of Appeals announced what would become the most prolific example of the EEC method of valuation for professional licenses and college degrees in *O'Brien v. O'Brien*.[60] The case featured a wife who financially supported her husband while he was obtaining his medical degree and license.[61] Indeed, Mrs. O'Brien worked full time in various jobs, maintained the home, and moved across the North American continent in order to support Dr. O'Brien's education.[62] The court ultimately found that Dr. O'Brien's medical license was a marital asset ripe for equitable distribution at divorce.[63] In so doing, the court held that the value of the license should be measured by any EEC it afforded Dr. O'Brien:

> [The license's] value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice for purposes of a distributive award, something the courts have not hesitated to do.[64]

The court implemented this method of valuation by computing the difference between Dr. O'Brien's projected future earnings as a surgeon and the average earnings of a typical college graduate, reducing that amount to its present value, and adding that sum to the couple's marital property eligible for distribution.[65] Within three years of the *O'Brien* decision, the New York Court of Appeals confirmed that the same principles of valuation applied to any degree that led to an increase in spousal earning capacity—not only those that led to professional licenses.[66]

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59. Schiffmacher v. Schiffmacher, 801 N.Y.S.2d 848, 849 (App. Div. 2005).

60. 489 N.E.2d 712 (N.Y. 1985).

61. *Id.* at 713–14.

62. *Id.*

63. *Id.* at 715.

64. *Id.* at 718.

65. *Id.* at 714.

66. *See generally* McGowan v. McGowan, 535 N.Y.S.2d 990 (App. Div. 1988) (using the O'Brien method of valuation to a teacher certificate and master's degree); *see also* Cozza v. Colangelo, 747 N.Y.S.2d 641, 644 (App. Div. 2002) (applying the *O'Brien* EEC method of valuation to an undergraduate degree).

B. EEC's Drawbacks and Ultimate Demise

While New York's use of this system lasted somewhat successfully for more than thirty years, it has remained in the minority when it comes to the status of degrees as marital property. The chief objection to the EEC method of valuation was effectively summarized by a Florida court of appeals: "[A]n educational degree is not an asset subject to distribution because its value, as measured by future earning capacity, is too speculative to calculate."[67] Similarly, the Supreme Court of Colorado in an oft-quoted opinion rejected the notion that a degree is property at all:

> An educational degree . . . is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. . . . It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property.[68]

Additionally, some scholars and practitioners have questioned whether the EEC method of valuation is fundamentally fair. Walter F. Bottger, a longtime fixture of the New York Bar,[69] opined that, under *O'Brien*, "the degree holder [is forced] to continue his or her present career, while the recipient spouse is free and financially enabled to do whatever he or she wishes."[70] Mr. Bottger also argued that the EEC method of valuation fails to adequately take into account degrees which may have value in general but actually present no value to the degree holder (like a medical doctor's unused MBA); results in wildly disparate values for the same degree based on individual effort; and fails to take into account the possibility of a future health or career disaster for the student spouse.[71]

It appears that these criticisms have been heard—in 2015 New York abrogated *O'Brien*'s holding by statute. The current law in New York prevents courts from considering a college degree as marital property but does allow a working spouse to argue that the working spouse's contributions to a student spouse's education should be considered in the court's

67. Hughes v. Hughes, 438 So. 2d 146, 149 (Fla. Dist. Ct. App. 1983).

68. *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978).

69. *See Walter F. Bottger*, BERKMAN, BOTTGER, NEWMAN & SCHEIN, LLP, https://www.berkbot.com/attorney-profiles/walter-f-bottger/ [https://perma.cc/K7XH-V5TG] (describing Mr. Bottger's esteemed history as a preeminent New York attorney).

70. Walter F. Bottger, *Bedtime for Doctor* O'Brien, NYSBA FAM. L. REV., Fall 2011, at 11, 12, https://www.berkbot.com/wp-content/uploads/2019/12/FamLRFall11-1.pdf [https://perma.cc/54K8-YQPK].

71. *Id.*

distribution of other assets or award of maintenance.[72] The next Part advocates for the use of an *O'Brien*-like EEC valuation of college degrees in bankruptcy—and in so doing addresses the concerns and criticisms of the method outlined above.

III. Using EEC to Bolster Bankruptcy's Response to the Student Loan Crisis

Family law's EEC method of degree valuation can be redeemed and put to new use in the bankruptcy setting. The current regime's inability to adequately address the student loan crisis should be replaced with a rule for discharge that takes the burden off of student borrowers and places an emphasis on the actual *value added* of the degree obtained.[73] This Part proposes such a rule, provides situations pulled from New York family law cases as examples for how the rule should be implemented, and anticipates the positive and negative implications of implementing the rule.

A. The Proposed Rule

The proposed rule is simple to define and implement. It serves as a complete replacement for the undue hardship standard currently in place and instead entitles student loan creditors to an equitable portion of the enhanced earning capacities (EECs) of student loan debtors. In so doing, it operates to give student loan creditors something like a security interest in the higher education of student loan debtors—in effect, tying a student loan creditor's repayment in bankruptcy to the ability of a debtor's higher education to meet and retain the value of the loans that funded it. Additionally, under the proposed rule, student loans carry an initial, but rebuttable, presumption of discharge. This shifts the burden of proof from debtors to creditors—replacing the current burden on debtors to prove their "certainty of hopelessness" with a burden on creditors to prove that debtors have achieved an EEC as a result of their degrees. And finally, the proposed rule encourages an ongoing partnership between creditors and debtors. The proposed rule is set out in the example subsection provided below:

72. Brandes, *supra* note 56.

73. Professor Daniel A. Austin has argued for something similar, a system which discharges all but the "fair market value" of the student loan creditor's claim against the debtor. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 417–18 (2013).

§ 523(f). Discharge of Student Loans

(A) Qualified education loans, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, are presumed dischargeable in any consumer bankruptcy.

(B) A creditor holding such a loan may rebut this presumption by showing that the educational loan was integral to the debtor's achievement of an Enhanced Earning Capacity.

(i) To make such a showing, the creditor must demonstrate that, as a result of the educational loan, the debtor's projected future earning capacity has increased from what the debtor's earning capacity would have been without the benefit of the loan.

(ii) The debtor may counter such a showing by demonstrating that the entirety or a portion of the Enhanced Earning Capacity was accomplished solely through means outside of the loan.

(C) If the creditor makes such a showing, it will be entitled to an equitable share of any benefit the debtor takes from the Enhanced Earning Capacity.

(i) The creditor is entitled to an equitable portion of the difference between any future earnings and the debtor's projected earnings without the benefit of the loan.

(ii) A portion of this difference will only be equitable if it allows for the debtor to maintain a reasonably expected standard of living based on the debtor's total earnings and other liabilities.

(D) Either party may make a subsequent motion to seek a new determination of the debtor's Enhanced Earning Capacity or to recalculate the creditor's equitable portion of the debtor's earnings based on a change in the debtor's circumstances.

This example subsection would replace the undue hardship rule as the means for excepting student loans from discharge. Accordingly, the current § 523(a)(8) would be removed, and this new subsection would be appended to the end of § 523. The first key to the proposed subsection, expressed in § 523(f)(A), is its presumption that student loans are dischargeable. Section 523(f)(B) then mandates a creditor prove a debtor's EEC to rebut this presumption and place the burden back on the debtor to show that her EEC is not a result of the educational loan. Next, § 523(f)(C) sets out what a student loan creditor may recover from a debtor: an equitable portion of her EEC.[74] Finally, § 523(f)(D) allows either party to seek a new finding on the

74. This "equitable portion" standard thus serves as a sort of replacement for the minimal standard of living standard from the undue hardship rule. Much ink has been spilt on this subject, with many arguing for a simple raise of the minimal standard of living to a standard that reflects a

debtor's EEC, just as a creditor may seek a determination of whether the debtor has surpassed a minimal standard of living subsequent to a loan discharge under the undue hardship standard.[75]

To illustrate the proposed rule's functionality, consider the following example taken from a family law case decided under the EEC rule in New York. In 2013, a New York appellate court considered the divorce proceedings of the McCaffrey couple.[76] A chief point of contention in the case was the two college degrees earned by Mr. McCaffrey during the marriage—an Associate's degree in telecommunications and a Bachelor's degree in business administration.[77] Unsurprisingly, Mr. McCaffrey argued that these degrees did not give him an EEC while Mrs. McCaffrey claimed the opposite.[78]

The court relied on a variety of evidence in concluding that Mr. McCaffrey's degrees had produced an EEC with a present-day value of more than $200,000.[79] The evidence included a performance review of Mr. McCaffrey that praised his ability to utilize his degrees and several applications for promotions on which he included his degrees.[80] Additionally, Mr. McCaffrey produced two coworkers as witnesses who testified that his promotions were "mostly attributable to his superior job performance."[81] However, the court noted that "neither witness testified that his degrees were not a factor in his promotions."[82] Ultimately the court relied on the couple's jointly retained consultant, who "opined that the value of the enhanced earnings attributable to the husband's degrees . . . was $204,000."[83]

Applying these facts to the proposed bankruptcy rule is rather simple. Assume that instead of commencing a divorce proceeding Mr. McCaffrey has declared bankruptcy—and owes $20,000 in student loans to Education Financing Bank (EFB). Under the proposed rule Mr. McCaffrey's student loans would be presumed dischargeable, but EFB decides to initiate an

middle-class lifestyle. *See* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 176–78 (1996) (arguing that "[a]llowing student loan debtors to live within the middle class is ultimately consistent with the purpose of preserving the solvency of student-loan programs"). This leaves questions regarding what an equitable portion of an EEC might look like in practice as compared to a minimal standard of living. Unfortunately, further discussion of this issue is beyond the scope of this Note.

75. *See* Lieber & Siegel Bernard, *supra* note 29 (explaining that creditors can seek additional proceedings after the debt is discharged to see if the debtor exceeds a minimal standard of living).

76. McCaffrey v. McCaffrey, 967 N.Y.S.2d 162, 165 (App. Div. 2013).

77. *Id.* at 167.

78. *Id.*

79. *Id.* at 168.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

adversary proceeding to show that the debt should not be discharged. EFB goes to court and presents Mr. McCaffrey's performance review and his applications for promotions, tending to show that Mr. McCaffrey's current earnings are the product of an EEC produced by his college degrees. Mr. McCaffrey follows by presenting the testimony of his coworkers, and both parties might present expert testimony regarding the influence of Mr. McCaffrey's degrees on his earnings.

Assuming the bankruptcy court weighs the evidence like the New York appellate court did, EFB will successfully show that Mr. McCaffrey is the beneficiary of an EEC attributed to his college degrees. Accordingly, the court will make a finding as to Mr. McCaffrey's anticipated earning capacity without the benefit of the degrees, utilizing either expert testimony or publicly available data,[84] and subtract it from his current earnings. The court will then make a determination of Mr. McCaffrey's reasonably expected standard of living and use these numbers to compute EFB's equitable share of Mr. McCaffrey's earnings going forward—ordering Mr. McCaffrey to pay this amount out of each paycheck until the $20,000 loan is repaid. Of course, if Mr. McCaffrey's earnings are substantively changed, either party may then go back to the court and ask for a recalculation based on the new information.

It will also be advantageous to consider a contrary example. In a 2008 case, the same New York appellate court considered the divorce of a Mr. and Mrs. Evans.[85] Mr. Evans had obtained an engineering degree during the course of the marriage, and a principle point of contention during the divorce was whether this degree had resulted in an EEC for Mr. Evans.[86] Mr. Evans presented an expert witness (a certified public accountant), who testified that "whatever promotions [Mr. Evans] obtained during his employment were likely the product of his professional competence and would have occurred 'even if [Mr. Evans] had not obtained the [d]egree'" and that he could have attained his current position without the benefit of his degree.[87] The court ultimately agreed with Mr. Evans and held that the degree had not resulted in an EEC.[88]

84. *See, e.g.*, TIFFANY JULIAN & ROBERT KOMINSKI, U.S. CENSUS BUREAU, ACS-14, EDUCATION AND SYNTHETIC WORK-LIFE EARNINGS ESTIMATES 2–3 (2011), https://www2.census.gov/library/publications/2011/acs/acs-14.pdf [https://perma.cc/K6TV-UQJM] (providing data on the annual earnings by level of education); *Industries at a Glance*, U.S. BUREAU LAB. STAT., https://www.bls.gov/iag/home.htm [https://perma.cc/8EC9-R9DQ] (providing a list of industry links to regularly updated statistical data on the average wages of workers in each industry).

85. Evans v. Evans, 866 N.Y.S.2d 788, 789 (App. Div. 2008).

86. *Id.*

87. *Id.* at 790.

88. *Id.*

Again, assuming Mr. Evans is engaged in a bankruptcy dispute with EFB rather than a divorce, EFB starts an adversary proceeding in order to rebut the proposed rule's presumption of student debt discharge. Mr. Evans then responds with the testimony of his expert, attempting to combat EFB's argument. Assuming that the bankruptcy court again follows the reasoning of the New York appellate court, the bankruptcy court would find that Mr. Evans's degree did not give him an EEC and would order the debt discharged.

Importantly, EFB's arguments would have to be tied to Mr. Evans's actual earnings, not what he might have earned if he utilized the engineering degree to its full potential. For example, in an exceedingly similar case a New York supreme court ruled that a husband's engineering license could create an EEC only to the extent to which the license was used.[89] At trial, an expert testified that the husband's EEC, on the basis of his "actual earning history," was $18,400, but that the EEC of a typical professional engineer with the husband's background would have been $296,000.[90] Critically, the court held that the fact that the husband's "career may not have been the most remunerative course available to him as a professional engineer does not . . . require that his actual situation be ignored in determining the value of the license."[91] The same is true under the proposed rule—student loan debtors only achieve an EEC when it is reflected in their actual earnings—thereby mitigating concerns regarding any potential career or health disaster lurking in the student loan debtor's future.

B. Positive Implications of Adopting the Proposed Rule

The above examples demonstrate the administrability of the rule and prove illustrative of the proposed rule's positive implications. First, enacting the proposed rule would increase the number of student loans discharged and thereby reduce the social and economic strains produced by the student loan crisis. Second, the proposed rule would allow the higher-education market to derive the benefits of creditor control and influence over student incentives both before and during college. And finally, enacting the proposed rule would align creditor and debtor incentives after college.

The most apparent benefit to the proposed rule, as opposed to the current undue hardship standard, is that it will unquestionably result in more student loans being discharged. Just by starting with a presumption that student loans are dischargeable rather than nondischargeable, the proposed rule would guarantee a rate of success higher than the 0.1% currently achieved by student

89. Fanelli v. Fanelli, 740 N.Y.S.2d 823, 825–26 (Sup. Ct. 2002).
90. *Id.* at 825.
91. *Id.* at 826.

loan debtors in bankruptcy.[92] This shifting of the burden—requiring creditors to prove an EEC rather than requiring debtors to prove a certainty of hopelessness—also shifts the initial costs of litigation to creditors. It follows then that creditors will only pursue proving an EEC for debtors with loan values great enough to justify the cost of going to court. Tens of millions of lower value loans in the current marketplace[93] are thus ripe to be discharged without even being challenged by creditors. Similarly, creditors are only likely to challenge discharge for those debtors who bring in enough income to support a reasonable chance of repayment of the loan. Given that almost 70% of those who file for consumer bankruptcy list "income loss" as a primary reason for filing[94] and that more than 90% of filers earn less than $60,000 per year,[95] most debtors will probably be insulated from an EEC challenge by the very financial circumstances which led them into bankruptcy.

The proposed rule also betters the current system by placing creditors in a position of control *ex ante*—before the debtor even goes to college in the first place. Professor Robert J. Mann has noted that one of the primary benefits of secured lending is that it allows secured creditors to mitigate incentive problems for debtors.[96] While the proposed rule does not grant a security interest to student loan creditors, it does give creditors something like a security interest in the EECs of student loan debtors—granting them a partial stake in the debtor's degree along with the means for a sort of repossession of the debtor's EEC in bankruptcy. Accordingly, it also gives student loan creditors the ability to mitigate some incentive problems both for student loan debtors and, maybe more importantly, for *potential* student loan debtors.

To illustrate, under the proposed rule, student loan creditors are incentivized to put potential student loan debtors in the best position to succeed financially. Because their returns will be directly tied to student debtors' potential to gain EECs, student loan creditors will be more likely to

92. *See* Iuliano, *supra* note 30 (reporting that only 0.1% of student loan debtors who file for bankruptcy successfully discharge their student loan debt).

93. Indeed, the majority of student loan debtors in America owe less than $20,000 dollars in student loans, 7.2 million of which owe less than $5,000. *Portfolio by Debt Size*, FED. STUDENT AID, https://studentaid.gov/data-center/student/portfolio [https://perma.cc/A2HR-VV6G] (click "Portfolio by Debt Size" to download the spreadsheet providing the relevant data).

94. *Bankruptcies Dropping Among Young, but Growing for Seniors*, KTEN (Aug. 28, 2014, 3:10 AM), https://www.kten.com/story/38973805/bankruptcies-dropping-among-young-but-growing-for-seniors [https://perma.cc/JVH7-FNAG].

95. Lyle Daly, *Personal Bankruptcy Statistics for 2020*, ASCENT (Mar. 24, 2020), https://www.fool.com/the-ascent/research/personal-bankruptcy-statistics/ [https://perma.cc/J38E-9WKZ].

96. Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 649–50 (1997).

provide debt only to students who are put in a position to succeed financially.[97] Student loan creditors are better equipped to determine when an educational opportunity represents a good investment than are potential student loan debtors.[98] They carry the institutional knowledge of major banks along with the best data available on educational outcomes—mostly because the chief student loan creditor today is the U.S. government.[99] Allowing student loan creditors to wield this power to shape incentives will decrease the amount of credit available for students enrolling in for-profit colleges, colleges with abysmally low graduation rates, and colleges that produce the worst debt-to-income ratios in their graduates. Given the vastly disproportionate rate at which such institutions contribute to the student loan crisis,[100] limiting the credit available at such institutions may do as much to mitigate the student loan problem as promoting a greater rate of student loan discharge.

An obvious question implicated by the proposed rule is whether it will undercompensate student loan creditors for the large number of student loans taken out by debtors who never actually earn a degree.[101] However, national data does indicate that the median earnings of individuals with some college experience but no degree is higher than that of individuals with only a high

97. Secured creditors already do this sort of analysis by providing more credit more cheaply to debtors with higher credit scores. *See, e.g.*, Michelle Fox, *To Get a Low Mortgage Rate, Your Credit Score Matters*, CNBC (Apr. 30, 2021, 11:26 AM), https://www.cnbc.com/2021/04/30/how-to-boost-credit-score-low-mortgage-rate.html [https://perma.cc/G8U7-DV4K] (explaining how home purchasers receive lower mortgage rates when they have a high credit score).

98. *See* Allie Bidwell, *Survey: Incoming College Students Struggle with Basic Financial Literacy*, NASFAA (Apr. 9, 2018), https://www.nasfaa.org/news-item/14855/Survey_Incoming_College_Students_Struggle_With_Basic_Financial_Literacy [https://perma.cc/XH46-UJFU] (summarizing an EverFi study that found only 15% of students who expected to take out loans to pay for college had "the education, information, and resources to be able to pay off their loans in the future").

99. *See* Anna Helhoski & Ryan Lane, *Student Loan Debt Statistics: 2021*, NERDWALLET (Aug. 19, 2021), https://www.nerdwallet.com/article/loans/student-loans/student-loan-debt#total-private-student-loan-debt [https://perma.cc/E4QL-GBBA] (reporting that the total outstanding federal student loan debt exceeds $1.6 trillion while the total outstanding private student loan debt is a mere $136 billion).

100. *See* Zack Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/?sh=3bb18072281f [https://perma.cc/4ANL-XGEW] (finding that 88% of students who attend for-profit colleges graduate with debt as opposed to 66% and 75 % at public and private non-profit colleges, respectively); Andrew Kreighbaum, *The Link Between Completion and Loan Repayment*, INSIDE HIGHER ED (Aug. 8, 2018), https://www.insidehighered.com/news/2018/08/08/link-between-college-completion-and-student-loan-repayment [https://perma.cc/RXC8-MTU5] (noting that graduates of for-profit colleges or certificate programs struggle to repay student loans).

101. A recent report found that more than 36 million Americans have left college without actually obtaining a degree. Paul Fain, *Some College, No Degree*, INSIDE HIGHER ED (Oct. 31, 2019), https://www.insidehighered.com/news/2019/10/31/new-data-36-million-americans-who-left-college-without-credential [https://perma.cc/8GFW-VNAW].

school diploma.[102] Even more importantly, the reality that student loan creditors are less likely to collect from debtors who do not earn degrees only serves to expand on the positive incentives creditors can effect on debtors. This reality bolsters the incentive of student loan creditors to reduce the available credit for students at institutions with low graduation rates. Additionally, just as student loan creditors are incentivized to support potential and current student loan debtors before college under the proposed rule, so too would they be incentivized to support students while they are in college.

Additionally, the proposed rule works to align student loan creditors' and student loan debtors' interests and incentives *ex post*—after a student loan debtor has earned a degree. As noted above, the proposed rule places student loan creditors in a position somewhat analogous to secured creditors. Professor Mann has also found that secured creditors utilize their influence over debtors to guide them towards reorganization rather than forcing debtors into liquidation of the collateral securing the loan.[103] Similarly, under the proposed rule, student loan creditors will likely be incentivized to guide student loan debtors to a place where repayment is possible rather than trying to prove EEC at bankruptcy.

Thus, by tying student loan creditors' chances of repayment to the EEC of student loan debtors, the proposed rule incentivizes student loan creditors to aid student loan debtors in finding the most lucrative opportunities in their chosen fields. At present, the role of student loan creditors and servicers in the lives of debtors is quite simple—usually consisting only of a bill each month and a description of repayment options.[104] Under the proposed rule, however, this relationship could be reimagined. Student loan creditors would be incentivized to provide student loan debtors with resources to aid them in finding gainful employment that utilizes their degrees—thereby pushing them towards repayment rather than bankruptcy, like a secured creditor pushing a debtor toward restructuring rather than liquidation.

C. Potentially Negative Implications of Adopting the Proposed Rule

Each of the proposed rule's positive implications carries with it some potentially negative implications. While the proposed rule would increase the number of discharges granted to student debtors, those discharges will be the product of a necessarily speculative inquiry that may result in a substantial

102. JULIAN & KOMINSKI, *supra* note 84, at 3 tbl.1.

103. Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 161–63, 242–43 (1997).

104. Brianna McGurran & Anna Helhoski, *Student Loan Servicers: Who They Are and What They Do*, NERDWALLET (Oct. 13, 2021), https://www.nerdwallet.com/article/loans/student-loans/who-is-my-loan-servicer [https://perma.cc/E4M6-HN9F].

burden on bankruptcy courts. Additionally, reaping the benefits of creditor control *ex ante* may require allowing creditors to disincentivize arts and humanities degrees, calling into question the amount of control that we may want to allow creditors—especially since the chief student loan creditor today is the federal government.[105]

Initially, the chief criticism of the EEC method of valuation in the family law setting[106] also applies to the proposed rule—determining the EEC of individuals based on their higher education will necessarily be somewhat speculative. The proposed rule asks the court to conduct an in-depth inquiry of highly subjective factors, rely on what will often be contradictory expert testimony, and make decisions in close-call situations. All of these will contribute to what will likely be a considerable variance in outcomes. Indeed, accepting the proposed rule will necessitate living with inconsistency from the courts based on the quality of advocacy, the quality of experts, and the predilections of the judge in a given case.

However, the proposed rule replaces a system that is at least equally as speculative. As discussed above, the undue hardship standard frequently requires that debtors prove that they have a certainty of hopelessness in paying back their student loans.[107] This requires a highly speculative inquiry into a debtor's projected ability to pay back the loan and necessitates an evaluation of the debtor's future earning capacity—the same inquiry required under the proposed rule. The undue hardship standard also requires judges to determine, and debtors to prove, whether a debtor can achieve a minimal standard of living—an analysis functionally identical to the analysis required by the proposed rule.[108] At worst, then, the proposed rule is only as speculative as the current system, but provides the advantages outlined above.

Additionally, because the proposed rule would produce substantially more discharges, those discharges may require significantly more litigation and therefore increase the burden placed on bankruptcy courts. The proposed rule's initial favor towards discharge will likely lead more debtors already in bankruptcy to seek the discharge of their student loans, especially since less than 1% of eligible filers seek student loan discharge under the current standard.[109] Also, many of those saddled with student debt, who would have no recourse under the current standard,[110] might turn to the bankruptcy

105. *See supra* notes 96–99 and accompanying text.

106. *See supra* notes 67–72 and accompanying text.

107. *See supra* notes 46–48 and accompanying text.

108. *See supra* notes 49–53 and accompanying text.

109. *See supra* note 31 and accompanying text.

110. This number is probably quite large since there are more than 43 million student borrowers with outstanding debt but only 250,000 of such borrowers filed for bankruptcy as recently as 2015. Hanson, *Student Loan Debt*, *supra* note 16; Iuliano, *supra* note 30, at 525 tbl.2.

process under the favorable standard set by the proposed rule—resulting in more bankruptcy filings overall.

While it is unquestionable that enacting the proposed rule would lead to an increased burden on the bankruptcy courts, that burden may not be as large as it might at first seem. As discussed above in subpart III(A), most debtors will be insulated from an EEC challenge because they either owe or earn too little for such a challenge to be profitable for their creditors.[111] It follows that the majority of these new cases, or new issues in already filed cases, are unlikely to produce a substantial amount of new litigation. This tracks the historical trend of consumer bankruptcies representing a much smaller portion of the burden on the bankruptcy courts than do corporate cases.[112]

Finally, the benefits of creditor control provided by the proposed rule come along with some drawbacks. The proposed rule incentivizes creditors to be more invested in the financial windfall that financed degrees give to their debtors.[113] While this effect will produce the benefits outlined above, it may also produce one particularly worrisome drawback—a drying up of credit for degrees that traditionally do not lead to lucrative careers. Specifically, the proposed rule may lead to a world where there is substantially more funding for degrees related to science, mathematics, business, and health services than there is for degrees in the arts and humanities.

However, this potentially negative consequence is unlikely to be as dramatic as it might seem upon first glance. As an initial matter, degrees in the arts and humanities have already been declining in popularity over recent years.[114] Because there is less demand for those degrees, a lower volume of loans should be required to fund them. Additionally, several studies suggest that degrees in the liberal arts actually provide an excellent chance at achieving a return on investment—as creditors look to value degrees, those

111. *See supra* notes 92–95 and accompanying text.

112. While more than 650,000 consumer cases were closed in 2020, less than 25,000 featured adversary proceedings—suggesting that the vast majority of consumer cases feature no adversary proceedings. *See BAPCPA Report – 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/bapcpa-report-2020 [https://perma.cc/NEZ9-WUF5] (providing data on the total number of consumer cases closed in 2020); *Table F-8—U.S. Bankruptcy Courts Federal Judicial Caseload Statistics*, U.S. CTS. (Mar. 31, 2021), https://www.uscourts.gov/statistics/table/f-8/federal-judicial-caseload-statistics/2021/03/31 [https://perma.cc/P2HZ-U95P] (click "Download Data Table" to download the spreadsheet with the relevant data) (providing data on the number of adversary proceedings in 2020).

113. *See supra* notes 96–100 and accompanying text.

114. Where the number of bachelor's degrees conferred in engineering and computer science increased from 2011–2017, the number of degrees conferred in foreign languages, social sciences, and history declined precipitously. *Most Popular Majors*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=37 [https://perma.cc/VSW5-FXFE].

awarded at liberal arts institutions[115] and majoring in arts and humanities[116] will often turn out to be the most financially viable over the long term. Moreover, this effect would not be a new occurrence—indeed, the very first federal loan program, spurred on by the space race of the mid-twentieth century, was only available to those studying math and science.[117]

IV. Splitting the Baby: The Proposed Rule as a Bipartisan Student Debt Solution

This Part addresses some current partisan proposals addressing student loans in bankruptcy and compares them to the proposed rule—first addressing proposals from the political left, then analyzing the response from the political right, and finally addressing the proposed rule's place in this partisan landscape.

The most cogent and concrete proposal to change how we treat student loans in bankruptcy has come from the political left in the form of a proposed bill from Senator Elizabeth Warren and Representative Jerry Nadler.[118] The Consumer Bankruptcy Reform Act of 2020 would collapse Chapters 7 and 13 of the Bankruptcy Code into a new Chapter 10, while allowing for student loans to be discharged on "equal terms with most other types of debt such as credit card debt."[119] Senator Warren summed up the bill's intended purpose, noting that debtors in bankruptcy "can cancel credit card debt, . . . medical debt, . . . excess debt on their car loan, [and] debt that exceeds the value of a home they might have, but it's virtually impossible to cancel student loan debt . . . that's fundamentally wrong . . . . Student loan debt should be canceled in bankruptcy."[120]

The Biden Department of Education is also reportedly considering changes to bankruptcy policy that would benefit student loan debtors.[121] The Biden Administration recently asked the Supreme Court to refrain from taking up a case that expressly advocates for a relaxation of the *Brunner* Test

115. Susan Svrluga, *Liberal Arts Education: Waste of Money or Practical Investment? Study's Conclusions Might Surprise You*, WASH. POST (Jan. 14, 2020), https://www.washingtonpost.com/local/education/liberal-arts-education-waste-of-money-or-practical-investment-studys-conclusions-might-surprise-you/2020/01/13/5a197b14-3649-11ea-bb7b-265f4554af6d_story.html [https://perma.cc/4LR2-87Y3].

116. George Anders, *The Unexpected Value of the Liberal Arts*, ATLANTIC (Aug. 1, 2017), https://www.theatlantic.com/education/archive/2017/08/the-unexpected-value-of-the-liberal-arts/535482/ [https://perma.cc/2HF9-FFR4].

117. Preston Cooper, *From Sputnik to Sallie Mae: A New History of Federal Student Loans*, FORBES (Aug. 2, 2021, 2:30 AM), https://www.forbes.com/sites/prestoncooper2/2021/08/02/from-sputnik-to-sallie-mae-a-new-history-of-federal-student-loans/?sh=66903bea5364 [https://perma.cc/6BHC-8QR2].

118. Swaminathan, *'The Bankruptcy System Is Broken*,*' supra* note 13.

119. *Id.* (internal quotations and citations omitted).

120. Swaminathan, *Senator Warren*, *supra* note 13.

121. Randles, *supra* note 45.

and the undue hardship standard.[122] This request is apparently on account of a change at the Department of Education which would soften the "government's stance on when borrowers should be able to discharge student loans."[123]

The political left does not want to stop student loan reform with the bankruptcy system, however. Senator Warren and others have "repeatedly urged . . . Biden to cancel $50,000 in federally-held student loan debt via executive action."[124] Senator Warren has specifically argued that "[b]ankruptcy doesn't make sense for most borrowers . . . . For everyone else, the federal government should not be throwing people into bankruptcy to try to deal with run of the mill student loan debt. It is time to cancel $50,000 of student loan debt."[125] Her view seems to be catching, as a recent survey found at least forty-three congressional Democrats currently supporting widespread student loan forgiveness of at least $10,000.[126]

The political right, meanwhile, has recently stayed away from offering amendments, or even any rhetoric, related to bankruptcy's treatment of student loans. Indeed, the congressional survey referenced above received only thirteen responses from Republicans as opposed to fifty-three responses from Democrats.[127] This may be due to the fact that some on the right have stressed that debtors should feel more personally responsible for taking out student loans, effectively saying, "[i]f you can't pay [your student loan payment], as a college graduate, it's your own fault."[128]

This idea that student loan debtors should be held accountable for their loans has also surfaced in Republican policy regarding student loan forgiveness. For example, Senator John Thune described Democratic proposals of student loan forgiveness as being "incredibly, fundamentally unfair."[129] Others, such as former Representative Steve Stivers, have argued that student loan forgiveness is too expensive and would add to a crisis even greater than student debt: the national debt.[130]

Those on the right who are at least somewhat sympathetic to student loan debtors have instead focused on providing better student loan repayment

122. *See id.* (reporting that the Biden Administration is asking the Supreme Court to not take a case in which the petitioner is asking for the Court to apply a more forgiving test for the undue hardship requirement).

123. *Id.*

124. Swaminathan, *Senator Warren*, *supra* note 13.

125. *Id.*

126. Leonhardt, *supra* note 14.

127. *Id.*

128. Fearnow, *supra* note 14.

129. Leonhardt, *supra* note 14.

130. *See id.* ("Our national debt is over $28 trillion and rising. That's over $85,000 per every citizen, far higher than the $32,731 that the average student borrower has.").

options. Simplifying the repayment options available to federal student loan debtors was one of the key policies of the 2020 Republican platform.[131] Additionally, former Senator Lamar Alexander has recently proposed a bill that would effectively put all student loan debtors under an income-based repayment plan or a traditional mortgage-style plan—arguing that this would mean "if you have no income, you have no monthly payments."[132]

The proposed rule splits the proverbial baby when it comes to partisan proposals, a compromise between reformative Democratic and apathetic Republican approaches to bankruptcy. It provides creditors, chiefly the U.S. government, with some chance of recovery from high-income debtors, while also allowing debtors with worthless degrees to discharge their loans. This prevents some of the gamesmanship that seems to worry the right—doctors and lawyers declaring bankruptcy to escape debt they should really be able to take ownership of—while providing some level of help for debtors similar to what the left desires. The proposed rule is not as debtor-friendly as the Warren–Nadler proposal, but it is also not as creditor-friendly as the undue hardship standard. It can therefore serve as middle-way compromise where both sides gain some ground.

The proposed rule is also a better solution to the student loan crisis than any that might be provided by Biden's Department of Education. Because the undue hardship standard is written into the Bankruptcy Code, any change to the standard must be judicial or legislative. While the Biden Administration may be able to set guidance as to when student loans should be discharged, bankruptcy courts are ultimately still beholden to the Bankruptcy Code. Accordingly, the best solution will be one that amends the actual language of the Code.

Additionally, like the Consumer Bankruptcy Reform Act of 2020, the proposed rule can be paired with, or separated from, later proposals for blanket student loan forgiveness. This would preserve that issue for Democrats while allowing Republicans to support the proposed rule without compromising their oft-repeated criticisms of student loan forgiveness.

Conclusion

Just as drug repurposing resurrected thalidomide despite its sordid history, so too can creative thinking and innovative drafting revive the EEC method of degree valuation from family law's graveyard and utilize it to help solve the U.S. student debt crisis. The inability of the current bankruptcy regime to adequately address the student loan crisis is both well-known and oft discussed. The reality of an ever-ballooning pool of debt and increasing default rates among student loan debtors, and the resulting economic and

131. Pilgrim, *supra* note 14.
132. Nicholson & Berman, *supra* note 14.

social consequences, demonstrate that this inadequacy cannot be allowed to continue. Such a potent problem, currently mired in partisan bickering, requires a creative solution. This Note proposes such a solution: a new rule for student loans in bankruptcy rooted in the actual value of a student loan to its debtor. The proposed rule borrows the EEC method of evaluation from a defunct family law doctrine and repurposes it in order to give student loan debtors a better chance at finding equity in bankruptcy. The result is a rule that creates a presumption favoring debtors, increases the likelihood of discharge, and aligns the interests of student loan creditors and debtors. The proposed rule also bridges the gap between the political right and left, offering a realistic, middle-way solution that advances the interests of both sides along with— most importantly—the interests of debtors.