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Fresh Start or False Promise? Addressing Black Student Loan Debt Through Bankruptcy

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FRESH START OR FALSE PROMISE? ADDRESSING BLACK STUDENT LOAN DEBT THROUGH BANKRUPTCY

ABSTRACT

The means test and student loan discharge exception in the Bankruptcy Code were enacted to prevent abuse of the bankruptcy system. However, these provisions have disproportionately denied Black Americans the fresh start bankruptcy intends to provide. Research consistently demonstrates that Black debtors fare worse in chapter 13 repayment plans than in chapter 7 liquidations, yet they file for chapter 13 at twice the rate of their white counterparts. One contributing factor to this disparity is the means test, which effectively forces many Black Americans into chapter 13 by categorizing their substantial student loan burdens as primarily consumer debt, thereby restricting access to chapter 7 relief. Current judicial tests, such as the profit motive test, have several gaps in their analysis and fail to account for students who pursue higher education for altruistic purposes, further compounding disparities in how student loan debt is classified.

This Comment argues that student loans should be classified as non-consumer debt within the Bankruptcy Code, up to the cost of attendance as defined by the Higher Education Act. This classification would resolve inconsistent judicial interpretations of consumer debt while balancing debtor financial relief with creditor interests. This approach also better aligns with the foundational goals of the Bankruptcy Code, ensuring that overburdened debtors—particularly Black borrowers disproportionately affected by student debt—have a meaningful opportunity for economic mobility and financial stability.

TABLE OF CONTENTS

INTRODUCTION

Many sections within the Bankruptcy Code (the "Code") were written to prevent abuse; however, in practice, these provisions have created significant barriers for "honest but unfortunate debtors"[1] who seek a "fresh start."[2] While debtors incur student loans with a genuine intention to repay them, systemic inequities and restrictive bankruptcy regulations trap them in cycles of financial hardship.[3] Debtors often spend years attempting to pay their debts before choosing bankruptcy as a means of relief.[4] For decades, legislators have perpetuated a false narrative of debtors filing for bankruptcy as a strategy to enjoy a high-income lifestyle while avoiding their creditors.[5] In reality, debtors file for bankruptcy out of necessity.[6] For Black debtors, the barriers to accessing chapter 7 bankruptcy are generally burdensome when compared to their white counterparts, and at the intersection of these challenges lies student loan debt.

Currently, the bankruptcy system is failing to fulfill its intended purpose of providing a "fresh start" for the most vulnerable populations. Empirical research on the racial dynamics of bankruptcy access remains limited due to the absence of racial data collection by bankruptcy courts.[7] Instead, scholars have relied on "creative empirical strategies, including surveys of bankruptcy professionals, online experiments, administrative data from specific metropolitan areas, and court records" to elicit racial disparities within bankruptcy.[8] Despite these methodological challenges, research consistently reveals disparities. Black debtors file for bankruptcy at "twice the rate they appear in the general population," and Black debtors "fare worse in the bankruptcy process than their

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1 Kathleen Murphy & Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply With Amended Section 707(b)*, 16 AM. BANKR. INST. L. REV. 413, 450 (2008).

2 DEANNE LOONIN, NAT'L CONSUMER CTR., NO WAY OUT: STUDENT LOANS, FINANCIAL DISTRESS, AND THE NEED FOR POLICY REFORM 33 (2006).

3 *See* Chrystin Ondersma, *What is Consumer Debt?*, 96 AM. BANKR. L.J. 413, 413–14 (2022).

4 *Id.* at 419.

5 *Id.* at 422.

6 *Id.*

7 Matthew Bruckner, Raphaël Charron-Chénier & Jevay Grooms, *Bankruptcy in Black and White: The Effect of Race and Bankruptcy Code Exemptions on Wealth*, 28 MICH. J. RACE & L. 217, 223 (2023); Leslie A. Pappas, *Bankruptcy Racial Disparities Poised to Add to Pandemic Pain,* BLOOMBERG L. (Aug. 31, 2020, at 06:30 ET), https://news.bloomberglaw.com/bankruptcy-law/bankruptcys-racial-disparities-poised-to-add-to-pandemics-pain.

8 Bruckner, Charron-Chénier & Grooms, *supra* note 7, at 228–29.

white counterparts."[9] Consequently, whether a debtor receives a fresh start is influenced by race.[10]

The national rise in student loan debt has contributed to the increase in bankruptcy filings,[11] but student loan debtors face two barriers when attempting to receive relief: (1) the student loan discharge exception; and (2) the means test. Congress enacted these provisions to curb abuse of the bankruptcy system.[12] Under the student loan discharge exception, student loans are presumptively non-dischargeable unless the debtor can show an "undue hardship,"[13] which is a notoriously difficult standard for borrowers to meet. Even before debtors can attempt to demonstrate undue hardship, they must first navigate the means test.[14]

The means test has become a significant mechanism that funnels debtors into chapter 13.[15] Unlike chapter 7, which allows for the quick liquidation of non-exempt assets to discharge eligible debts, chapter 13 requires a structured repayment plan over a span of three to five years.[16] The means test uses a rigid formula to force those whose income is above their state's median income into chapter 13, presuming abuse based solely on their perceived ability to repay debts.[17] For debtors whose obligations are primarily consumer debts, this presumption makes them ineligible for chapter 7 unless they pass the means test.[18] This presumption raises the question of whether student loans should be classified as consumer or non-consumer debt.[19] Congress has not clarified this question, leaving courts to grapple with this issue to the detriment of Black

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9 *Id.* at 229.

10 *See id.* at 230 ("Unfortunately, the benefits of bankruptcy are not evenly distributed among racial groups.").

11 *See* Dora Gicheva & Jeffrey Thompson, *The Effects of Student Loans on Bankruptcy*, *in* STUDENT LOANS AND THE DYNAMICS OF DEBT 287, 288 (Brad Hershbein & Kevin M. Hollenbeck eds., 2015) (showing that "student debt is associated with a higher probability of being credit constrained and a greater likelihood of declaring bankruptcy").

12 DUKE CHEN, CONG. RSCH. SERV., RS22699, STUDENT LOANS IN BANKRUPTCY 5 (2007); Murphy & Dion, *supra* note 1, at 413.

13 11 U.S.C. § 523(a)(8); CHEN, *supra* note 12, at 7.

14 *See* Murphy & Dion, *supra* note 1, at 414; Cooper Murphy, *Side Stepping the* Brunner *Test: An Easier Path to Student Loan Discharge*, 30 REV. L. & SOC. JUST. 453, 457–59 (2021).

15 Murphy & Dion, *supra* note 1, at 418; *see In re* Thurston, No. 07-35092, 2008 WL 3414138, at *5–6 (Bankr. N.D. Ohio Aug. 8, 2008) (addressing chapter 13 as the only bankruptcy alternative that would remain for many debtors who have significantly high student loan debt); Tami W. Thomas, *Student Loan Debts as Non-Consumer Debts – or Not,* AM. BANKR. INST. J., Oct. 2015, at 28–29.

16 Matthew R. Johnson, *Punishing Our Professionals: Why Student Loans Should Be Non-Consumer Debt*, 18 TRANSACTIONS: TENN. J. BUS. L. 235, 244 (2016).

17 *See* Murphy & Dion, *supra* note 1, at 435.

18 A court may dismiss a case filed by an individual debtor whose debts are primarily consumer debts. *See* 11 U.S.C. § 707(b); Stewart v. United States Trustee (*In re* Stewart) 175 F.3d 796, 806 (10th Cir. 1999).

19 *See In re* Stewart, 201 B.R. 996, 1005 (Bankr. N.D. Okla. 1996).

borrowers—considering that Black borrowers tend to carry much larger student debt burdens than white debtors.[20] Even when Black debtors' income exceeds the median, it does not necessarily mean they have the capacity to repay,[21] especially given the increasingly disproportionate weight of student loan obligations relative to income.[22]

This Comment aims to highlight the racial disparities in the treatment of student loan debt within the bankruptcy system. Specifically, this Comment explores the lack of access to a meaningful chapter 7 discharge for Black debtors, focusing on: (1) the legislative history behind the student loan discharge exception and the means test; (2) why chapter 7 is the better chapter choice for Black debtors; and (3) the current approaches to the categorization of student loans as consumer or non-consumer debts for the purpose of the means test. To address these issues, this Comment proposes legislative reforms to categorize student loans as non-consumer debts, thereby enhancing access to chapter 7 for Black student loan borrowers. By examining these disparities and proposing reforms, this analysis seeks to advocate for changes that would make bankruptcy a more accessible and equitable solution for Black borrowers struggling under the weight of student loan debt.

I. FAVORABLE CREDITOR LAWS HAVE MADE STUDENT LOAN DISCHARGE NEARLY IMPOSSIBLE, CONTRIBUTING TO THE RISE OF STUDENT LOAN DEBT

To understand the larger economic impact on Black student loan borrowers, it is crucial to explore the reasons behind the significant disparity in student loan debt and the perspectives that led to the enactment of the discharge exception: 11 U.S.C. § 523(a)(8). This section examines the evolution of student debt, focusing on how rising education costs and predatory lending practices have driven Black borrowers to accumulate unmanageable levels of debt.[23] It also provides insight into how creditor-friendly legislation has contributed to a system that restricts meaningful debt relief, entrapping borrowers in cycles of financial hardship instead of providing the fresh start that bankruptcy was intended to offer. Despite numerous efforts to reform student loan bankruptcy

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[20] *See* STUDENT BORROWER PROT. CTR., DISPARATE DEBTS: HOW STUDENT LOANS DRIVE RACIAL INEQUALITY ACROSS AMERICAN CITIES 6 (2020), https://protectborrowers.org/wp-content/uploads/2020/06/SBPC-Disparate-Debts.pdf.

[21] *See* Stephen Urciolo, *Emergency Surgery: A Plea for Student Debt Relief*, 25 TRANSACTIONS: TENN. J. BUS. L. 537, 568 (2024); STUDENT BORROWER PROT. CTR., *supra* note 20, at 8.

[22] *See* Urciolo, *supra* note 21, at 559–60.

[23] *See* Johnson, *supra* note 16, at 240–43; STUDENT BORROWER PROT. CTR., *supra* note 20, at 8; Ondersma, *supra* note 3, at 413.

provisions,[24] the restrictive discharge exception and the means test remain firmly in place.

A. *Student Debt Continues to Rise*

Education, "the very thing that is supposed to be the solution to generational poverty[,] tends to reinforce it."[25] The rise in student loan debt has reached staggering levels, affecting 45 million Americans.[26] The national student loan debt now stands at $1.8 trillion,[27] making it the second-largest source of consumer debt, trailing only mortgage debt.[28] This national crisis has been exacerbated by the rising costs of tuition, which appears to compound annually, having risen by more than 500% since 1985.[29] University tuition that once cost $10,000 per year now nearly exceeds $60,000.[30]

Several factors can account for the spike in tuition. For instance, a wage gap between high school and college graduates[31] may account for an increase in the demand for higher education. The increase in reliance on private lenders also contributes to the tuition increases. Due to federal borrowing limits,[32] students are compelled to seek additional funding from private lenders to cover the full cost of attendance. Without private lenders, "universities would be forced to limit their tuition hikes."[33] Additionally, private lenders set interest rates as the market dictates, reaching as high as 20% monthly.[34] Tuition, however, is not the only contributor to rising student loan debt. The cost of attendance includes living expenses, books, health insurance, parking, and a host of other fees.[35]

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24 *See* CHEN, *supra* note 12, at 1; KEVIN M. LEWIS, CONG. RSCH. SERV., R45113, BANKRUPTCY AND STUDENT LOANS 5 (2019).

25 Urciolo, *supra* note 21, at 567.

26 *Id.* at 537; STUDENT BORROWER PROT. CTR., *supra* note 20, at 4; *see* LOONIN, *supra* note 2, at 33.

27 Jason Iuliano, *Bridging the Student Loan Bankruptcy Gap*, 99 AM. BANKR. L.J. 414, 416 (2025).

28 Johnson, *supra* note 16, at 236.

29 *Id.* at 240.

30 *Id.*

31 Jaison R. Abel & Richard Deitz, *Do the Benefits of College Still Outweigh the Costs?*, 20 CURRENT ISSUES IN ECON. & FIN., no. 3, 2014, at 2.

32 *Direct Subsidized and Direct Unsubsidized Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized#how-much (last visited Mar. 20, 2026) ("[T]here are limits on the amount in subsidized and unsubsidized loans that you may be eligible to receive each academic year . . . .").

33 Johnson, *supra* note 16, at 242 (quoting Preston Mueller, Comment, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229, 244 (2015)).

34 CHEN, *supra* note 12, at 2–3.

35 *See* Wesley Whistle, *What Is Driving the $1.5 Trillion Student Debt Crisis*, FORBES (June 28, 2021, at 10:52 ET), https://www.forbes.com/sites/wesleywhistle/2020/09/01/what-drives-the-15-trillion-student-debt-crisis/.

While tuition may have a higher inflation rate, the rising cost of living adds another layer of financial pressure.[36] As a result, students often need to borrow as much for their living expenses as they do for tuition itself.[37]

By senior year of high school, most students are focused on pursuing higher education as the next step in their career development. Seventeen and eighteen-year-olds are being tasked with the burden of making financial decisions they are ill-equipped to make. This includes how they will pay for their college education, with student loans as the primary option.[38] Yet, the once sure promise of a stable career after college graduation is no longer guaranteed, making the cost of higher education unjustifiable to some.[39] Regardless of whether students finish or use their degrees, the debt remains.[40]

Student debt is a national problem, but its impact is not evenly distributed. Black Americans—who constitute 14% of the population[41]—bear the student debt burden the hardest. Student loan debt impacts Black borrowers differently at every stage of their educational and financial journey. Black students are more likely to take out loans, borrow larger amounts, and face greater difficulty in repayment compared to their similarly situated white peers.[42] On average, twelve years from enrollment, white student loan borrowers owe 60% of their balance at graduation, whereas Black student loan borrowers owe 13% more than their balance at graduation.[43] Even two decades into repayment, the median Black borrower still owes 95% of their original balance, while the median white borrower has nearly paid off their debt.[44] These racial disparities are prevalent in both undergraduate and graduate programs. Law students, for example, incur an average of $100,000 in student loan debt to finance law school.[45] Notably, this figure does not account for "*which* students must borrow more than others."[46] Minority students who pursue professional degrees "account for a

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36 *Id.*

37 *See id.*

38 *See* Urciolo, *supra* note 21, at 562.

39 *See* Abel & Deitz, *supra* note 31, at 8.

40 *See* Urciolo, *supra* note 21, at 562.

41 Gracie Martinez & Jeffrey S. Passel, *Facts About the U.S. Black Population*, PEW RESEARCH CENT. (Jan. 23, 2025), https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/.

42 *See* STUDENT BORROWER PROT. CTR., *supra* note 20, at 6–8.

43 Ondersma, *supra* note 3, at 413.

44 STUDENT BORROWER PROT. CTR., *supra* note 20, at 8; Ondersma, *supra* note 3, at 413.

45 Louis S. Rulli & Eric Foley, *Student Loan Debt and Public Service: Is Relief on the Horizon?*, PHILA. LAW., Winter 2009, at 14, 14.

46 Christopher J. Ryan, *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, 2021 U. ILL. L. REV. 97, 103 (emphasis in original).

significant portion of the student loan debt."[47] For example, on average, members of marginalized groups attending law school incur debts near $200,000.[48]

The best way to minimize student debt is through parental financial support.[49] Most Americans, however, cannot afford to put their kids through college.[50] Black students are even less likely to receive family financial support, further contributing to the need to take on twice as much debt as their white peers.[51] When Black students do receive parental financial support, it is often for a lesser amount than their white counterparts.[52] For example, one study found that "58 percent of Black students receive an average parental contribution of $4,200, whereas 72 percent of white students receive an average of $12,000 from their parents."[53]

Predatory student lending has further widened the racial student loan debt gap.[54] For-profit colleges, which have a higher enrollment of Black students,[55] aggressively target students because they are eligible for federal funding.[56] These institutions have been known to mislead borrowers about the costs, value, and outcomes of their education.[57] Lending institutions have also engaged in deceptive practices that disproportionately affect Black borrowers, causing them to incur additional fees and penalties. For instance, in 2016, Wells Fargo was fined $3.6 million for depriving borrowers of critical information needed to manage their student loans effectively.[58]

After Black students incur disproportionate amounts of student loan debt, they enter a workforce with few employment opportunities sufficient to repay such debt.[59] "Black graduates are almost twice as likely to be unemployed as

47 *See id.* at 104.
48 *See id.* at 105.
49 Urciolo, *supra* note 21, at 560; STUDENT BORROWER PROT. CTR., *supra* note 20, at 6.
50 Urciolo, *supra* note 21, at 561; STUDENT BORROWER PROT. CTR., *supra* note 20, at 6.
51 STUDENT BORROWER PROT. CTR., *supra* note 20, at 6.
52 *Id.*
53 *Id.*
54 *See* Brei'a Womack, *Predatory Student Lending: The Disparate Impact on Minorities' Higher Education Plans*, 24 LOYOLA PUB. INT. L. REP. 43, 44 (2018).
55 *See* David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSPS. 139, 146 (2012).
56 Womack, *supra* note 54, at 44; *see* Deming, Goldin & Katz, *supra* note 55, at 150–51.
57 *See* Womack, *supra* note 54, at 43.
58 Charisse Jones, *Wells Fargo Fined $3.6M Over Student Loan Practices,* USA TODAY (Aug. 22, 2016, at 18:18 ET), https://www.usatoday.com/story/money/2016/08/22/wells-fargo-must-pay-36-million-for-illegal-student-loan-practices/89116916/.
59 *See* STUDENT BORROWER PROT. CTR., *supra* note 20, at 7.

their white peers a year after leaving college."[60] Even when they do find employment, Black families make 20% less than white families with the same education level.[61] Black women make sixty-three cents for every dollar paid to white men with the same degree.[62] The inability to secure sufficient income to manage student loan payments, compounded by the rising cost of living, forces Black borrowers into a perpetual "buy now pay later" cycle.[63] When this financial strain becomes unsustainable, bankruptcy becomes the last resort for relief.

B. Creditor-Friendly Legislation Leads to the Creation of Undue Hardship

In 1970, the Commission on the Bankruptcy Laws of the United States was established to reform the bankruptcy system.[64] In its 1973 report, the Commission identified four criteria to measure the effectiveness of the bankruptcy system: (1) the availability of relief to debtors; (2) the degree of relief provided; (3) the prevention of debtor abuse; and (4) the protection of creditors.[65] The latter two seem to outweigh the former. Although the Commission consistently emphasized debtor rehabilitation as a central objective of bankruptcy, its recommendations reflected a more creditor-centric approach.[66] While panelists strongly supported provisions that facilitated creditor-initiated involuntary bankruptcy proceedings and mandated full disclosure of debtor assets,[67] they were divided on whether voluntary filings should be made more accessible and affordable for debtors.[68] The Commission was particularly unified in its stance that those with the ability to pay should be required to do so, promoting that: (1) repayment is an important part of the rehabilitation process; and (2) the bankruptcy system should not permit abuse, "even by a small percentage of its users."[69]

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60 Nick Morrison, *Black Graduates Twice as Likely to Be Unemployed*, FORBES (June 18, 2020, at 16:21 E.T.), https://www.forbes.com/sites/nickmorrison/2020/06/18/black-graduates-twice-as-likely-to-be-unemployed/.

61 *See* STUDENT BORROWER PROT. CTR., *supra* note 20, at 7.

62 *Id.*

63 Urciolo, *supra* note 21, at 599 (describing a cycle of financing present consumption through deferred-payment credit, resulting in ongoing debt).

64 CHEN, *supra* note 12, at 3.

65 H.R. DOC. NO. 93-137, at 9 (1973).

66 *Id.* at 34.

67 *Id.* at 49.

68 *See id.* at 47.

69 *Id.* at 37.

Filing for bankruptcy allows an individual to be relieved from paying certain debts, known as a "discharge."[70] Some debts are difficult to discharge, while others are nondischargeable.[71] Prior to 1976, student loans were dischargeable.[72] Now, student loans are included in the list of nondischargeable debts,[73] with stringent requirements that have only grown more restrictive over time. In 1973, the Commission recommended that student loans be made nondischargeable, a recommendation that ultimately shaped the modern Code.[74] The Commission's recommendations manifested in the Bankruptcy Reform Act of 1978, which introduced 11 U.S.C. § 523(a)(8).[75] Under the first enacted provision, public student loans were dischargeable once "five years had passed after the beginning of the repayment period, except in cases in which it would cause undue hardship."[76]

In 1990, section 523(a)(8) was amended to lengthen the initial five-year waiting period to seven years.[77] By 1998, the waiting period was eliminated altogether, meaning government student loans could only be discharged if the borrower demonstrated "undue hardship."[78] In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") expanded the nondischargeable provision to include private student loans, when it had previously only applied to public loans.[79] Now, for debtors to receive a discharge of any student loan, they must demonstrate undue hardship.[80] "[O]f the $1.8 trillion of outstanding student loan debt, approximately $1.75 trillion falls within the scope of this bankruptcy provision."[81]

The undue hardship standard is difficult to meet. The Code does not merely require hardship; it requires a certainty of hopelessness,[82] and proof that a debtor's financial situation is beyond repair. By then, a discharge would come too late to make a meaningful difference in a debtor's financial condition. "The

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70 11 U.S.C. § 524(a).
71 *See* 11 U.S.C. § 523(a).
72 CHEN, *supra* note 12, at 3.
73 11 U.S.C. § 523(a)(8).
74 CHEN, *supra* note 12, at 3; *see* Urciolo, *supra* note 21, at 562.
75 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978) (codified at 11 U.S.C. § 523(a)(8)).
76 CHEN, *supra* note 12, at 3.
77 *See* Crime Control Act of 1990, Pub. L. NO. 101-647, 104 Stat. 4789.
78 11 U.S.C. § 523(a)(8).
79 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.
80 *See* 11 U.S.C. § 523(a)(8).
81 Iuliano, *supra* note 27, at 420.
82 *See* Love v. United States Dep't of Educ. (*In re* Love), 649 B.R. 556, 569 (Bankr. E.D. Cal. 2023).

Bankruptcy Code does not define 'undue hardship,'"[83] leaving judges with the discretion to interpret it. This discretion leads to inconsistent applications.[84] "Only the most compelling cases seem to be able to qualify for discharge as 'undue hardship'".[85]

Most courts have adopted the *Brunner* test to determine if a debtor meets the burden of undue hardship.[86] Specifically, nine circuits have adopted *Brunner*,[87] which would suggest the creation of some degree of standardization. Still, the circuits apply the test's three elements in different ways. Under *Brunner*, a debtor must show that: (1) they cannot maintain a minimal standard of living; (2) this inability to pay will persist for a significant portion of the repayment period; and (3) they have made a good faith effort to repay their loans.[88] The remaining two circuits use the totality of the circumstances test, which considers: (1) the debtor's past, present, and future income; (2) the debtor's and their dependents' living expenses; and (3) any other relevant facts.[89] Supporters of the *Brunner* test argue that the totality of the circumstances approach is insufficient for determining undue hardship, affording judges too much discretion.[90] Meanwhile, opponents of the *Brunner* test argue that the totality of the circumstances test is more consistent with the goals of the Code.[91]

A comparison of these tests illustrates their differing impacts. In *Love v. United States Department of Education*, the debtor was forced to abandon her

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83 *In re* Roberson, 999 F.2d 1132, 1134 (7th Cir. 1993).

84 *Compare In re* Brunner, 46 B.R. 752, 757–58 (S.D.N.Y. 1985) (holding that the debtor did not meet the undue hardship standard despite the debtor having a mental disability), *with* United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998) (holding that the debtor met the undue hardship test under *Brunner* partly because the debtor's mental disability prevented her from obtaining permanent employment).

85 *Love,* 649 B.R. at 560 (arguing the adequacy of the undue hardship standard when "the bar and the bench correctly do their jobs."); *see, e.g.*, Marcotte v. Brazos Higher Educ. Serv. Corp. (*In re* Marcotte), 455 B.R. 460 (Bankr. D.S.C. 2011) (holding the undue hardship standard was satisfied because the debtor's loss of use of his right arm and pain resulting from an automobile accident left him unable to work); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 357, 363 (6th Cir. 2007) (holding the undue hardship standard was satisfied because the debtor was diagnosed with the highest level of Hodgkin's disease and treatment left him unable to work).

86 Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987); John Patrick Hunt, *Student Loan Purpose and the* Brunner *Test*, 15 HARV. L. & POL'Y REV. 238, 240 (2020); *see* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); *Pena*, 155 F.3d at 1114; Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1307–09 (10th Cir. 2004).

87 Hunt, *supra* note 86, at 240.

88 *Brunner*, 831 F.2d at 396.

89 Cumberworth v. United States Dep't of Educ. (*In re* Cumberworth), 347 B.R. 652, 657 (B.A.P. 8th Cir. 2006).

90 LEWIS, *supra* note 24, at 28.

91 *Id.*

studies after being left completely disabled by injuries inflicted by her former husband.[92] The court held that she met the undue hardship standard, applying the *Brunner* test.[93] Similarly, in *Cumberworth v. United States Department of Education*, the joint debtors' disabilities also left them unable to obtain future employment.[94] The court found that the debtors met the undue hardship standard under the totality of the circumstances test, emphasizing the importance of considering the specific facts of each case, including non-economic factors.[95] However, even in circumstances where debtors show great financial need, courts have not granted a discharge when applying the *Brunner* test.[96] In *Thomas v. Department of Educ*ation, the debtor had a disability, a monthly income of $194, and monthly expenses of $640.[97] Still, the Fifth Circuit found that the debtor did not meet the undue hardship standard.[98] In contrast, in *Fern v. FedLoan Servicing*, the Eighth Circuit held that a single mother with a shortfall of sixty-two dollars each month to meet living expenses met the undue hardship standard.[99] The Eighth Circuit's totality of the circumstances test provides room for more flexibility. Additionally, many student loan bankruptcy filers do not even attempt to get their student loans discharged, assuming that it would not get granted.[100] "For every five hundred student loan borrowers in bankruptcy, 499 of them give up without even attempting to discharge their student loans."[101] Even the Department of Justice and Department of Education reforms, discussed in Section IV(B), have done little to bridge the gap.[102]

The stringent student loan provisions in the Code stem from a fear that debtors would abuse the bankruptcy system.[103] This fear of abuse dates back decades.[104] By enacting section 523(a)(8), Congress intended to prevent students from discharging loans when their assets and current income were at their lowest while their future income potential was at its highest.[105] This fear of abuse is

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92 Love v. United States Dep't of Educ. (*In re* Love), 649 B.R. 556, 561 (Bankr. E.D. Cal. 2023).
93 *Id.* at 571.
94 *Cumberworth*, 347 B.R. at 655–56.
95 *Id.* at 661.
96 *See* Hunt, *supra* note 86, at 248.
97 Thomas v. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 483 (Bankr. N.D. Tex. 2017).
98 *Id.* at 486.
99 Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4–5 (B.A.P. 8th. Cir. 2017).
100 Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 525 (2020).
101 Iuliano, *supra* note 27, at 459.
102 *See* discussion *infra* Section IV(b).
103 *See* CHEN, *supra* note 12, at 5.
104 *See id.*
105 *See id.*

unfounded.[106] There is no evidence to support a theory of abuse by student loan borrowers.[107] Prior to 1978, when section 523(a)(8) was first introduced, a study commissioned by Congress found that while 18% of student loans were in default, less than 1% were discharged through bankruptcy.[108] Despite this finding, Congress enacted the statute anyway. Additionally, the Code already includes multiple safeguards to prevent abuse. Debtors are required to complete credit counseling before filing for bankruptcy and must also complete a debtor education course before receiving a discharge.[109] Attorneys representing debtors must certify, by signing the bankruptcy petition, that they have conducted a reasonable investigation into the accuracy of the filing.[110] Courts can deny a discharge if they uncover fraudulent or malicious conduct by the debtor.[111] Courts can also dismiss a case if it is found that it was filed in bad faith.[112]

There are legitimate circumstances where public policy necessitates overriding the debtor's opportunity for a fresh start.[113] However, student loans do not rise to the level of severity associated with other nondischargeable debts under section 523(a). This provision includes debts resulting from personal injury or death caused by a debtor driving under the influence,[114] intentional and malicious injuries,[115] fraud committed while acting in a fiduciary capacity,[116] and domestic support obligations.[117] These categories reflect debts that involve culpable conduct or critical societal interests. Student loans, by contrast, do not share these characteristics and should not be equated with such egregious or essential obligations. In fact, the federal government actively promotes higher education and facilitates borrowing through direct loan programs,[118] making student loans a necessity for most students rather than a discretionary financial risk. The lack of dischargeability, then, penalizes borrowers for making the very

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[106] *See id.* at 4 n.23; Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009); Richard Pallardy, *History of Student Loans: Bankruptcy Discharge,* SAVING FOR COLLEGE (updated Mar. 11, 2022), https://www.savingforcollege.com/article/history-of-student-loans-bankruptcy-discharge.

[107] Pardo & Lacey, *supra* note 106, at 181; Pallardy, *supra* note 106.

[108] *See* LOONIN, *supra* note 2, at 33; Pardo & Lacey, *supra* note 106, at 181.

[109] 11 U.S.C. § 109(h).

[110] 11 U.S.C. § 707(b)(4).

[111] 11 U.S.C. § 727(a)(2)(A).

[112] 11 U.S.C. § 707(b)(3); Johnson, *supra* note 16, at 251–52.

[113] *See* LEWIS, *supra* note 24, at 3.

[114] 11 U.S.C. § 523(a)(9).

[115] 11 U.S.C. § 523(a)(6).

[116] 11 U.S.C. § 523(a)(4).

[117] 11 U.S.C. § 523(a)(5).

[118] *See Federal Student Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans (last visited April 10, 2026).

choices that public policy encourages—pursuing education to improve career prospects and economic stability.

Another argument made in favor of section 523(a)(8) is that college degrees are assets that should not be discharged.[119] This argument frames student loan repayment as being tied to future income, characterizing it as a "mortgage on the debtor's future."[120] Once the loan is disbursed, the creditor's sole remedy is repayment, as a college degree is an asset that cannot be repossessed.[121] This argument is fundamentally flawed and ignores the broader framework of unsecured debt in bankruptcy. General unsecured debts, including credit card obligations and medical bills, are also subject to repayment as the sole remedy, yet they remain dischargeable,[122] and no similar argument is made to shield those debts from discharge.

The assumption that a college degree guarantees a comfortable future income is flawed. While "education is generally a very good investment, it does not guarantee a high paying job or freedom from financial difficulties."[123] For many Americans, it can take years to find themselves in a better financial condition after graduating college than they were during admitted students' weekend.[124] Furthermore, not all college degrees reap the same benefits. A Bachelor of Arts in Humanities does not have the same income potential as a Bachelor of Science in Engineering.[125] That is why the former tend to find themselves in graduate programs, incurring even more debt.[126] Racial biases also make it difficult for Black graduates to secure employment,[127] giving them even more reason to gain additional credentials. Black women with a high school diploma or less have the

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119 CHEN, *supra* note 12, at 5.

120 *See* LOONIN, *supra* note 2, at 29.

121 *See id.*

122 *See* CHEN, *supra* note 12, at 5; LEWIS, *supra* note 24, at 41.

123 *See* LOONIN, *supra* note 2, at 5.

124 *See id.* at 5–6.

125 Andrea Koncz, *Salary Trends Through Salary Survey: A Historical Perspective On Starting Salaries For New College Graduates*, NAT'L ASS'N COLLEGES AND Employers (Aug. 2, 2016), https://www.naceweb.org/job-market/compensation/salary-trends-through-salary-survey-a-historical-perspective-on-starting-salaries-for-new-college-graduates/.

126 Kimberly A. Goyette & Ann L. Mullen, *Who Studies the Arts and Sciences? Social Background and the Choice and Consequences of Undergraduate Field of Study*, 77 J. HIGHER EDUC. 497, 517 (2006).

127 *See generally* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (studying racial bias in the employment market).

highest unemployment rates.[128] Notably, Black women are among the most educated demographic in the country.[129]

C. Efforts to Make Student Loans Dischargeable

Several bills have been introduced in Congress to make student loans more readily dischargeable in bankruptcy. In 2011, Senate Bill 1102 proposed making both private and public student loans dischargeable after seven years from the start of the repayment period.[130] That same year, Senate Bill 1561 sought to restore the law to its pre-BAPCPA state by making only public loans nondischargeable while allowing private loans to be discharged in bankruptcy.[131] This bill reflected the perspective that public loans should remain protected because they are backed by taxpayer dollars.[132] In 2015, House Bill 449 was introduced with the bold aim of repealing section 523(a)(8) entirely, thereby making all student loans dischargeable in bankruptcy.[133] Despite their potential to address the growing crisis of student loan debt, none of these bills progressed to the committee stage for consideration.[134]

Legal scholars have also advocated for changes to make student loans more dischargeable within the bankruptcy system. Proposals include: (1) defining "undue hardship" explicitly within the Code to provide clarity and consistency; (2) updating the undue hardship standard to reflect contemporary economic realities and borrower conditions; and (3) repealing section 523(a)(8) entirely to restore student loans to the same status as other unsecured debts.[135]

Even outside the realm of bankruptcy, there have been notable efforts to provide relief to student loan borrowers. President Biden's student loan

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[128] *Analyzing Unemployment Rates Across Race/Ethnicity, Gender, and Education Attainment*, TEX. A&M UNIV. SYS., https://www.tamus.edu/data-science/2021/09/15/unemployment-rates-by-race-ethnicity-gender-educational-attainment/ (last visited Mar. 20, 2026).

[129] Nikki Katz, *Black Women Are the Most Educated Demographic in America*, THOUGHTCO (Sep. 21, 2024), https://www.thoughtco.com/black-women-most-educated-group-us-4048763#:~:text=Black%20women%20are%20also%20starting,people%20who%20receive%20postsecondary%20degrees.

[130] Fairness for Struggling Students Act, S. 1102, 112th Cong. § 2(a) (2011).

[131] *See* 153 CONG. REC. S7335-01 (daily ed. June 7, 2007) (statement of Sen. Richard Durbin) (explaining that the bill would "take[] the bankruptcy law, as it pertains to private student loans, back to where it was before the law was amended in 2005" and that "privately issued student loans will once again be dischargeable in bankruptcy," while protections remain for loans "issued by or are guaranteed by state and federal government").

[132] *Id.*; CHEN, *supra* note 12, at 6.

[133] Discharge Student Loans in Bankruptcy Act of 2015, H.R. 449, 114th Cong. § 2 (proposing repeal of 11 U.S.C. § 523(a)(8)).

[134] *See* LEWIS, *supra* note 24, at 46.

[135] *See id.* at 39–46 (compiling proposals).

forgiveness proposal aimed to address the student loan debt crisis during the economic challenges of the COVID-19 pandemic. The plan sought to cancel up to $10,000 in federal student loans for borrowers with a 2021 income under $125,000 and up to $20,000 for borrowers who received a Pell Grant.[136] The plan would have relieved $430 billion in student debt,[137] roughly a quarter of the $1.7 trillion in outstanding student loans at the time. The proposal faced significant pushback, with six states filing lawsuits to block its implementation.[138] The Supreme Court did not address whether student debt should be canceled, but rather "'who has the authority' to decide."[139] The Court held that the executive branch lacked the authority to enact such widespread debt forgiveness, even during a national emergency.[140]

Most recently, the Department of Justice, in coordination with the Department of Education, issued guidance on the undue hardship standard.[141] This guidance applies to both the *Brunner* test and the totality of the circumstances test.[142] The guidance memorandum underscores that the concerns of fraud and abuse continue to dominate the application of bankruptcy laws.[143] In its discussion of the *Brunner* good faith element, the Department of Justice stated that a debt should not be discharged due to abuse of the student loan system.[144] Still, the guidance sets guidelines for bankruptcy judges and attorneys applying the undue hardship standard by promoting three goals: (1) set clear and consistent expectations of discharge; (2) reduce debtors' burdens in pursuing a student loan discharge; and (3) increase the number of cases that meet the undue hardship standard.[145]

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136 Biden v. Nebraska, 600 U.S. 477, 488 (2023).
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 494.
141 *See* Memorandum from U.S. Dep't of Just., Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation 2 (Nov. 17, 2022), https://www.justice.gov/civil/file/1553726/dl?inline, [https://web.archive.org/web/20221123082353/https://www.justice.gov/civil/page/file/1552681/download] (streamlining the adversary proceeding process for student loan discharge petitions).
142 *Id.* at 3.
143 *See id.*
144 *Id.*
145 *Id.*

II. Chapter Choice Can Make or Break Restoring Black Debtors to Economic Productivity

After debtors make the choice of filing for bankruptcy, they are also faced with a choice of which chapter to file. Chapter 7 and chapter 13 are the primary chapters for which individual debtors choose to seek relief.[146] Chapter 7 involves the liquidation of a debtor's non-exempt assets to satisfy creditor claims, while chapter 13 allows debtors to reorganize their financial obligations through a court-approved repayment plan.[147] Both chapters are designed to balance competing concerns between creditors and debtors, providing debtors with the opportunity of a clean financial slate while maximizing creditor return.[148] Each chapter has its benefits and drawbacks, but ultimately, chapter choice should focus on the debtors' individual circumstances and needs, which is not always the case for Black debtors.

A. Chapter 7 Versus Chapter 13

In chapter 7 bankruptcy, a debtor's assets are liquidated to pay back creditors.[149] A chapter 7 trustee manages the debtor's estate, which includes all "legal or equitable interests of the debtor."[150] The trustee manages the sale of the debtor's assets and distributes the proceeds to creditors.[151] At first glance, "liquidation" is not appealing; debtors do not want to lose their belongings. However, individuals who file for chapter 7 bankruptcy often do not have many assets,[152] and the assets they do possess can be protected through exemptions under state or federal law.[153] "What a debtor can exempt varies from state to state but typically includes, at a minimum, a modest car, basic household furniture, and goods, anything the debtor needs for work, and at least some home equity."[154] Even if certain assets are non-exempt, the trustee may abandon them, returning them to the debtor, if they hold minimal value to the bankruptcy estate,

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[146] Johnson, *supra* note 16, at 243.

[147] *Chapter 7 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Apr. 10, 2026); *Chapter 13 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Apr. 10, 2026).

[148] *See* Ryan M. Deutsch, *Balance 1001: Recalibrating the Student Debt Relationship*, AM. BANKR. INST. J., Nov. 2023, at 38, 38.

[149] *Chapter 7 – Bankruptcy Basics*, *supra* note 147.

[150] *See* 11 U.S.C. § 704(a); 11 U.S.C. § 541(a)(1).

[151] *See* 11 U.S.C. § 704(a).

[152] Bronson Argyle et al., *Racial Disparities and Bias in Consumer Bankruptcy* 9 (Nat'l Bureau of Econ. Research, Working Paper No. 33575, 2025).

[153] *See* 11 U.S.C § 522(b).

[154] Ondersma, *supra* note 3, at 416.

such as family photos or sentimental items.[155] Ninety percent of chapter 7 debtors have no assets available for liquidation, either due to exemption planning or because their assets are beyond the reach of the bankruptcy trustee.[156] Under chapter 7, debtors also have the option to redeem personal property subject to a security interest by paying the creditor an amount equal to the secured portion of the claim.[157]

Chapter 7 cases are typically resolved quickly,[158] with most debtors exiting their bankruptcy case within six months of filing.[159] Most debts are quickly discharged, providing debtors with a relatively swift financial reset.[160] Additionally, chapter 7 rarely involves litigation, as cases are generally resolved administratively through attorneys and trustees.[161] While liquidation may seem intimidating, the process ultimately provides a straightforward and efficient path to financial relief.

In contrast, chapter 13 bankruptcy requires debtors to devote 100% of their disposable income to creditors through a proposed repayment plan spanning three to five years.[162] Chapter 13 allows the debtor to keep their property while they make payments from future income.[163] A discharge is only granted upon the successful completion of a repayment plan,[164] which can impose significant burdens on debtors. For instance, certain debts must be paid in full under chapter 13, even if they would have been dischargeable in chapter 7.[165] The reliance on future income renders chapter 13 plans highly susceptible to disruptions, such as job loss, disability, or the death of a family member, which can leave debtors in worse financial conditions than before filing.[166]

The vulnerabilities of chapter 13 were exposed during the COVID-19 pandemic, as widespread unemployment rendered many repayment plans

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155 11 U.S.C. § 544(a).

156 *See* Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 394 (2012).

157 11 U.S.C. § 722.

158 Johnson, *supra* note 16, at 244; Kathleen & Justin H. Dion, Murphy & Dion, *supra* note 1, at 416; Ondersma, *supra* note 3, at 416.

159 *See* Johnson, *supra* note 16, at 244; Braucher, Cohen & Lawless, *supra* note 156, at 394.

160 *See* Ondersma, *supra* note 3, at 416. Tax debts, judgments from DUIs, domestic support obligations are examples of debts that are not dischargeable. 11 U.S.C. § 523(a).

161 *See* Murphy & Dion, *supra* note 1, at 416; Braucher, Cohen & Lawless, *supra* note 156, at 394.

162 Ondersma, *supra* note 3, at 416; Bruckner, Charron-Chénier & Grooms, *supra* note 7, at 233.

163 Murphy & Dion, *supra* note 1, at 414.

164 11 U.S.C. § 1328(a).

165 *See* 11 U.S.C. § 1322(a).

166 Pappas, *supra* note 7; LOONIN, *supra* note 2, at 1.

unfeasible.[167] During the pandemic, less than half of chapter 13 filers successfully completed their plans, with Black filers facing higher dismissal rates than other racial groups.[168] Even outside of extraordinary events like the pandemic, structural inequities exacerbate the challenges faced by Black debtors. In 2016, the median net worth of Black households was 10% that of white households.[169] This racial wealth disparity leaves Black debtors with fewer resources to overcome financial emergencies and makes them more susceptible to chapter 13 plan failures.[170] Accordingly, chapter 13 plans for Black debtors have the highest dismissal rates.[171]

Chapter 13 can be a strategic option for debtors with non-exempt assets they want to keep or for managing non-dischargeable debts like mortgages and taxes.[172] The repayment plan provides an opportunity to catch up on missed payments and avoid foreclosure.[173] However, this reality does not align with the circumstances of many Black debtors filing for bankruptcy, as the average filer has few significant assets. For instance, a study of Washington, DC debtors showed the median value of liquid assets owned by U.S. Black households was \$5,000, whereas the white household median for liquid assets was \$65,000.[174] Additionally, Black Americans represented a lower percentage of homeowners compared to other racial groups.[175] This study advanced the argument that "bankruptcy law favors certain white debtors over debtors from other racial groups by, among other things, allowing debtors to retain their equity in assets that white debtors are more likely to own."[176] Therefore, Black debtors are less likely to benefit from chapter 13's asset retention provisions.

The liquid assets that Black Americans do own can easily be protected through chapter 7 exemption planning.[177] Two-thirds of chapter 13 plans are not completed, resulting in the dismissal of the case or conversion to chapter 7,[178] but conversion still may require the debtor to pass the means test.[179] One factor

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167 *See id.*
168 *See id.*
169 *Id.*
170 *See id.*
171 Braucher, Cohen & Lawless, *supra* note 156, at 405.
172 Johnson, *supra* note 16, at 244.
173 *Id.*
174 Bruckner, Charron-Chénier & Grooms, *supra* note 7, at 222.
175 *See id.*
176 *See id.* at 220.
177 *See* Johnson, *supra* note 16, at 244.
178 Ondersma, *supra* note 3, at 416–17; Murphy & Dion, *supra* note 1, at 417.
179 *See* Garrett Pratt, Daniel Graves & Michelle Arnopol Cecil, *Harmonizing Conversion and the Means Test in Bankruptcy*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 36, 38 (2019).

that makes chapter 13 attractive is the fact that attorney fees can be spread out over the course of the repayment plan, whereas chapter 7 fees must be paid upfront.[180] However, chapter 13 cases are also significantly more costly to debtors, costing up to three times as much as chapter 7.[181]

Given these considerations, chapter 7 is the more advantageous choice for Black student loan debtors. Student loans are nondischargeable under both chapter 7 and chapter 13. Regardless of which chapter an individual chooses, they must demonstrate an "undue hardship" to discharge their student loans. However, in chapter 13, debtors will exit bankruptcy with more student loans than they started with, as student loan debt continues to accrue interest throughout the repayment plan.[182] In chapter 7, debtors can discharge other debts and quickly exit bankruptcy. Still, Black debtors disproportionately file under chapter 13.[183]

B. Black Debtors are Racially Steered Towards Chapter 13

There is significant stigma surrounding bankruptcy, and this stigma also extends to chapter choice, particularly for Black debtors and their attorneys.[184] Despite the poorer outcomes associated with chapter 13, Black debtors are twice as likely as white debtors to file under this chapter.[185] Bankruptcy attorneys play a critical role in perpetuating this disparity.[186] A 2012 study on chapter choice has revealed that attorneys are more likely to recommend chapter 13 to Black debtors than to debtors of other races.[187] These attorneys seem "to view black debtors with the negative lens that Congress used when viewing *all* debtors during the BAPCPA legislative debates."[188] Black debtors are viewed more favorably when they choose chapter 13, while filing under chapter 7 is

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180 Braucher, Cohen & Lawless, *supra* note 156, at 395; *see, e.g.*, Brown v. Gore (*In re* Brown), 742 F.3d 1309, 1314 (11th Cir. 2014) (acknowledging that the debtor only filed chapter 13 to finance his attorney fees).

181 *See* Braucher, Cohen & Lawless, *supra* note 156, at 394.

182 *See* Johnson, *supra* note 16, at 245.

183 Ayanna Alexander, *Racial Gaps in Bankruptcy Advice Expose Lawyers' Blind Spots*, BLOOMBERG L. (Nov. 11, 2021, at 08:46 ET), https://news.bloomberglaw.com/social-justice/racial-gaps-in-bankruptcy-advice-lay-lawyers-blind-spots-bare; Pappas, *supra* note 7; Braucher, Cohen & Lawless, *supra* note 156, at 395; A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 624 (2012).

184 *See* Braucher, Cohen & Lawless, *supra* note 156, at 395.

185 Dickerson, *supra* note 183, at 624; *see* Braucher, Cohen & Lawless, *supra* note 156, at 404.

186 *See* Braucher, Cohen & Lawless, *supra* note 156, at 412.

187 *See* Alexander, *supra* note 183; Braucher, Cohen & Lawless, *supra* note 156, at 395; Dickerson, *supra* note 183, at 628.

188 Dickerson, *supra* note 183, at 628.

stigmatized as an abuse of the bankruptcy system.[189] These negative perceptions, however, are not similarly applied to white debtors.[190]

Although the study did not pinpoint the precise reasons for this racial steering, several explanations have been proposed. One theory suggests that repeated interactions with debtors of the same racial group lead to consistent, biased recommendations.[191] Another posits that the steering stems from the belief that Black debtors need to demonstrate greater financial responsibility in bankruptcy, given their higher likelihood of experiencing future credit discrimination.[192] Regardless of the rationale, it is evident that some attorneys allow implicit biases about who should repay creditors to override their obligation to tailor chapter recommendations to the debtor's specific financial circumstances.

III. THE MEANS TEST: WHAT WAS ORIGINALLY ADOPTED TO PREVENT ABUSE HAS INSTEAD BECOME A BARRIER

The means test is another mechanism that disproportionately steers Black debtors toward chapter 13. Congress was transparent with its intent when it enacted the means test: to push more people into chapter 13 rather than chapter 7.[193] However, this push has created significant problems, forcing some debtors—especially those with student loan burdens—into chapter 13 plans that may not align with their best financial interests. The means test system of chapter 7 disqualification fundamentally undermines the goals of the Code to provide a fresh start to consumer debtors. While creditors can file involuntary chapter 7 petitions against debtors, no such mechanism exists for chapter 13.[194] Public policy dictates that debtors should not be forced into repayment plans.[195] Yet, in practice, the means test operates as a de facto method of forcing debtors into chapter 13, regardless of whether it aligns with their financial realities or best interests.

The means test was introduced as part of BAPCPA to determine who qualifies for chapter 7.[196] Framed as a tool to assess whether a debtor is worthy

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189 Braucher, Cohen & Lawless, *supra* note 156, at 423; *see* Dickerson, *supra* note 183, at 628.
190 *See* Braucher, Cohen & Lawless, *supra* note 156, at 414; Dickerson, *supra* note 183, at 628.
191 *See* Dickerson, *supra* note 183, at 631.
192 *Id.* at 632–33; *see* Braucher, Cohen & Lawless, *supra* note 156, at 422.
193 *See* H.R. REP. NO. 109-31, pt. 1, at 2 (2005) (stating that BAPCPA was intended to ensure that "debtors repay creditors the maximum they can afford" and to require those with the ability to pay to enter chapter 13).
194 *See* 11 U.SC. § 303(a); Murphy & Dion, *supra* note 1, at 430.
195 *See* Murphy & Dion, *supra* note 1, at 430.
196 *See id.* at 413–14.

of debt relief, the means test has become one of the most significant hurdles debtors must clear before discharging their debts in chapter 7.[197] Originally designed to keep out high-income debtors, it instead "reduces access to bankruptcy for the poorest debtors."[198] Much like Congress's fear of students abusing the bankruptcy system, lawmakers also believed that chapter 7 filers were acting in bad faith.[199] This view was heavily influenced by creditors, with credit lobbyists taking active roles in bankruptcy legislative matters.[200]

Under section 707(b)(1), "a court may dismiss or convert a chapter 7 case filed by an individual whose debts are primarily consumer debts if the court 'finds that the granting of relief would be an abuse' of the bankruptcy system."[201] The means test is the tool used to evaluate whether there is potential abuse.[202] Debtors are required to fill out complex forms detailing their financial circumstances, putting those without sophisticated means to navigate the forms at a disadvantage from the start of filing.[203] The means test employs a mathematical formula to evaluate a debtor's income and expenses.[204] The first step is to determine the debtor's monthly income.[205] If the debtor's income is below the state's median income for a household of the same size, they are eligible for chapter 7.[206] If a debtor's income exceeds the median income for their state, they must assess whether they have enough disposable income to make payments to unsecured creditors by calculating the expense deductions in section 707(b)(2)(A)(ii)–(iv).[207] The second and third steps are the most intricate.[208] To put it succinctly, if the debtor is found to have the ability to pay their creditors, a grant of relief under chapter 7 would be an abuse of the bankruptcy system.[209]

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197 *See id.* at 413 n.90.

198 Ondersma, *supra* note 3, at 418.

199 Murphy & Dion, *supra* note 1, at 413.

200 *See* Ondersma, *supra* note 3, at 421 ("The Bankruptcy Issues Council, representing 6000 members of Visa and MasterCard, and the Consumer Bankruptcy Reform Coalition (comprised of banks, credit unions, mortgage lenders, and other financial service providers). . . ."); Bruckner, Charron-Chénier & Grooms, *supra* note 7, at 225.

201 Murphy & Dion, *supra* note 1, at 434 (citing 11 U.S.C. § 707(b)(1)).

202 *See* 11 U.S.C. § 707(b)(1).

203 *See* Ondersma, *supra* note 3, at 417.

204 *See* 11 U.S.C. § 707(b).

205 *See* 11 U.S.C. § 707(b)(2)(A)(i).

206 *See* 11 U.S.C. § 707(b)(2)(A)(ii).

207 11 U.S.C. § 707(b)(2)(A)(ii)–(iv).

208 *See* Murphy & Dion, *supra* note 1, at 436–37 ("If the debtors monthly disposable income does not exceed $100.00 per month, then the presumption of abuse does not arise. If [it] is greater than $166.67 per month, then [that] abuse immediately arises. If, however, [it] falls between $100.00 and $166.67 per month, then one further calculation is needed.").

209 *See* 11 U.S.C. § 707(b).

However, the means test is flawed in its calculations. For above-median debtors, pre-determined expenses are applied to the debtor rather than their actual expenses.[210] The means test also fails to account for debt as an expense,[211] giving rise to misleading conclusions about a debtor's financial capacity. State median incomes are generally not high in comparison to the state's cost of living. In 2024, California's median income for a family of four was $128,533, while the estimated cost of living stood significantly higher at $188,269.[212] On paper, individuals earning above the median income may appear capable of repaying creditors, but in reality, many of these individuals are struggling just to pay for groceries.[213] There is an apparent disconnect between theoretical calculations and actual financial hardship.

A. Consumer Versus Non-Consumer Debt

Debt can generally be classified as either consumer or non-consumer debt, with significant implications for how the means test applies.[214] The means test is only applicable to debtors whose obligations are primarily consumer debts.[215] "Primarily" is another term not statutorily defined by the Code, but most bankruptcy courts conclude that a debtor's debts are primarily consumer debts if the aggregate of such debt exceeds 50%.[216] If a debtor's debts are primarily business debts or other non-consumer debts, they are exempt from the means test and may file for chapter 7 bankruptcy, provided they meet the remaining qualifications.[217] In contrast, debtors with predominantly consumer debts must pass the means test to qualify for chapter 7 relief.[218] If a debtor fails the means test, the case must be dismissed or converted to chapter 13.[219]

The issue with the distinction between consumer and business debts in bankruptcy is that "an individual may have debts that are not consumer debts even though those debts do not fit precisely into the category of business

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210 Murphy & Dion, *supra* note 1, at 436.

211 11 U.S.C. § 707(b)(2)(A)(ii)(I).

212 *Census Bureau Median Family Income by Family Size*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/ust/eo/bapcpa/20240401/bci_data/median_income_table.htm (last visited Mar. 27, 2026).

213 *See generally* Murphy & Dion, *supra* note 1 (discussing the gaps within the means test's calculations).

214 *See* Ondersma, *supra* note 3, at 416.

215 *See* 11 U.S.C. § 101(8); Ondersma, *supra* note 3, at 414; Johnson, *supra* note 16, at 236; *In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988); *In re* Almendinger, 56 B.R. 97, 99 (Bankr. N.D. Ohio 1985).

216 Johnson, *supra* note 16, at 252; *In re Booth*, 858 F.2d at 1055.

217 *See* 11 U.S.C. § 707(b)(1).

218 *See id.*; Johnson, *supra* note 16, at 236–37; *In re Booth*, 858 F.2d at 1055; *In re Almendinger*, 56 B.R. at 99.

219 *See* 11 U.S.C. § 707(b)(1).

debt."[220] Additionally, bankruptcy courses are often taught by making the distinction of a bankruptcy filer as either a consumer (individual) or a business.[221] The reality is that many individuals have both consumer and business debts.[222] The constitutionality of this distinction has been challenged on the grounds that no rational basis exists for differentiating between consumer and business debts when the stated purpose of the means test is to ensure that those with the ability to repay do so.[223] Cases have upheld the distinction relying on "Congress' assumption that consumer debt is voluntarily incurred for consumption purposes," without the intention to repay.[224] Business debts are not subject to the means test because it is the *consumer* debtor legislators intended to prevent abuse from.[225] Therefore, when businesses file for bankruptcy, they are not subject to the means test.[226]

The Code defines consumer debt as debt incurred "primarily for personal, family, or household purpose[s]."[227] However, the code does not explicitly define non-consumer or business debt, nor does it clarify the classification of student loans.[228] Determining whether student debt is incurred for a "personal, family, or household purpose" is a difficult task.[229] The ambiguity of non-consumer debt presents a critical issue for Black professionals whose student loans constitute the majority of their obligations. For those earning above the median income, the classification of student debt as consumer or business debt determines whether they must navigate the means test to access chapter 7 relief. For Black debtors, "classifying student loan debt as non-consumer debt may be the only way to qualify for chapter 7."[230]

B. Approaches to Defining Non-consumer Debt

Since the Code does not define non-consumer or business debt, courts have been left to interpret the terms on their own, resulting in inconsistencies like those seen in applying the undue hardship standard. Various tests have been developed to differentiate non-consumer debt, and courts have grappled with the

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220 Ondersma, *supra* note 3, at 416.
221 *Id.* at 415.
222 *Id.*
223 *See id.* at 422.
224 *Id.* at 415.
225 *Id.* at 423–24.
226 *See* 11 U.S.C. § 707(b).
227 11 U.S.C. § 101(8).
228 Thomas, *supra* note 15, at 28.
229 *See* Ondersma, *supra* note 3, at 416.
230 Thomas, *supra* note 15, at 28.

question of whether student loans should be classified as consumer or non-consumer debt. Applying the *noscitur a sociis* canon of construction—interpreting the meaning of ambiguous terms by considering their association with surrounding words—might suggest a straightforward solution: non-consumer debt is simply debt that is not incurred for "personal, family, or household purposes." However, the analysis is not so simple. "[N]early all debts have some kind of personal, family, or household purpose."[231] Debt classifications that have faced little debate regarding their status include tax debt, civil judgment debt, and debt incurred for running a business, all of which have been consistently recognized as non-consumer.[232]

Like most debts, student loans do not fit neatly into the consumer versus non-consumer binary. On one hand, individuals may pursue education for personal reasons, such as exploring interests or expanding knowledge.[233] Education is also sought for family or household purposes, such as increasing income potential to support dependents.[234] On the other hand, education serves clear business purposes for many individuals who pursue advanced qualifications to secure employment or launch entrepreneurial ventures.[235] This ambiguity leaves student loan classification open to subjective interpretation by courts, contributing to inconsistent outcomes and ongoing uncertainty. Whether a debtor's student loans will be classified as non-consumer debt largely depends on "the bankruptcy court in which the debtor happens to find themself."[236]

The "profit-motive" test has been the primary test used to address the question of whether student loans should be classified as consumer debts. The test was first applied to the means test by the Bankruptcy Court for the Northern District of Ohio when it noted the similarities between the Truth in Lending

231 Ondersma, *supra* note 3, at 425–26.

232 *Id.* at 426.

233 Johnson, *supra* note 16, at 262.

234 *See In re* Valdivia, No. 20-00369, 2020 WL 4939161 *1, *5 (Bankr E.D.N.C. Aug. 21, 2020) (holding the debtors students loans were consumer debts because even though the "student loans funded additional vocational training that would allow for a higher salary, but the Debtor wanted to increase her income in order to benefit her family so they might 'have a better life'") (citing *In re* Stewart, 201 B.R. 996, 1005 (Bankr. N.D. Okla. 1996)).

235 *See e.g.*, Palmer v. Laying, 559 B.R. 746, 755–56 (D. Colo. 2016).

236 *See* Ondersma, *supra* note 3, at 429.

Act[237] and the Code.[238] Cases decided under the Truth in Lending Act indicate that "when the credit transaction involves a *profit motive*, it is outside the definition of 'consumer' credit transaction."[239] Following the Ohio court, the Fifth Circuit adopted the profit-motive test when applying the means test.[240] Drawing on this principle, the profit-motive test in bankruptcy examines whether a debt was incurred "with an eye toward profit" as opposed to personal, family, or household purposes.[241] The test has since been adopted by other courts to assess student loan classifications.

In *In re Booth*, the Fifth Circuit adopted the profit-motive test when it addressed the question of whether a signature loan—a personal, unsecured loan that can be used for any purpose the borrower chooses[242]—is always a consumer debt.[243] Applying the profit-motive test, the court held that the portion of the loan used for a business venture was not consumer debt, while the portion that was used to pay the debtor's mortgage was consumer debt.[244] Other courts have raised concerns about the profit-motive test and have opted to apply broader or more narrow frameworks.[245] One narrow approach defines a profit motive by requiring the debtor to show that the debt was incurred for an existing business or current job advancement, avoiding a focus on a student's aspirational goals or vague "hopes and dreams."[246] The broader approach is the totality-of-the-circumstances test, which evaluates cases on an individual basis.[247] Some courts classify student debt as consumer debt when it "result[s] in intangible benefits that are assimilated to the debtor's person, thereby enhancing the debtor's

[237] One court also considered 26 C.F.R. 1.162–5, "[t]he treasury regulation governing deductibility of expenses for education." *See In re* Teter, No. 19-11224, 2019 WL 9899504 *1, *6 (Bankr. N.D. Ohio Dec. 11, 2019) (citing O'Connor v. Comm'r of International Revenue, 653 F. App'x 633 (10th Cir. 2016) ("IRS properly disallowed taxpayer's expenses for J.D. degree under 26 C.F.R. 1.162–5(b)(3) because they were incurred in connection with entering a new trade or business)"); Marks v. Comm'r, 390 F.2d 598, 599 (9th Cir. 1968) ("Educational expenses undertaken to qualify for a profession are deemed to be personal expenses and are nondeductible under . . . 26 C.F.R. 1.162–5(b)")).

[238] *See In re* Almendinger, 56 B.R. 97, 99 (Bankr. N.D. Ohio 1985); *In re* Booth, 858 F.2d 1051, 1054–55 (5th Cir. 1988).

[239] *In re Almendinger*, 56 B.R. at 99 (emphasis in original).

[240] *See In re Booth*, 858 F.2d at 1055.

[241] *Id.*; *see In re Almendinger*, 56 B.R. at 99; Thomas, *supra* note 15, at 28.

[242] Julia Kagan, *Signature Loan: Meaning, Overview, and Examples*, INVESTOPEDIA (Sep. 16, 2024), https://www.investopedia.com/terms/s/signature_loan.asp#:~:text=A%20signature%20loan%2C%20also%20known,car%20title%20or%20a%20home.

[243] *In re Booth*, 858 F.2d at 1055.

[244] *Id.*

[245] *See* Ondersma, *supra* note 3, at 430.

[246] Palmer v. Laying, 559 B.R. 746, 754 (D. Colo. 2016).

[247] *In re* Steiner, No. 19-60062, 2020 WL 2027250, at *2 (Bankr. S.D. Ill. Jan. 29, 2020).

personal qualities."[248] Other courts focus on the primary purpose for which the debt was incurred,[249] noting that student loans are personal, but the personal benefit is not always the "primary result of receiving an education."[250]

One major critique of the profit motive test is that Congress's decision not to define non-consumer debt in the Code does not grant courts or debtors the authority to impose their own definitions.[251] These critics further argue that the profit-motive test effectively allows debtors to manipulate the classification of their debts:

> If a debtor testified that he or she had attended school for humanitarian reasons or just for the personal satisfaction of learning, the student loan could be considered a consumer debt. If the debtor testified that he or she had attended school primarily to earn a large income, the *same* loan could now become a non-consumer debt. The result of applying the 'profit motive test' allows a debtor to tailor his or her testimony to determine if a debt is to be considered a consumer or non-consumer debt.[252]

For instance, in *Palmer v. Laying*, the bankruptcy court classified the debtor's student loans as consumer debts, reasoning that the debtor pursued a doctorate degree to fulfill a lifelong personal goal.[253] However, on appeal, the district court reversed the decision, relying on the debtor's testimony that the education was intended to acquire business knowledge for entrepreneurial purposes.[254] There is a possibility for debtors to alter their testimony based on how their jurisdiction defines profit motive. However, as the *Palmer* district court articulated, the adversarial system should be equipped to decipher a debtor's true intent for incurring student loans and pursuing higher education.[255]

Other critics argue that the profit motive test produces absurd results; it may require "the court 'to analyze the utility of every class taken and every book purchased with respect to the degree earned.'"[256] "For example, the court would

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248 *In re* Grenardo, No. 11-25401, 2012 Bankr. LEXIS 6302, at *29 (Bankr. D. Colo. May 2, 2012) (internal citation omitted).
249 *See* Thomas, *supra* note 15, at 29; *see, e.g.*, *In re* Rucker, 454 B.R. 554, 558 (Bankr. M.D. Ga. 2011).
250 *In re Steiner*, 2020 WL 2027250, at *4 (citing *In re* Rucker, 454 B.R. 554, 557 (Bankr M.D. Ga. 2011)).
251 *See id.* at *5.
252 *Id.* at *5.
253 *See* Palmer v. Laying, 559 B.R. 746, 754 (D. Colo. 2016) (noting that factual inquiries are sufficient to determine the purpose of incurring student debt).
254 *See In re* Teter, No. 19-11224, 2019 WL 9899504, at *3 (Bankr. N.D. Ohio Dec. 11, 2019).
255 *See Palmer*, 559 B.R. at 753–54.
256 *In re* Rucker, 454 B.R. 554, 556 (Bankr M.D. Ga. 2011) (quoting *In re* Millikan, No. 07-01759, 2007 WL 6260855, at *5 (Bankr. S.D. Ind. Sep. 4, 2007)).

have to decide whether the portion of student loans used to pay for elective classes unrelated to the student's major were 'incurred with a profit motive.'"[257] Consider an undergraduate engineering student: a court may be tasked with deciding whether anthropology courses the student takes out of personal interest serve a personal purpose under the profit-motive test. This issue is further complicated by the reality that students frequently change majors, making it even more difficult to determine a clear profit-driven intent behind their educational decisions. For instance, the same engineering student may later decide to major in anthropology, rendering the previous classification irrelevant. However, this critique appears less persuasive when considering that elective courses, even those unrelated to a student's specific major, are still graduation requirements. These courses, whether chosen out of interest or necessity, contribute to the completion of the degree, which should be considered in its entirety.

The existing business or current job advancement approach has garnered its own criticisms. In *Palmer*, the Colorado District Court argued this test "flips the inquiry and places the focus upon the benefit to (or investment in) the employer[,] [which] is not the focus of the profit motive test."[258] This reasoning suggests that a degree must serve as a direct means to an end—rather than the end itself—to qualify as a non-consumer debt. However, in either scenario, the ultimate objective is enhancing career prospects. For example, if an attorney employed at a law firm pursued a Master of Laws in tax law, and a recent law school graduate without a job pursued the same degree immediately after graduation, both would hold identical qualifications. Both would similarly benefit employers with the advanced knowledge, but only the former's education would be considered non-consumer debt under this approach. The distinction, then, is not substantive but rather an artificial framework imposed by the court.

Critics of the business or current job advancement approach have further noted that the test "cuts out the vast majority of students from incurring a student loan that is a non-consumer debt."[259] The goal of climbing up the corporate ladder is a goal college students have *after* they have graduated college, not while they are attending.[260] The test also eliminates employee initiative in pursuing additional education, intrinsically requiring that such education be

[257] *Id.* at *5.
[258] *Palmer*, 559 B.R. at 751.
[259] *Id.*
[260] *Id.*

mandated by the employer to meet the bankruptcy court's standard, even if the employee's sole motive is career advancement or higher compensation.[261]

There is also discord over whether college education is inherently personal in nature. Some argue that education is business-related, pursued by students hoping to secure future employment.[262] Others contend that education is deeply personal, as it often involves pursuing intellectual growth or fulfilling personal aspirations.[263] The *Stewart* line of cases in the Tenth Circuit illustrates this dilemma. In *Stewart I*, the court stated that "[n]othing is more intimately 'personal' than the debtor's own education," holding the debtor's student loans were primarily consumer debts.[264] The court did not differentiate the purpose for which the student loan was applied: it made no difference whether it was used to pay tuition or living expenses.[265] However, the Tenth Circuit Court of Appeals later applied a stricter profit-motive test, distinguishing between portions of the loans used for family expenses, which it deemed consumer debts, and those potentially used for tuition, books, or other direct educational purposes.[266] The debts the court held were used for family expenses constituted a majority of the debtor's obligations.[267] Consequently, the court did not address whether the "direct" educational expenses were consumer or non-consumer debts.[268]

In contrast, the Bankruptcy Court for the Southern District of Texas in *In re De Cunae* explicitly held that "student loan proceeds that are used for direct educational expenses with the intent that the education received will enhance the borrower's ability to earn a future living are not consumer debts."[269] The court noted the ability to earn a future income was the best example of incurring a debt with an eye toward profit, rejecting the argument that a personal benefit creates a consumer debt, further stating, "collateral self-enrichment is not the type of 'consumption' that is the trademark of a consumer debt." [270]

It is clear that there is a dual purpose of higher education, contributing to the difficulties of classifying student loans. But that same difficulty is not present

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261 *See id.*

262 *See* Johnson, *supra* note 16, at 256.

263 *See In re* Millikan, No. 07-01759, 2007 WL 6260855, at *3 (Bankr. S.D. Ind. Sep. 4, 2007) (quoting *In re* Stewart, 201 B.R. 966, 1005 (Bankr. N.D. Okla. 1996)) ("… the benefits acquired by the debts are used up ('consumed') by the debtor himself and assimilated to his person …").

264 *In re* Stewart, 201 B.R. 966, 1005 (Bankr. N.D. Okla. 1996).

265 *Id.*

266 Stewart v. U.S. Trustee (*In re* Stewart), 175 F.3d 796, 807 (10th Cir. 1999).

267 *See id.* at 808.

268 *See id.*

269 *In re* De Cunae, No. 12-37424, 2013 WL 6389205, at *4 (Bankr. S.D. Tex. Dec. 6, 2013).

270 *Id.*

for traditional business investments,[271] even though they, too, have a dual purpose. The entrepreneur who follows their dreams to start a creative agency and uses debt to finance that business also receives a personal benefit.[272] Despite the personal benefit gained from entrepreneurship, debts incurred for business investments are viewed predominantly through an economic lens. But as we have seen illustrated through case law, higher education is an investment in oneself,[273] and the student loans incurred to obtain such education should be viewed like any other business debt. While some may argue that business debt is traditionally incurred to operate a business, this reasoning overlooks the fact that many professions require degrees and certifications as a prerequisite to practice. By this logic, a medical degree would be necessary not only for practicing medicine but also for operating a medical practice. Whether an individual incurs a loan to go to college or start a small business, they are both opportunity debts.[274] There is no reason that someone choosing higher education to generate income "should face the same hurdles to bankruptcy that someone opening a business to generate an income does not face."[275]

In addressing student loan classification, many courts seem to be asking "whether this particular debtor is the kind of debtor Congress wished to exclude from Chapter 7."[276] Courts have often justified their approaches of classifying student loans as consumer debts by echoing arguments used by legislators when enacting the "undue hardship" standard and the means test.[277] In *Stewart I,* the court held that student loan debtors should not be able to absorb the benefits of discharging educational debts at creditors' expense after they have gained higher salaries from their education.[278] Similarly, in *In re Millikan*, the court characterized the "classic case of the consumer debtor" as someone who exploits credit through luxury vacations, extravagant dining, and gambling.[279] It then applied this reasoning to student loan debtors, equating educational borrowing with reckless consumer spending.[280] Other courts have rejected this reasoning, rationalizing that the weeding out of undeserving debtors is done by the means test, not in deciding whether a debtor has primarily consumer debts.[281]

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271 *See* 11 U.S.C. § 707(b) (applying the means test only to individual debtors).
272 *See* Ondersma, *supra* note 3, at 426.
273 *In re* Steiner, No. 19-60062, 2020 WL 2027250, at *4 (Bankr. S.D. Ill. Jan. 29, 2020)
274 *See* Ondersma, *supra* note 3, at 444.
275 *Id.*
276 *Id.* at 429.
277 *See In re* Millikan, No. 07-01759, 2007 WL 6260855, at *3 (Bankr. S.D. Ind. Sep. 4, 2007).
278 *In re* Stewart, 201 B.R. 996, 1004 (Bankr. N.D. Okla. 1996).
279 *In re Millikan*, 2007 WL 6260855, at *3; Ondersma, *supra* note 3, at 436.
280 *In re Millikan*, 2007 WL 6260855, at *3; Ondersma, *supra* note 3, at 436.
281 Palmer v. Laying, 559 B.R. 746, 752 (D. Colo. 2016).

The former courts ultimately concluded that the debtors filed for chapter 7 in bad faith based on their assets and earning potential. In *Millikan*, the court did not indicate a specific test when holding that the debtor's student loans were consumer debts but reasoned that a conclusion otherwise would be against BAPCPA's goals when the debtor had no dependents, a $177,000 annual salary, and a $1,248 car payment.[282] Similarly, in *In re Ferreira*, the Bankruptcy Court for the Eastern District of California encountered a debtor who increased her income by earning her nursing degree.[283] The court noted that the debtor made an excess of $148,000 and drove a luxury car.[284] The court applied the existing business or current job advancement approach, emphasizing that the purpose of higher education was to benefit the debtor's lifestyle.[285]

No courts have adopted a per se rule that student loan debts are consumer debts,[286] but some have come close. The court in *Millikan* summarily found that student loan debt is in the nature of consumer debt.[287] Similarly, a per se rule was referenced in *Stewart I* that student loans should generally be considered consumer debts. These courts have decided that debtors who leverage education and high-income careers are exactly the type of debtors targeted by the means test.[288] They have reasoned that if student loans are treated as non-consumer debts, then professionals who incur student loans can avoid a chapter 7 dismissal or conversion to a chapter 13 even if their salaries put them in a position to repay creditors. However, as discussed in earlier sections, earning an income above the median does not necessarily translate into actual repayment ability. The financial burden on student loan debtors only worsens in a chapter 13 plan, where the structure of repayment can lead to greater financial strain rather than relief. If a debtor's access to a fresh start is contingent on filing under chapter 13 rather than chapter 7, their overall debt burden may increase over the course of the repayment plan.[289]

282 *In re Millikan*, 2007 WL 6260855, at *6.
283 *In re* Ferreira, 549 B.R. 232, 240 (Bankr. E.D. Cal. 2016).
284 *Id.*
285 *Id.*
286 *See* Thomas, *supra* note 15, at 29.
287 *See In re Millikan*, 2007 WL 6260855, at *7.
288 *See In re* Rucker, 454 B.R. 554, 556 (Bankr M.D. Ga. 2011).
289 *In re* Thurston, No. 07-35092, 2008 WL 3414138, at *4 (Bankr. Ohio N.D. Aug. 8, 2008).

C. The Profit-Motive Test Contributes to the Decrease of Public Sector Careers

The classification of student loans also raises concerns about career choices. Research shows that student loans are a driving factor in career choice.[290] In fact, studies reveal that debt might be the single strongest influence on career paths and is a major contributor to the phenomenon known as "public-interest drift."[291] This drift describes the shift of students from pursuing public-interest careers to opting for higher-paying private sector roles.[292] For example, many law students enter law school with aspirations to make a difference in their communities and the world, but upon graduation, they shift their focus to the private sector despite those intentions.[293] "[P]ublic interest salaries have remained relatively static and quite low, while salaries of first year associates at large private firms have kept pace with ballooning tuition costs."[294] For graduates burdened with substantial student debt, the decision to pursue high-paying careers is not surprising. A 2004 study revealed that 70% of law school graduates identified repaying student loans as a top concern influencing their career choices[295]—a figure likely to have increased alongside rising tuition rates.

To incentivize students to enter public interest careers, Congress designed the Public Service Loan Forgiveness ("PSLF") Program.[296] This program forgives student loan debt after ten years of qualifying employment with the government or an eligible public-service or tax-exempt organization under section 501(c)(3) of the Internal Revenue Code ("IRC").[297] Black students are twice as likely as their white peers to participate in the PSLF program.[298] Arguably, the students who "need access to debt relief are the same students who intend to enroll in the PSLF program."[299] Black students face systemic barriers that limit their access to high-paying private-sector careers, which is often critical for repaying significant student loan debt.[300] Black law students, for example, have a harder time getting the "big law" jobs than their white peers.

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290 *See* Ryan, *supra* note 46, at 123; Hunt, *supra* note 86, at 257.

291 Ryan, *supra* note 46, at 123.

292 *Id.*; Hunt, *supra* note 86, at 257.

293 Ryan, *supra* note 46, at 122–23.

294 Rulli & Foley, *supra* note 45, at 14.

295 Ryan, *supra* note 46, at 121.

296 *Id.* at 108; ALEXANDRA HEGJI, CONG. RSCH. SERV., R45389, THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM: SELECTED ISSUES 1 (2018).

297 Ryan, *supra* note 46, at 108; HEGJI, *supra* note 296, at 7–8.

298 *See* Ryan, *supra* note 46, at 132.

299 *Id.* at 128.

300 *See generally* Bertrand & Mullainathan, *supra* note 127 (discussing discrimination in the labor market).

Black law students, on average, receive lower grades than their white peers.[301] This grading disparity undermines their ability to secure positions at private law firms, where hiring decisions heavily rely on academic performance.[302] Despite efforts to diversify the legal profession, still around 90% of law firm partners are white.[303] Law is not the only profession to which Black students lack access. Black professionals are also underrepresented in professions like engineering, architecture, and business-related occupations, among others.[304] With the lack of access to the private sector, Black students turn to the PSLF program to address their student loans.[305]

The PSLF program offers some relief, but it is far from sufficient to mitigate the broader problem of student loan debt.[306] The program's requirements, which are that graduates not only obtain but retain qualifying employment for ten years while keeping up with loan payments,[307] are burdensome. Life's uncertainties during a decade-long period often compel borrowers to seek immediate relief, such as through bankruptcy.

The characterization of student loan debt as profit-motivated exacerbates the public-interest drift. If interpretations of student loan classification remain centered around a profit motive, then debtors who pursue careers based on passion and purpose rather than financial gain would never see their debts classified as non-consumer. This approach risks driving debtors away from low-paying public interest careers toward higher-paying positions that allow them to service their debts. Such a framework arbitrarily penalizes borrowers who prioritize social impact over financial gain, reinforcing a system where debt relief is contingent not on economic realities but on subjective determinations of career intent.

IV. SOLUTIONS

A. Suggestion for Categorizing Student Loans for Purposes of the Means Test

The classification of student loans as consumer or non-consumer debt presents significant challenges due to the dual nature of their use. These loans

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301 *See* Ryan, *supra* note 46, at 134.

302 *See id.*

303 *Id.* at 133; NAT'L ASS'N FOR L. PLACEMENT, 2023 REPORT ON DIVERSITY IN U.S. LAW FIRMS 33 (2024).

304 Valerie Wilson, Ethan Miller, & Melat Kassa, *Racial Representation in Professional Occupations*, ECON. POL'Y INST. (June 8, 2021), https://www.epi.org/publication/racial-representation-prof-occ/.

305 *See* Ryan, *supra* note 46, at 134.

306 *See id.* at 136.

307 *See id.* at 135; HEGJI, *supra* note 296, at 1.

are designed to serve both personal and business-related purposes.[308] Moreover, student loans cover a wide range of expenses integral to a student's education, including tuition, fees, room and board, and other necessary living costs.[309] For many students, these loans not only finance their education but act as their primary financial support, allowing them to focus entirely on their academic pursuits without the need for employment. In judicial rulings where student loans have been classified as non-consumer debt, the courts have generally focused on loans used directly for tuition, fees, and books, categorizing these as direct educational costs, while other expenses like room and board are often deemed indirect educational expenses.[310] However, these indirect costs are still included in the cost of attendance for higher education.[311] Like consumer debt, educational expenses can invite room for judicial interpretation. The Higher Education Act of 1965, however, clears up this ambiguity. The Higher Education Act defines the cost of attendance to include both direct costs and indirect costs such as transportation, living expenses, and personal expenses "*as determined by the institution*."[312] Universities provide a yearly cost of attendance for each student to the dollar amount.[313] Deferring to universities to specify their cost of attendance effectively provides debtors with an objective means to show a court their cost of attendance.

Currently, there is too much room for judicial interpretation regarding the classification of student loans. "Forum shopping"—the practice of selecting a court perceived as more favorable to a litigant's case—is not an option for most individual debtors, making case outcomes reliant on a bankruptcy judge's perceptions of consumer debtors.[314] To address this problem, Congress should explicitly specify that student loans utilized for educational expenses do not constitute consumer debt. A proposed amendment to this effect could be precisely articulated as follows:

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308 *See* Palmer v. Laying, 559 B.R. 746, 751–54 (D. Colo. 2016) (noting the difficulty of determining where a personal purpose for student loans ends and where profit motive begins).

309 *See* Higher Education Act, 20 U.S.C. § 1087ii (1965).

310 *See, e.g.*, *In re* Stewart, 201 B.R. 966, 1004 (Bankr. N.D. Okla. 1996) (differentiating between tuition and books as direct educational expenses and household expenses as other educational expenses). *But see In re* Palmer, 542 B.R. 289, 294 (Bankr. D. Colo. 2016) (noting the "distinction between living and tuition expenses may be problematic and may lead to disparate or unfair results"), *rev'd sub nom.,* Palmer v. Laying, 559 B.R. 746 (D. Colo. 2016).

311 20 U.S.C. § 1087ii.

312 *Id.* (emphasis added).

313 *See generally* 20 U.S.C. § 1087 (deferring to universities to specify their cost of attendance).

314 *See* Ondersma, *supra* note 3, at 429.

> A loan acquired to obtain a postsecondary degree from an accredited institution of higher education is classified as non-consumer debt up to the cost of attendance as defined by the Higher Education Act of 1965.

Similarly, section 221(d) of the IRC defines qualified educational expenses as the cost of attendance determined by the Higher Education Act.[315] This amendment would create a uniform standard for bankruptcy courts, reducing the inconsistency that results from varying judicial interpretations. Without such a statutory clarification, courts will continue to rely on subjective assessments of whether a student loan was incurred with a "profit motive." This amendment also properly treats student debts on the same level as other business debts as a tool for economic advancement.

Envisioning this amendment's application, consider a hypothetical scenario involving a 2027 graduate of Emory Law filing for chapter 7 bankruptcy in 2030. If this student had incurred $120,000 in loans by their second year, $105,942 of this amount would be classified as non-consumer debt based on the stipulated cost of attendance for their first year of law school, leaving the remainder as consumer debt. This provision balances the conflicting goals of the Code (i.e., a fresh start) for the debtor and equitable treatment of creditors, by ensuring that student loan debtors can classify their debts as non-consumer debts only up to the threshold of actual educational expenses. Beyond clarifying the classification of student loans, this statutory amendment could significantly assist Black debtors, who disproportionately bear the burden of student loans. By ensuring that the majority of student loan debt qualifies as non-consumer debt, more Black debtors would be able to access chapter 7 relief rather than facing the means test and the potential of dismissal of their petitions.

B. Department of Justice Guidance on Undue Hardship Can Lead to More Discharge of Student Loans

Even if student loan debtors can bypass the means test, they must still meet the undue hardship standard for discharge. With the Department of Justice and the Department of Education issuing comprehensive guidance to standardize and simplify the process, there is renewed hope that debtors navigating adversary proceedings will be able to satisfy this requirement more consistently.

The guidance explicitly acknowledges the challenges borrowers face in seeking relief, noting that many debtors have been deterred from pursuing a student loan discharge due to the historically low probability of success and the

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[315] I.R.C. § 221(d).

widespread misconception that student loans are categorically ineligible for discharge.[316] To address these barriers, Department of Justice attorneys are now required to consult with the Department of Education to increase the number of cases where the government stipulates to the facts supporting an undue hardship claim.[317] This approach ensures a systematic evaluation of a debtor's past, present, and future financial circumstances under both the *Brunner* and the totality of the circumstances tests.[318] A key component of this process is the Department of Justice's attestation form, which requires debtors to submit comprehensive personal and financial information,[319] allowing government attorneys to assess their true ability to repay. By creating a standardized evaluation method, this guidance aims to streamline the discharge process, reduce procedural hurdles, and improve access to relief for those facing genuine financial distress.

Issued in 2022, the long-term impact of this guidance remains to be fully realized. However, early data suggests a notable shift toward more favorable outcomes for borrowers. As of July 17, 2023, the guidance has resulted in a 74.6% success rate, with seventy full discharges and twenty-four partial discharges granted from the 205 attestations submitted since December 5, 2022.[320] These early results indicate a meaningful progression toward making student loan discharge more attainable. Although the initial increase in student loan discharges following the Department of Justice guidance has been modest, a higher discharge rate is likely as more debtors become aware of the guidance and initiate adversary proceedings accordingly.[321]

CONCLUSION

The student loan crisis is less a function of the overall scale of student debt and more a consequence of the government's "failure to utilize its existing

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[316] DEP'T OF JUST., GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION 1 (2022), https://www.justice.gov/civil/file/1553726/dl?inline, [https://web.archive.org/web/20221123082353/https://www.justice.gov/civil/page/file/1552681/download].

[317] *See id.* at 2.

[318] *See id.* at 10 n.15.

[319] *See id.* at 10.

[320] Igor Roitburg & George Vogl, Managing Directors, Stretto, U.S. Department of Justice Guidance for Attorney's Regarding Student Loan Bankruptcy Litigation (Sep. 2023), https://www.americancollegeofbankruptcy.com/file.cfm/29/docs/developments%20on%20the%20dischargeability%20of%20student%20loans.pdf.

[321] *See* Belisa Pang, Dalié Jiménez & Matthew Adam Bruckner, *Full Discharge Ahead? An Empirical First Look at the New Student Loan Discharge Process in Bankruptcy*, 41 EMORY BANKR. DEV. J. 259, 304 (2025).

mechanisms for . . . debt cancellation."[322] It has been two decades since Congress introduced the means test and nearly four decades since the first provision restricting the discharge of student loans was enacted. Throughout this period, legislative reforms have been primarily driven by concerns over potential abuse by so-called "can pay" debtors, leading to significant amendments to the Code, particularly through BAPCPA.[323] These creditor-friendly provisions have disproportionately hindered Black borrowers from accessing a fresh start.

Despite these constraints, the foundational goal of consumer bankruptcy remains to ensure that overburdened debtors have a genuine opportunity for a fresh start. By explicitly classifying student loans as non-consumer debts, greater access to chapter 7 bankruptcy would be facilitated for Black student loan borrowers, who face higher student loan burdens and are typically underserved by chapter 13's restructuring plans. This reclassification would enable these debtors, who might otherwise fail to qualify for chapter 7, to obtain a fresh start through bankruptcy while preserving creditor protections.

Expanding access to chapter 7 bankruptcy for Black borrowers also addresses the broader financial hardships that disproportionately affect Black Americans. Student loan debt restricts borrowers' ability to purchase homes, save for retirement, and build generational wealth.[324] By alleviating one of the most significant financial burdens faced by Black debtors, greater access to chapter 7 relief would enhance economic mobility, allowing debtors to invest in long-term financial security—or, at the very least, allow debtors to stabilize their finances to meet their daily financial needs without the weight of insurmountable debt.

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322 *See* John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 5 (2020).
323 *See* Johnson, *supra* note 16, at 250.
324 *See* Brooks & Levitin, *supra* note 322, at 9–10.