ARTICLES

CORPUS LINGUISTICS AND STUDENT LOAN DEBT

KYRA BABCOCK WOODS*

* Law Clerk to the Hon. Kevin R. Anderson, United States Bankruptcy Court, District of Utah. My views are unequivocally my own. Special thanks to Hon. Kevin R. Anderson, Hon. William T. Thurman, Hon. Joel T. Marker, Professor Brook Gotberg of BYU Law School, Sarah Lucas, Austin Morris, Mika Hillery, Sarah Laybourne, and the *Boston University Public Interest Law Journal* staff for their feedback and contributions on an earlier draft of this Article. Additional thanks to the many scholars and creators of the BYU Corpus Linguistics Project for their invaluable training on legal corpus linguistics. Your pioneering efforts made these insights in the bankruptcy code possible. Final thanks to James Heilpern for sparking this idea of crossing bankruptcy law with education law. It is immensely satisfying to finally see this piece complete.

ABSTRACT

An American college degree is both elite and very expensive. Thus, with the average annual tuition list price hovering in the tens of thousands of dollars, large swaths of students are forced to take out student loans to fund their educations. Unfortunately, unpredictable job opportunities resulting from the COVID-19 pandemic require each student loan debtor to ask: How do I pay my loans back? The bankruptcy code, found under 11 U.S.C. § 523(a)(8), offers student loan debtors an opportunity to discharge their loans—provided they can show that repayment will inflict "undue hardship."

There is currently a shallow circuit split over undue hardship's meaning. The majority view found in the Second Circuit's *Brunner* decision rarely permits discharge under section 523(a)(8), essentially requiring debtors to prove complete destitution.[1] Conversely, the minority view under the Eighth Circuit's *Long* decision is more lenient, merely requiring the court to balance various factors on a case-by-case basis.[2] Neither scholars nor members of the judiciary agree over how strict or lax Congress intended undue hardship to be.

This Article proposes a new method of statutory interpretation to demystify undue hardship: legal corpus linguistics (LCL), or the use of large, naturally-occurring bodies of text to understand how different language communities understand legal language. In conducting an LCL analysis, this Article addresses four matters. First, it explores the history of consumer bankruptcy and student loan debt under section 523(a)(8). Second, it tackles America's student loan debt problems and discusses how they pair with *Brunner* and *Long*. Third, it discusses LCL in-depth as a method of legal interpretation. And finally, it conducts an LCL analysis on undue hardship—demonstrating that the ordinary legal and lay meaning of undue hardship is a hybrid of both *Brunner* and *Long*. Ultimately, this Article aims to demonstrate LCL's feasibility, and show that student loan debtors are entitled to an easier way out from under the load.

INTRODUCTION

"[T]here are *whole categories* of non-dischargeable debt that even bankruptcy *cannot* get rid of," HBO's John Oliver stated in his signature talking-head outrage.[3] His eyes wide and gestures ardent, a graphic entitled "BANKRUPTCY" flanking left, he listed a handful of the bankruptcy discharge exceptions found under 11 U.S.C. § 523.[4] Outstanding criminal penalties do not

---

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

[2] *See id.*

[3] LastWeekTonight, *Bankruptcy: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 19, 2021), https://youtu.be/GzFG0Cdh8D8.

[4] *Id.* Unless otherwise designated, all subsequent in-text statutory references are to 11 U.S.C.

magically disappear.[5] Uncle Sam wants his taxes.[6] Pay up that child support.[7] And for the crown jewel of the exceptions— the inescapable student loan debt.[8]

"*Jobless, she quickly defaulted on her $80,000 student loan bill*," remarked the reporter in one of Mr. Oliver's news playbacks.[9] The segment described the plight of a former New York University student who graduated with her master's degree during the 2008 Recession.[10]

"Oh, well, I'll just file for bankruptcy like everyone else is doing. Ha, ha, ha," lamented the former student.[11] "And then, you realize . . . no, the only way to get away from your student loan debt is to *die*."[12]

While debtors may theoretically receive a discharge for their student loans under section 523, convincing a bankruptcy judge to grant discharge for a living debtor is difficult in practice. Under section 523(a)(8), student loans that qualify as "educational loan[s]" under the Internal Revenue Code of 1986 may not be discharged, unless barring discharge "would impose an undue hardship on the debtor and the debtor's dependents."[13] In addition, the Internal Revenue Code's definition of "qualified educational loan" is broad, capturing both government and private loans dispersed to public, private non-profit, and private for-profit schools.[14] Most problematic of all is the shallow authority split between two judge-made frameworks defining "undue hardship": the Second Circuit's

---

[5] 11 U.S.C. § 523(a)(4), (7), (9), (13), (19).

[6] *Id.* (a)(1), (14), (14A).

[7] *Id.* (a)(5), (15).

[8] *Id.* (a)(8).

[9] *See* LastWeekTonight, *supra* note 3 (citing a segment from *Real Money with Ali Velshi*, AL JAZEERA AMERICA (2015)).

[10] *Id.*

[11] *Id.*

[12] *Id.*; *see Discharge Due to Death*, U.S. DEP'T OF EDUC., https://studentaid.gov/manage-loans/forgiveness-cancellation/death (last visited Apr. 2, 2022) ("If your loan servicer receives acceptable documentation of your death, your federal student loans will be discharged.").

[13] 11 U.S.C. § 523.

[14] 26 U.S.C. § 221(d)(1). Significantly, however, there is a growing body of circuit court case law indicating that not all private student loans are automatically nondischargeable in bankruptcy. *See* Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 604–05 (2d Cir. 2021) (holding in a chapter 7 class action suit that private student loans are excepted from discharge under 11 U.S.C. § 523(a)(8)(A)(ii) only if they were "made to individuals attending eligible schools for certain qualified expenses"); McDaniel v. Navient Sols. LLC (*In re* McDaniel), 973 F.3d 1083, 1098 (10th Cir. 2020) (holding in a chapter 13 case that a student loan is not an "obligation to repay funds received as an educational benefit" under 11 U.S.C. § 523(a)(8)(A)(ii)); Crocker v. Navient Sols. LLC (*In re* Crocker), 941 F.3d 206, 224 (5th Cir. 2019) (denying in a chapter 7 case the loan lender's motion for summary judgment and declaring that the debtors' private loans had been discharged under 11 U.S.C. § 523(a)(8)).

Brunner test,[15] and the Eighth Circuit's "totality-of-the-circumstances" standard in *Long*.[16]

Although Congress is required to create uniform bankruptcy laws,[17] it did not define undue hardship under section 523(a)(8)—resulting in the appellate struggle to determine the phrase's meaning.[18] This oversight has placed both college students and their creditors at risk for uneven, geography-specific bankruptcy code application regarding educational debt.[19] Considering how complicated America's student loan debt issues are,[20] this is a critical problem.

With high stakes for college students' financial health in the United States, defining the ordinary meaning of undue hardship is desirable as both a judicial matter and as a policy matter.[21] This goal, however, is not necessarily achieved due to a dictionary's limits, incomplete accounts of congressional deliberations, variable canon application, or a judge's gut reaction as an English-speaking legal

---

[15] The majority view in the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits follows a three-prong test the Second Circuit Court of Appeals adopted in *Brunner v. N.Y. State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 455 (4th Cir. 2019); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993). For further exploration of the *Brunner* standard and its prongs, see *infra* Part II.

[16] The Eighth Circuit adopted a minority view that "undue hardship" is determined after exploring "the totality-of-the-circumstances." Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (declining to follow the more restrictive majority view and noting that each case should be decided on its own unique facts); *see also* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981). Similarly, several bankruptcy appellate panels in the First Circuit adopted *Long*'s totality-of-the-circumstances test. *See* Schatz v. Access Grp., Inc. (*In re* Schatz), 602 B.R. 411, 428–29 (B.A.P. 1st Cir. 2019); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 800–01 (B.A.P. 1st Cir. 2010). There is, however, an internal split within the First Circuit, as several bankruptcy courts followed the majority view in *Brunner*. *See* Gallagher v. Educ. Credit Mgmt. Corp. (*In re* Gallagher), 333 B.R. 169, 173 (Bankr. D.N.H. 2005); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 874 (Bankr. D.N.H. 2000)). For further exploration of the *Long* standard, see *infra* Part III.

[17] U.S. CONST. art. I, § 8, cl. 4.

[18] *See supra* notes 15–16.

[19] For further discussion regarding methods of statutory interpretation in *Brunner* and *Long*, see discussion *infra* Section II.B.1.

[20] For further discussion regarding the status of student loan debt in the United States, see *infra* Section II.A.

[21] *See* RICHARD A. POSNER, HOW JUDGES THINK 251 (2008).

professional.[22] Instead, the inconsistency is best solved by turning to legal corpus linguistics, or "LCL"—a data-driven method of legal interpretation fit for a twenty-first century attorney or judge.[23]

LCL enables judges and attorneys to analyze language usage in large, "naturally occurring" bodies of text.[24] It injects a real-world application into otherwise confusing or ambiguous legal language.[25] It is repeatable and falsifiable.[26] In other words, it requires the judicial branch to treat legal interpretation as a scientific lab experiment, complete with specific steps, calculable sample sizes, identical data, and feasible peer review.[27]

LCL is an attractive legal interpretation method considering the linguistic pitfalls found in the bankruptcy code. According to its legislative history,[28] the current iteration of the code was drafted to curtail allegedly rampant and "abusive [bankruptcy] practices undertaken by attorneys as well as other bankruptcy professionals"[29]—an effort Congress spearheaded while under

---

[22] Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 794–95 (2018) ("[T]he law has done a poor job conceptualizing the notion of ordinary meaning, and we ultimately agree that '[u]ncertainty and division' in assessing such meaning 'seem inevitable' under the methods currently resorted to by judges. But we do not see these problems as an invitation to abandon the search for the ordinary communicative content of the law in favor of case-by-case 'interpretive eclecticism.' Nor do we find in the indeterminacy of the search for ordinary meaning a broad license for 'normative judgments' about whatever 'interpretation' 'makes our constitutional system better rather than worse.'" (footnotes omitted) (quoting Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1268, 1305, 1308 (2015); Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193–94 (2015)).

[23] *Id.* at 795.

[24] *Id.*

[25] Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 159 (2011).

[26] Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1337, 1340–41 (2017); *see also* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 66 (2002) ("We say that a theory is falsified [or refutable] only if we have accepted basic statements which contradict it. This condition is necessary, but not sufficient; for we have seen that non-reproducible single occurrences are of no significance to science.").

[27] Solan & Gales, *supra* note 26, at 1311.

[28] *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (canvassing the debate on what constitutes the "legislative history" of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236 n.3, 253–54 (2010); Conn. Bar Ass'n v. United States, 620 F.3d 81, 97 (2d Cir. 2010).

[29] *Milavetz*, 559 U.S. at 236 n.3.

pressure from the credit lobby.[30] After the federal courts panned the bankruptcy code as "awkward" and "mediocre" in later years,[31] Congress doctored some of the more problematic technical and substantive issues.[32] However, its efforts did little to curtail the subsequent circuit splits over the code's challenging language.[33]

---

[30] *See* Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1098 (2004).

[31] *See, e.g.*, Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1110 (9th Cir. 2009) ("BAPCPA has been criticized for its lack of clarity. We agree that BAPCPA is hardly the very model of a well-drafted statute."); DaimlerChrysler Fin. Servs. Ams., LLC v. Miller (*In re* Miller), 570 F.3d 633, 639 (5th Cir. 2009) ("BAPCPA has been criticized by some judges and commentators as being 'poorly drafted' and has resulted in certain readings of the Code that would qualify as 'awkward' under the definition in *Lamie* . . . . Although we have no reason to pass judgment on the process by which BAPCPA became law, we note that perceived poor drafting should not be regarded as a license to invalidate plain-text readings in the name of fixing a statute that some believe is broken."); Carroll v. Sanders (*In re* Sanders), 551 F.3d 397, 404 (6th Cir. 2008) ("Congress, like the courts, makes mistakes from time to time, and some provisions of BAPCPA may be among them."); *In re* Grydzuk, 353 B.R. 564, 566–67 (Bankr. N.D. Ind. 2006) ("Although certainly participants in its drafting know who they are, no one has come forward to claim authorship of the newly-minted provisions of the BAPCPA. This is understandable, for unlike the rapture which arises from reading the eloquent prose and poetry ever written in the English language, no such elevated state of consciousness derives from reading the BAPCPA. Thus, while a debate rages over whether William Shakespeare or someone else wrote the plays and sonnets attributed to the Bard of Avon, there will never be a similar debate over the authorship of the BAPCPA because no one wants to be associated with that body of work. 11 U.S.C. § 1328(f)(1) presents another in a long string of incredibly poor drafted statutory provisions under the BAPCPA."); *In re* Pope, 351 B.R. 14, 16 (Bankr. D.R.I. 2006) ("While the statute in question—[11 U.S.C. § 362(c)(3)(A)]—exhibits the same mediocre draftsmanship as the bulk of BAPCPA of 2005, in this instance it does accomplish its intended purpose, *i.e.*, to terminate the stay for all purposes [with respect to the debtor and debtor's property].").

[32] Religious Liberty and Charitable Donations Clarifications Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 34 (allowing charitable donations up to 15 percent of a debtor's gross income as an exclusion from a debtor's disposable income); National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, §§ 2(1)–(4), 122 Stat. 5000 (current version at 11 U.S.C. § 707(b)(2)(D)) (exempting from all forms of the means test qualifying reservists of the armed forces and members of the National Guard called to active duty for at least ninety days, or who perform homeland defense activity for at least ninety days); Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 2(1), 123 Stat. 1607 (amending 11 U.S.C. § 109 to extend from five days to seven days the period during which a potential debtor must be unable to obtain a prepetition briefing to be eligible for the exigent circumstances waiver in § 109(h)(3)); The Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3561.

[33] For further discussion of the circuit split over 11 U.S.C. § 523(a)(8) in particular, see *infra* Section II.B.1.

Today, debtors and creditors are governed by a bankruptcy code that disservices them both.[34] With no guarantee that the faulty code will be fixed, the judiciary must impartially dissect and apply the code, ensuring both college students and their lenders receive a fair shake in managing student loan debt. Using LCL to interpret the bankruptcy code is a first step to ensure that fairness becomes a reality.

To present this new method of legal interpretation for judges and practitioners, this Article covers four main topics. Part I explores a non-exhaustive history of consumer bankruptcy law in America, with an emphasis on student loan debt and the evolution of section 523(a)(8). Part II tackles American student loan debt issues, why college is so expensive, and how student loan economics pair with *Brunner*, *Long*, and Congress's non-dischargeability policy decision. Part III discusses LCL, including an in-depth description of the method; the method's strengths and weaknesses; its past application; and usage pointers. Finally, Part IV conducts a corpus analysis of the undue hardship language in section 523(a)(8)—ultimately showing that the data supports a brand new, hybrid approach of *Brunner* and *Long*. In sum, this Article aims to demonstrate applied LCL by moving beyond a mere LCL academic debate to a practical application on a salient, real-world matter. The two overarching goals are to instill attorneys and judges with the confidence that LCL is legitimate and feasible in practice, and to give student loan debtors some breathing room in their individual financial futures.

I. A BRIEF HISTORY OF CONSUMER BANKRUPTCY LAW AND STUDENT LOAN DEBT

For the sake of brevity, we begin our foray into American bankruptcy law history with the United States Constitution.[35] In 1787, the newly drafted and delegate-ratified Constitution directed Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[36] Any

---

[34] Proponents of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (and its multiple proposed predecessors) largely rejected any express concerns over the new legislation from the individuals who regularly practiced in or studied bankruptcy law, including bankruptcy lawyers (both debtor and creditor counsel), trustees, judges, and academics. Proponents often characterized these experts as the bankruptcy "establishment." *See* Jacoby *supra* note 30, at 1093 n.3.

[35] America's bankruptcy law origins may be traced as far back as 1542 England during King Henry VIII's reign. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995). While I am certain that readers will be emotionally shattered by the lack of detail, I aim for mere bankruptcy history basics, ensuring the reader understands how bankruptcy law came to treat consumers and student loan debt under section 523. In sum, an extensive history of bankruptcy law (including the history of corporate bankruptcy) falls outside the scope of this Article.

[36] *See* U.S. CONST. art. I, § 8, cl. 4.

substantive attempts at standardizing bankruptcy during the next one hundred and thirty years, however, were unsuccessful.[37]

To illustrate, Congress passed five major bankruptcy code overhauls from 1800 through 1938, experimenting with various approaches to consumer and corporate bankruptcy estate management, court procedures, and bankruptcy personnel.[38] Student loan debt itself debuted in the bankruptcy code via the Bankruptcy Reform Act of 1978, where it was codified as an exception to discharge under section 523.[39] Following the recommendations in a 1973 report from the Commission on the Bankruptcy Laws of the United States,[40] as well as the discharge exceptions from the Education Amendments of 1976,[41] Congress excepted student loans from discharge until the loans had been due for at least "five years before the date of the filing of the petition."[42] In addition, student loan debt was eligible for the "superdischarge" under chapter 13 reorganization cases for consumers.[43] This is also the first time the undue hardship language appeared regarding student loan discharge, allowing debtors to waive the five-year waiting period if they could prove said undue hardship for both the debtor *and* the debtor's dependents.[44] Unfortunately, Congress failed to define undue

---

[37] Generally, Congress could not be bothered to pass bankruptcy legislation unless there was a war, a financial crisis, or a financial crisis because of a war. *See* Tabb, *supra* note 35, at 23 ("Another major point of contention was whether bankruptcy law should be instituted as a permanent regulation, or instead as a temporary expedient to resolve the immediate financial crisis only. The earlier laws had been of the latter variety, and substantial sentiment remained for that view, especially in the Senate. In the end, the forces seeking to establish bankruptcy law as a permanent part of the federal code prevailed.").

[38] Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Bankruptcy Act of 1867, ch. 176, § 1, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; Bankruptcy Act of 1898, ch. 541, 30 Stat. 554 (repealed 1978); Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1978).

[39] Pub. L. No. 95-598, tit. I, § 523(a)(8), 92 Stat. 2549, 2591.

[40] Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, pt. I, 93d Cong., 1st Sess. (1973), *reprinted in* B Collier on Bankruptcy, App. Pt. 4(c) (16th 2021) at pt. I, ch. 1, (D)(2)(a). Specifically, the Commission found no more than nominal anecdotal evidence that college students were abusing the bankruptcy code when discharging student loans. *Id.* The Commission also coined the phrase "undue hardship" in the context of student loans, but it did not suggest any "undue hardship" parameters. *Id.* at pt. I, ch. 7, (C)(1).

[41] Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141 (adding section 439A to the Higher Education Act of 1965).

[42] Pub. L. No. 95-598, tit. I, § 523(a)(8)(A), 92 Stat. at 2591.

[43] *See id.* § 1328(a)(2), 92 Stat. 2549, 2650 (discharging all debts provided for by a chapter 13 plan except for debts specified in section 523(a)(5)).

[44] *Id.* § 523(a)(8)(B), 92 Stat. at 2591.

hardship in the 1978 Act, beginning a pattern of neglect that would arise in future section 523 iterations.[45]

The decades following the 1978 Act were rife with political warfare over new bankruptcy law proposals. Beginning in the 1990s, a critical mass of legislators pushed for yet another major bankruptcy code change, hiccupping their way through multiple draft versions of what ultimately became the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA).[46] BAPCPA essentially overhauled the 1978 Act, making substantial changes to student loan discharge provisions under section 523. Specifically, it eradicated the language allowing debtors to pursue discharge for any type of student loan after a set number of years, added new language expanding the definition of "educational loan" to cover privately issued student loans, and coined the phrase "educational benefit."[47] As per usual, Congress stayed true to BAPCPA's predecessor by declining to define undue hardship regarding student loan discharge.

Because BAPCPA's language was so incoherent, inelegant, and grammatically incorrect, Congress later enacted several line-item revisions after the federal courts pointed out BAPCPA's more obvious problems.[48] These changes did not, however, include any interpretive viewpoint on "undue hardship" under section 523(a)(8). Otherwise, any movement favoring large-scale consumer bankruptcy reform remained dormant for fifteen years—until the COVID-19 global pandemic reached the United States.

In March 2020, President Donald Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a $2.2 trillion economic stimulus package intended to temper any adverse effects the novel coronavirus disease would have on the American economy.[49] The CARES Act offered multiple benefits for student loan debtors. These benefits included suspending scheduled payments for federal student loans;[50] reducing student loan interest to 0%;[51] barring creditors from garnishing wages, Social Security, and tax refunds for student loan debt collection;[52] and crediting any paused federal student loan

---

[45] For an analysis of how the courts have handled the "undue hardship" language, see *infra* Section II.B.1.

[46] *See* Keith M. Lundin, LUNDIN ON CHAPTER 13, § 2.2, at ¶¶ 10–24, https://lundinonchapter13.com/NACTT2020/Chapter13CaseLawUpdateSection/2.2 (last visited Apr. 2, 2022); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[47] *Id.* tit. II, § 220, 119 Stat. at 59. For a more expansive debate on what "educational benefit" means, see Navient Sols. LLC v. McDaniel (*In re* McDaniel), 973 F.3d 1083, 1097 (10th Cir. 2020) (holding that a student loan is not an "obligation to repay funds received as an educational benefit" under 11 U.S.C. § 523(a)(8)(A)(ii)).

[48] *See supra* note 32.

[49] Pub. L. 116-136, 134 Stat. 281 (2020).

[50] *Id.* § 3513(a), 134 Stat. at 404.

[51] *Id.* § 3513(b), 134 Stat. at 404.

[52] *Id.* § 3513(e), 134 Stat. at 404–05.

payments toward the public service loan forgiveness program.[53] The U.S. Department of Education and the Biden administration later scheduled the CARES Act student loan debt relief to end in 2022.[54]

In wake of these temporary changes, a renewed interest in bankruptcy law reform blossomed, specifically for student loan debt discharge in bankruptcy.[55] Here, as the COVID-19 pandemic catalyzes America's student loan debt issues, this Article now considers two issues. First, why is American student loan debt so astronomically large? And second, what reforms to student loan debt discharge in bankruptcy should Congress implement, if any?

II. BANKRUPTCY AND AMERICA'S STUDENT LOAN DEBT TROUBLES

A. *Understanding the Debt Load*

As of 2021, Americans owe approximately $1.5 trillion in student loan debt—triple the $500 billion Americans owed in 2006.[56] Why is the outstanding student loan debt so high?

The theories are vast and widely researched. For example, in their 2016 publication, economists and higher education policy researchers Beth Akers and Matthew M. Chingos offer a multi-faceted explanation for the $1.5 trillion figure: More Americans under the age of thirty are attending college, staying long enough to obtain a bachelor's and/or graduate degree, and taking out loans

---

[53] *Id.* § 3513(c), 134 Stat. at 404.

[54] At the time of this publication, student loan debt relief is scheduled to end on August 31, 2022. *See Statement by President Biden Extending the Pause on Student Loan Repayment Through August 31, 2022*, THE WHITE HOUSE (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/statement-by-president-biden-extending-the-pause-on-student-loan-repayment-through-august-31st-2022/.

[55] *See, e.g.*, Karen Sloan, *ABA Will Press Congress to Ease Student Loan Discharge in Bankruptcy*, REUTERS (Aug. 10, 2021), https://www.reuters.com/legal/transactional/aba-will-press-congress-ease-student-loan-discharge-bankruptcy-2021-08-10/; Beth Akers, *Unlike Free College, Discharging Student Loans in Bankruptcy is a Great Idea*, HILL (Aug. 9, 2021), https://thehill.com/opinion/education/566932-unlike-free-college-discharging-student-loans-in-bankruptcy-is-a-great-idea; *Student Loan Bankruptcy Reform: Hearing Before the S. Comm. on the Judiciary*, 117th Cong., (2021), https://www.judiciary.senate.gov/meetings/student-loan-bankruptcy-reform; Press Release, Sen. Dick Durbin, Durbin, Cornyn Introduce New, Bipartisan Bill to Allow Federal Student Loan Borrowers to Discharge Loans in Bankruptcy (Aug. 3, 2021), https://www.durbin.senate.gov/newsroom/press-releases/durbin-cornyn-introduce-new-bipartisan-bill-to-allow-federal-student-loan-borrowers-to-discharge-loans-in-bankruptcy; AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 1–15 (2019).

[56] FED. RSRV., CONSUMER CREDIT – G.19 (Mar. 7, 2022), https://www.federalreserve.gov/releases/g19/current/default.htm. All figures are based on calculations from the Federal Reserve's G.19 release on consumer credit. *Id.*

(with the average amount borrowed increasing over time).[57] In essence, more students plus more degrees equal more debt.[58] Second, the federal government has expanded the student loan program since the program's inception in 1965.[59] It now offers universal access to all students, regardless of the borrower's ability to repay.[60] By virtue of this universal access, the federal government is the largest student loan lender in the U.S. market.[61] And third, post-secondary institutions are experiencing major tuition inflation on average, leaving students to shoulder a greater financial burden.[62]

Of these factors, tuition inflation is arguably the most onerous and opaque. From a demand-side economic perspective, Akers explains in her 2020 Manhattan Institute research findings the four reasons why consumers drive tuition inflation.[63] First, many students buy into the "Golden Ticket Fallacy"—the idea that a college degree, regardless of the major or the institution, is the gateway to financial stability.[64] Although 90% of students cite increased earnings as the primary motivator to attend college, the general culture rarely focuses on "savvy shopping for colleges and degree programs" that guarantee a higher payout post-grad.[65]

Second, it is extremely difficult and expensive to price-compare colleges.[66] An institution's "published price" may vary wildly from the actual price after applying grant aid and other discounts.[67] Unfortunately, students are currently barred from calculating their true aid eligibility until *after* receiving an

---

[57] BETH AKERS & MATTHEW M. CHINGOS, GAME OF LOANS: THE RHETORIC AND REALITY OF STUDENT LOAN DEBT 40–44 (2016) (ebook).

[58] *Id.* at 40.

[59] *Id.* at 44–50.

[60] *Id.*

[61] *Id.* at 13–15.

[62] *Id.* at 50–54. For additional research supporting these factors, see Adam Looney et al., *Who Owes All That Student Debt? And Who'd Benefit if it Were Forgiven?*, BROOKINGS INST. (Jan. 28, 2020), https://www.brookings.edu/policy2020/votervital/who-owes-all-that-student-debt-and-whod-benefit-if-it-were-forgiven/; ADAM LOONEY & CONSTANTINE YANNELIS, BORROWERS WITH LARGE BALANCES: RISING STUDENT DEBT AND FALLING REPAYMENT RATES 7, 10, 13 (Feb. 2018), https://www.luminafoundation.org/wp-content/uploads/2018/02/most-students-with-large-loan-balances-aren-t-defaulting.pdf.

[63] BETH AKERS, MANHATTAN INST., A NEW APPROACH FOR CURBING COLLEGE TUITION INFLATION 4, 7 (Aug. 2020), https://media4.manhattan-institute.org/sites/default/files/new-approach-curbing-college-tuition-inflation_BA.pdf.

[64] *Id.* at 7–9.

[65] *Id.*

[66] *Id.* at 9. Of all the tuition-inflation factors, this one is particularly sad and frustrating. How many students (this author included) were forced to choose a college by relying on assumptions and gut reaction?

[67] *Id.* at 10.

admission offer.[68] Furthermore, unregulated application fees can be pricey for many top schools, erecting yet another barrier to effectively compare prices.[69]

Third, "oligopolistic competition" may reduce student aid options.[70] Today, a prototypical college student is not a fresh-faced, financially dependent high school graduate leaving home for some far-flung, four-year university. Instead, a plurality of first-time students is age twenty-five or older, holds a job, has children, and/or attends school within fifty miles of their home.[71] Essentially, even if effective price shopping existed, most first-time students juggle logistical and geographic mobility constraints that considerably curtail their institution choices.

Finally, the current accreditation system is far too arduous for innovative, price-friendly institutions to emerge.[72] Akers explains that "[i]n the current regime, colleges are largely judged based on how they educate students (e.g. curriculum, faculty, manner of instruction) rather than on the [job] outcomes they produce."[73] This forces colleges to conform to a business model of so-called "traditional" instruction, which often requires in-person learning and expansive campuses that accommodate faculty, staff, students, and administration—a model that most new institutions can ill-afford.[74]

Of course, this isn't to say that tuition inflation is purely consumer-driven. In their comprehensive 2011 work, economists Robert B. Archibald and David H. Feldman describe the supply-side factors driving tuition inflation.[75] They explain that the factors boil down to four main categories: cost disease, subsidy distribution, income inequality, and overly complex financial aid policies.[76]

First, Archibald and Feldman assert that college is a human-delivered "personal service," not a good.[77] Twenty-first century technological

---

[68] *Id.*; *see also* ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? 161 (2011) (ebook) ("[T]here are two steps in the student recruitment process. The first is to convince a broad set of students to apply to your institution. After you have . . . admitted a group of them, the second step . . . is to convince the students who you have admitted to accept your offer . . . . [Financial aid] comes into play [here] . . . . [It is] designed to increase the probability that the most desirable students will accept an offer of admission.").

[69] AKERS, *supra* note 63, at 10–11.

[70] *Id.* at 11.

[71] *Id.*

[72] *Id.* at 12–13.

[73] *Id.* at 13.

[74] *Id.* This concept also overlaps with the "oligopolistic competition" issue, where colleges have failed to expand online education to geographically constrained students. *Id.* at 11–12.

[75] ARCHIBALD & FELDMAN, *supra* note 68, at 31–32 (arguing that to understand tuition inflation over the last sixty years, "[o]ur story [should be] based on a flat long-run supply curve . . . . If the long-run supply curve is indeed flat, then an account of rising college costs has to explain why the flat supply curve have shifted upward over time."). For a list of Archibald and Feldman's sources supporting their work, see *id.* at 277–82.

[76] *See infra* notes 77–92.

[77] ARCHIBALD & FELDMAN, *supra* note 68, at 35, 41.

advancement is highly effective in driving down the cost of producing most goods, but it seriously lags in increasing human productivity.[78] Thus, educational attainment's slow progress not only fails to meet demand for a highly educated workforce, but these scarce, highly educated workers are the only ones who can deliver higher education, leading to sky-high higher education costs.[79] This phenomenon is known as "cost disease," which partially explains why higher education has ballooned over time.[80]

Second, "higher education is a heavily subsidized activity," which paradoxically lowers the final price for the average student, while simultaneously forcing many other students to pay an inflated list-price.[81] Subsidies come in multiple forms, including grants from the state and federal government, as well as gifts and endowments from private donors.[82] Subsidies also include institutional grants from the college or university itself, serving to attract a quality student body through merit-based tuition discounting.[83] Unfortunately, government-funded subsidies have decreased over the last several decades, primarily because of shifting political and economic climates.[84] And merit-based institutional grants, which may lure in stellar students, ultimately require institutions to shift a greater percentage of their operating

---

[78] *Id.* at 37, 39, 47.

[79] *Id.* at 15–16, 24–25.

[80] *Id.* at 39. Other service industries susceptible to cost disease since the 1970s have included doctors, lawyers, and dentists. *Id.* at 24–25 fig. 2.4. As an aside, there is extensive conflicting research on whether cost-disease is partially a result of the "prestige games" and "gold plating" that attract wealthy students (*e.g.*, lavish campuses and dorms, unnecessary staffing, etc.). *Id.* at 92–113 (citing bibliography sources for support at 277–82). For the sake of brevity and clarity, I feel the more general cost-disease research suffices for now.

[81] *Id.* at 137, 167, 170.

[82] *Id.* at 171.

[83] *Id.* at 142, 152–53, 159. Some elite institutions have turned tuition discounting on its ear, distributing based on a generous definition of "need" rather than merit. *Id.* at 165, 167; *see, e.g.*, *How Aid Works*, HARV. COLL., https://college.harvard.edu/financial-aid/how-aid-works (last visited Apr. 2, 2022); *Admission and Financial Aid*, STAN. UNIV., https://bulletin.stanford.edu/academic-policies/admission-and-financial-aid#financial-aid (last visited Apr. 2, 2022); *Fees, Expenses, and Financial Aid*, COLUM. COLL., https://bulletin.columbia.edu/columbia-college/fees-expenses-financial-aid/#financialaidtext (last visited Apr. 2, 2022); *Financial Aid*, YALE UNIV., https://finaid.yale.edu/ (last visited Apr. 2, 2022); *Cost and Aid*, PRINCETON UNIV., https://admission.princeton.edu/cost-aid (last visited Apr. 2, 2022). This has resulted in sky-rocketing list prices and an institutional grant "arms race." ARCHIBALD & FELDMAN, *supra* note 68, at 165, 167. While Archibald and Feldman applaud this type of discounting that serves the neediest students, they emphasize that tuition inflation will decrease only if *all* institutions agree to replace merit-based institutional grants with needs-based grants. *Id.* at 165, 167–70. This recommendation is a tall order, made even taller by antitrust hurdles. *Id.*

[84] ARCHIBALD & FELDMAN, *supra* note 68, at 143–46. For the data supporting this finding, *see id.* at 146, tbl. 9.2.

costs on the more prosaic student body to accommodate these tuition discounts.[85] The result is an inflated list-price, albeit with a comparatively lower final price tag for a particular subset of students.

Third, larger economic forces driving income inequality are causing affordability issues for aspiring college students. Using higher education cost disease as a baseline, Archibald and Feldman measure college affordability on "the amount [of income] *left over* after subtracting the cost of college [] rising or falling over time."[86] Applying this metric, the data indicates that college is generally affordable for all except for middle-class and impoverished students attending private four-year institutions.[87] Unfortunately, "this affordability problem has little to do with rising college costs and much more to do with the broad economic forces [outside of higher education] that are widening the American income distribution in favor of the well-educated."[88]

And finally, an overly complex and piecemeal financial aid system places logistical, political, and economic barriers to keeping tuition (and student loan debt) low. From a logistical standpoint, for example, "[f]illing out the Free Application for Federal Student Aid (FAFSA) is a daunting [and time-consuming] task .... The evidence suggests that the complex multi-step application" only positively impacts the likelihood that students will attend college *and* receive adequate funding when the process is well-explained.[89] And from an economic and political standpoint, the theory "that increases in federal financial aid create a climate that makes higher tuition more likely" is shaky at best.[90] Rather, the inverse is true—tuition rises independent of Congressional

---

[85] *Id.* at 142, 152–53.

[86] *Id.* at 187–88. Archibald and Feldman favor this definition over the lay definition, which measures affordability based on percentage of income that college costs consume. *Id.* at 188–89. They argue that measuring affordability based on "left over" income better indicates how the average family fares after controlling for fluctuating incomes and the cost of household goods. *Id.*

[87] *Id.* at 195. In running their analysis, the authors make no distinction between the quality or the profit/non-profit status of these private institutions. *Id.*

[88] *Id.* Archibald and Feldman go on to explain that these "broad[er] economic forces" include:

> [S]kill-biased technical change that increases the relative demand for skilled labor, changes in the composition of the family that leave more children in single-parent settings, immigration into the United States of a pool of labor with less formal education than the native-born population, and trade liberalization in the developing world that puts downward pressure on unskilled wages in developed nations.

Id. at 197–98.

[89] *Id.* at 217.

[90] *Id.* at 201–05. This theory is more popularly known as the "Bennett Hypothesis." *Id. But see* JENNA ROBINSON, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL, THE BENNETT HYPOTHESIS TURNS 30, at 8 (Dec. 2017), https://www.jamesgmartin.center/wp-content/uploads/2017/12/Bennett_Hypothesis_Paper_Final-1.pdf (comparing and contrasting multiple studies on the matter, including Archibald and Feldman's position).

spending, with Congress only reluctantly increasing aid after the education lobby applies sustained pressure.[91] Unfortunately, even when Congress increases grant aid, the preliminary academic and administrative steps students must complete prior to college admission offers more than one opportunity for students to forego college attendance altogether.[92]

In sum, higher education costs are rising, and grant-based aid is shrinking, forcing students to shoulder additional debt to cover the increase. Consumers, schools, governments, and economic forces outside higher education are all to blame. That said, each of these researchers stress that the popular rhetoric regarding tuition inflation misses the mark. There is no single, systemic higher education crisis.[93] Instead, a host of miniature crises adversely affect the most vulnerable students.[94] The American conversation oversimplifies the issues, resulting in a failure to enact effective solutions.[95]

Injecting nuance into the conversation, Akers and Chingos offer several solutions to the tuition inflation problem: Funnel loans toward academic expenses rather than campus consumer goods and services as much as possible.[96] Encourage students to pursue degrees and training with adequate employment and earning potential.[97] Refine the current public information on college graduate earnings to include data from all students, rather than the ones who received financial aid.[98] Develop online programs to alleviate students' geographic constraints.[99] Revise the existing accreditation system to focus on graduates' job outcomes.[100] And pass legislation that allows students to gauge their financial aid eligibility before applying for college, such as creating a look-up table for Pell Grant awards, regulating application fees, and requiring institutions that receive federal aid to inform students of potential award amounts before offering admission.[101]

---

[91] ARCHIBALD & FELDMAN, *supra* note 68, at 206–08. This theory is also known as "The Congressional Squeeze." *Id.*

[92] *Id.* at 215–16.

[93] AKERS & CHINGOS, *supra* note 57, at 3–4; ARCHIBALD & FELDMAN, *supra* note 68, at 252–54.

[94] ARCHIBALD & FELDMAN, *supra* note 68, at 252–54.

[95] *Id.*

[96] AKERS & CHINGOS, *supra* note 57, at 10–11.

[97] *Id.*; AKERS, *supra* note 63, at 9.

[98] AKERS, *supra* note 63, at 9. The College Scorecard, which the Obama administration created in 2015, aims to report earnings information online. *Id.* Students underutilize this tool. *See* Michael Hurwitz & Jonathan Smith, *Student Responsiveness to Earnings Data in the College Scorecard*, 56(2) ECON. INQUIRY 1220, 1220–43 (2018).

[99] AKERS, *supra* note 63, at 12. The COVID-19 pandemic may have provided an excellent kick-start for this solution.

[100] *Id.* at 13.

[101] *See id.* at 10–11.

Similarly, Archibald and Feldman offer several solutions. Eliminate FAFSA and replace needs-based grant aid with a universal, income-blind Pell Grant savings account for all students.[102] Allow public institutions to manage their own budget independent from state legislatures.[103] And subsidize individual students, not schools.[104] Archibald and Feldman posit that these changes will not only introduce necessary simplicity and universality into student aid, but it will free both students and institutions from volatile and unpredictable state legislatures.[105]

B. Brunner, Long, *and the Non-Dischargeability Policy*

Of course, these proposed solutions to tuition inflation and gradual student loan debt reduction take time to implement. How should students manage their debt loads in the interim?

Today's political and cultural conversation discusses everything from reduced interest rates, to debt cancellation, to bankruptcy.[106] Here, this Article focuses on student loan debt and bankruptcy. More specifically, it discusses under which circumstances debtors may discharge student loans in bankruptcy, as well as the policy pros and cons of section 523(a)(8).

1. *Brunner* and *Long*

As stated in the introduction, student loan debt is non-dischargeable in bankruptcy under section 523(a)(8) unless the debtor can prove that paying the debt will impose an "undue hardship on the debtor and the debtor's dependents."[107] A shallow circuit split governs two approaches in defining undue hardship: the widely adopted *Brunner* test[108] and its cousin, the *Long* standard.[109]

Pre-BAPCPA, the first federal appellate court to discuss undue hardship in-depth under section 523(a)(8) was the Eighth Circuit in its 1981 *Andrews* decision.[110] Debtor Gladys Marie Andrews was a thirty-six-year-old divorcee

---

[102] ARCHIBALD & FELDMAN, *supra* note 68, at 223–24.

[103] *Id.* at 238, 243.

[104] *Id.* at 244.

[105] *Id.* at 219–20, 241.

[106] *See* Erica L. Green et al., *Biden Clashes with Liberals over Student Loan Cancellation*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2020/12/10/us/biden-clashes-with-liberals-over-student-loan-cancellation.html?smid=url-share; Zina Kumok & Brianna McGurran, *How to Lower Your Student Loan Interest Rate*, FORBES (June 28, 2021, 10:02 AM), https://www.forbes.com/advisor/student-loans/lower-student-loan-interest-rate/.

[107] *See* 11 U.S.C. § 523(a)(8).

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

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

[110] *See* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981).

who had taken out $2,500 in federal student loans to pay for nursing school.[111] Andrews later dropped out of school due to her battle with lymphatic cancer.[112] Her cancer eventually went into remission, with a possibility of relapse.[113] At the time she filed for bankruptcy, she had not completed nursing school, but she did hold unsteady employment with an underfunded domestic violence shelter earning $10,000 annually.[114] She had "no support obligations or dependents" from her divorce, and her "her total assets [were] worth substantially less than the outstanding indebtedness on the student loan."[115]

The Bankruptcy Court for the District of South Dakota found Andrews adequately proved undue hardship under section 523(a)(8) and discharged her student loans.[116] On appeal, the Eighth Circuit offered "no opinion as to the merits of the debtor's case for discharge,"[117] but vacated the judgment and noted that on remand, the bankruptcy court should consider past, present, and future income resources; reasonable and necessary living expenses; health of the debtor and their dependents; and other facts and circumstances in the case to make a finding of undue hardship.[118] Citing decisions from other bankruptcy courts, the Eighth Circuit heavily based its undue hardship interpretation on various analyses of a recommendation from the 1973 Commission on the Bankruptcy Laws of the United States.[119]

Six years later, the Second Circuit faced a similar legal issue in its seminal *Brunner* decision, albeit with a radically different outcome. Debtor Marie Brunner filed for bankruptcy approximately seven months after receiving her Master's degree in Social Work, seeking to discharge approximately $9,000 in student loans, as well as other debts.[120] She was not elderly or disabled, did not support any dependents, and failed to show that she conclusively could not find

---

[111] *Id.* at 703.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 705.

[118] *Id.* at 704.

[119] *Id.* (quoting the Commission's recommendation that student loans "should not as a matter of policy be dischargeable before [the debtor] has demonstrated that for any reason he [or she] is unable to earn sufficient income to maintain himself [or herself] and his [or her] dependents and to repay educational debt . . . . [T]he rate and amount of [the debtor's] future resources . . . [and] unearned income or other wealth . . . should be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain . . . a minimal standard of living.").

[120] Brunner v. N.Y. State Higher Educ. Servs. Corp., 46 B.R. 752, 753 (S.D.N.Y. 1985). The Second Circuit adopted the District Court's findings, although in sparser detail. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396–97 (2d. Cir. 1987).

employment in social work.[121] The Bankruptcy Court found that Brunner faced undue hardship in repaying her student loans and granted her a discharge.[122] The United States District Court for the Southern District of New York reversed,[123] and the Second Circuit Court of Appeals affirmed the reversal.[124]

In its approximately one-page opinion, the Second Circuit determined that the District Court had

> adopted a standard for "undue hardship" requiring a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[125]

The Second Circuit itself then adopted the test and incorporated the District Court's reasoning by reference, specifically endorsing the District Court's use of "legislative history" and discovery of "clear congressional intent," the use of "common sense," and the application of "the decisions of other district and bankruptcy courts."[126]

The Second Circuit's succinct analysis held fast and gained widespread popularity, with the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits adopting the test.[127] Outcomes varied in each precedent-establishing case, with most courts favoring discharge denial.[128] To be sure,

---

[121] *Brunner*, 831 F.2d at 396–97.

[122] *Brunner*, 46 B.R. at 753.

[123] *See id.* at 758.

[124] *See Brunner*, 831 F.2d at 397.

[125] *Id.* at 396; *see also Brunner*, 46 B.R. at 756.

[126] *Brunner*, 831 F.2d at 397. ("For the reasons set forth in the district court's order, we adopt this analysis."). The Second Circuit's conclusion that the District Court uncovered "clear congressional intent" regarding the interpretation of undue hardship is particularly odd. In its original opinion, the District Court stated that "Congress itself had little to say on the subject" and "[t]he Senate Report which accompanied the [final bankruptcy revision] bill . . . is mute on the issue of undue hardship," hence the Court's heavy reliance on the Commission's report and recommendations. *Brunner*, 46 B.R. at 753–54.

[127] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 455 (5th Cir. 2019); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

[128] *See In re Thomas*, 931 F.3d at 450 (denying student loan discharge to a woman in her sixties battling diabetic neuropathy and unable to stand for long periods of time); *In re*

discharge after adopting *Brunner* was not completely impossible,[129] although it was rare and difficult to predict.

Unconvinced by the Second Circuit's reasoning, the Eighth Circuit ultimately rejected *Brunner* in its 2003 case *Long*. Debtor Nanci Long was a thirty-nine-year-old chiropractor and single mother who experienced debilitating mental and physical health problems.[130] She ultimately closed her chiropractor practice because of these issues, leaving her unable to pay her substantial student loans from chiropractor college.[131] At the time of her bankruptcy, she was living with her parents, made $12.59 per hour, owed $61,000 in student loans, and had attempted suicide.[132] The Bankruptcy Court for the District of Minnesota found that Long's indebtedness created an undue hardship and discharged her loans.[133] The Bankruptcy Appellate Panel for the Eighth Circuit (BAP) affirmed.[134] Long's student loan creditor appealed to the Eighth Circuit.[135]

Relying on the fact-specific test the *Andrews* court suggested, the Eighth Circuit adopted the "totality-of-the-circumstances" standard in *Long*, stating that the Court

> prefer[red] a less restrictive approach to the "undue hardship" inquiry[,] . . . convince[ed] that . . . adher[ing] to the strict parameters of a particular test would diminish the [judicial] discretion contained in [section] 523(a)(8)(B) . . . . [F]airness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.[136]

Frushour, 433 F.3d at 396 (denying student loan discharge to a single woman raising her child with no child support); *In re Oyler*, 397 F.3d at 384 (reversing student loan discharge for a married father of three children, who made $10,000 annually as a pastor and had suffered four retinal detachments and scleral buckle without health insurance); *In re Gerhardt*, 348 F.3d at 91 (denying student loan discharge for a cello teacher who could not maintain a minimal standard of living); *In re Cox*, 338 F.3d at 1240 (denying student loan discharge for a lawyer with a failed private practice); *In re Faish*, 72 F.3d at 300 (denying student loan discharge for a single mother who received no child support and suffered from Crohn's disease); *In re Roberson*, 999 F.2d at 1138 (denying student loan discharge for a man who was fired from his job and unable to find work because of his DUI conviction).

[129] *See Polleys*, 356 F.3d at 1305, 1312 (granting student loan discharge for an underemployed single mother who lived with her parents, suffered from cyclothymic disorder, and had attempted suicide); *In re Pena*, 155 F.3d at 1113–14 (granting student loan discharge for a man whose wife suffered from depression, bipolar disorder, schizophrenia, and paranoia).

[130] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 551 (8th Cir. 2003).

[131] *Id.* at 551–52.

[132] *Id.*

[133] *Id.* at 551.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 554.

The Court further argued that its rejection of *Brunner* was proper because congressional intent regarding undue hardship "is decidedly absent" in available legislative materials, calling its meaning an "enigma."[137] Post-analysis, the *Long* court reversed the BAP's decision affirming Long's student loan discharge for incorrect review under the *Brunner* test.[138] It then remanded the case back to the BAP for a new analysis under the totality-of-the-circumstances standard.[139]

Since *Long*, the only other circuit court to adopt the totality-of-the-circumstances standard is the First Circuit BAP.[140] Conversely, several bankruptcy courts under the United States Court of Appeals for the First Circuit follow the *Brunner* majority view.[141] Only time will tell which method the Court of Appeals for the First Circuit itself will adopt in the future.

2. Non-Dischargeability Policy

In comparison with the considerably different "totality of the circumstances standard," why is the *Brunner* test so strict as a policy matter? The Second Circuit, in adopting the District Court's reasoning by reference in *Brunner*,[142] makes some suggestions.

The Court primarily relied on the Bankruptcy Commission's 1973 recommendation to understand non-dischargeability under pre-BAPCPA section 523(a)(8). The Commission posited that the multi-year waiting period before students become eligible for loan discharge under the 1978 Act was beneficial, as it disincentivized students from abusing bankruptcy to shed their loans directly after graduation.[143] From this reasoning, the Court inferred that

---

[137] *Id.*

[138] *Id.* at 555.

[139] *Id.*

[140] *See* Access Grp., Inc. v. Schatz (*In re* Schatz), 602 B.R. 411, 428–29 (B.A.P. 1st Cir. 2019); Educ. Credit Mgmt. Corp. v. Bronsdon (*In re* Bronsdon), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

[141] *See* Gallagher v. Educ. Credit Mgmt. Corp. (*In re* Gallagher), 333 B.R. 169, 173 (Bankr. D.N.H. 2005); Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 874 (Bankr. D.N.H. 2000).

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

[143] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (Bankr. S.D.N.Y. 1985). It is worth mentioning that the Commission's recommendation reflects the 1978 Act's language, which barred debtors from receiving discharge for at least five years post-graduation. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. I, § 523(a)(8), 92 Stat. 2549, 2591. If a debtor wanted to receive a discharge during that period, the debtor had to establish that (s)he would experience undue hardship from the payments. *Id.* This language changed under BAPCPA, which axed the five-year period in favor of general non-dischargeability, regardless of how long the debtor had made payments on his or her loans. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59. Whether the majority's current reliance on the 1973 Commission's recommendation is still appropriate post-BAPCPA is, in my opinion, a touch dubious.

the Commission wanted the federal judiciary to impose a "good faith" showing from the debtor prior to discharge.[144] Illustrating its point, the Court explained:

> [Requiring] good faith [naturally] makes student loans a very difficult burden to shake without actually paying them off. While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program. When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders, who may, after investigating their borrowers' financial status and prospects, choose to deny as well as grant credit . . . . The government has no such luxury . . . . Indeed, because it bases its loan decisions in part on student need, it arguably offers loans selectively to the worst credit risks . . . . In return, . . . it strips these [risky] individuals of the refuge of bankruptcy in all but extreme circumstances . . . . This is a bargain each student loan borrower strikes with the government.[145]

Legal scholars differ on whether the *Brunner* court's reasoning for such a burdensome test holds water. For some, the *Brunner* court's reasoning wins the day. While research findings do not support the idea that student loan debtors engage in opportunistic behavior in bankruptcy, *Brunner* adherents believe that repealing non-dischargeability would reduce general credit availability to the most financially-strapped students.[146] Taking it a step further, Congress could even remove the undue hardship exception and its accompanying judicial discretion altogether, since courts inconsistently analyze a debtor's financial situation compared to current income-driven repayments plans.[147]

Other scholars favor a less stringent position. One particular camp asserts that all loans should remain non-dischargeable, except student loans from private lenders.[148] Under this theory, allowing general discharge of student loans places the federal financial aid program at risk of insolvency.[149] Insolvency would then force students to turn to largely unregulated private loans

---

[144] *In re Brunner*, 46 B.R. at 755–56. To its credit, the Court admits in a moment of self-awareness that "[t]here is no specific authority for this requirement" before applying "good faith" in Marie Brunner's case, anyway. *Id.* at 755, 758.

[145] *Id.* at 756.

[146] Rajeev Darolia, *Should Student Loans Be Dischargeable in Bankruptcy?*, BROOKINGS INST. (Sept. 29, 2015), https://www.brookings.edu/blog/brown-center-chalkboard/2015/09/29/should-student-loans-be-dischargeable-in-bankruptcy/.

[147] Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 265–68 (2000).

[148] Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229, 237 (2015); Mike Papandrea, *Should We Really Discharge the Student Loan Debt Discharge Exception? Why Reversing the 2005 BAPCPA Amendment is Not Relief to the Debtor*, 12 RUTGERS J.L. & PUB. POL'Y 555, 572–74 (2015).

[149] Mueller, *supra* note 148.

with no lending limits and comparatively unfavorable terms.[150] Conversely, general discharge solely for private loans would incentivize private lenders to self-regulate, protecting consumers and staving off tuition inflation.[151] At any rate, section 707 of the bankruptcy code provides sufficient procedural safeguards to keep debtor abuses in check.[152] In line with this position, several circuit courts in recent years have found that private loans are dischargeable under section 523(a)(8).[153]

Another camp asserts that the current system may stick with general non-dischargeability, but either (1) the courts need to rework their interpretation of undue hardship or (2) Congress needs to replace undue hardship with a clearer standard. Suggestions include interpreting undue hardship on narrower grounds, such as a debtor's debt-to-income ratio or fraudulent intent;[154] determining dischargeability at the time of filing;[155] creating a separate bankruptcy chapter for student loan debt;[156] and/or simply changing the cultural attitude in the legal field that non-dischargeability is inevitable.[157] These changes would arguably

---

[150] *See id.* at 238–39.

[151] *Id.* at 244–46; *see also* Papandrea, *supra* note 148, at 568. For more discussion regarding the Bennett Hypothesis and its effect on tuition inflation, see *supra* note 90 and accompanying text.

[152] Mueller, *supra* note 148, at 247–51.

[153] *See* Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 601–02, 604 (2d Cir. 2021) (holding that private student loans are excepted from discharge under 11 U.S.C. § 523(a)(8)(A)(ii) only if they were "made to individuals attending eligible schools for certain qualified expenses"); McDaniel v. Navient Sols. LLC (*In re* McDaniel), 973 F.3d 1083, 1097–98 (10th Cir. 2020) (holding that a student loan is not an "obligation to repay funds received as an educational benefit" under 11 U.S.C. § 523(a)(8)(A)(ii)); Crocker v. Navient Sols. LLC (*In re* Crocker), 941 F.3d 206, 224 (5th Cir. 2019) (denying loan lender's motion for summary judgment and declaring that the debtors' private loans had been discharged under 11 U.S.C. § 523(a)(8)).

[154] Stephen W. Sather, *Dischargeability of Student Loans in Bankruptcy*, AM. BANKR. INST. (Sept. 20, 2021, 4:19 PM), https://www.abi.org/feed-item/dischargeability-of-student-loans-in-bankruptcy ("If Congress is not willing to generally allow discharge of student loans after a period of time, some reforms it might consider include[s]: . . . [a]dopting a definition of 'undue hardship' which does not require proof of absolute desolation."); John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725, 766, 771–83 (2019); John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44(2) CANADIAN BUS. L.J. 245, 266–67 (2007).

[155] Feather D. Baron, *The NonDischargeability of Student Loans in Bankruptcy: How the Prevailing "Undue Hardship" Test Creates Hardship of Its Own*, 42 U.S.F.L. REV. 265, 267–68, 294–97 (2007).

[156] Colin T. Halpin, *The Disconnect of Student Loan Dischargeability in Bankruptcy*, 59 WASHBURN L.J. 25, 32 (2019).

[157] Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 537–39, 543 (2020). For an example of a bankruptcy court creating a novel method of navigating *Brunner*, see Bell v. U.S. Department of Education (*In re* Bell), 633 B.R. 164, 177, 180–81 (Bankr. W.D. Va. 2021).

improve the bankruptcy system by discarding overly broad language that currently mislabels students as "frauds,"[158] and mitigate a market that encourages sub-prime lending.[159] The increased possibility of discharge would also encourage students to enter into fields that are low-paying (particularly at the front-end of a career) but need highly-educated professionals.[160]

III. LEGAL CORPUS LINGUISTICS

While the average American citizen may openly have a policy bias in favor of rethinking a case like *Brunner*, judges themselves are generally less candid in their personal preferences. This is arguably because judges understand that policy and law are different. Judges are supposed to be neutral arbiters of the law, not law-making legislators.[161] Interpretation must necessarily be as free from bias as practicable, or the courts may lose their legitimacy by acting unconstitutionally.[162] Indeed, this concept of judicial neutrality appears straightforward—except when Congress makes room for judicial discretion. Based on the current case law and scholarship listed in Section II.B, it appears that most courts agree Congress allowed ample judicial discretion for interpreting undue hardship. However, there is no consensus on which method or theory of statutory interpretation will result in fairness and clarity, while still maintaining the courts' institutional integrity. With these issues in mind, this Article now addresses legal corpus linguistics (LCL).

A. *What is Legal Corpus Linguistics?*

Corpus linguistics is the study of language ("linguistics") by analyzing samples of real-world language in large bodies of written text ("corpus," plural "corpora").[163] Twenty-first century technology enables linguists to digitize text into user and search-friendly corpora (also known as databases).[164] A corpus often contains millions (or even billions) of words collected from a range of

---

[158] Pottow, *supra* note 154, at 276.

[159] *Id.*

[160] Hunt, *supra* note 154, at 773–75.

[161] THE FEDERALIST NO. 47 (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."). The reference is to Montesquieu, 1 *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Pub. Co. N.Y. 1949).

[162] Robert Rantoul, *Oration at Scituate*, *in* AMERICAN LEGAL HISTORY 317, 317–18 (1991) ("Judge-made law is ex post facto law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.").

[163] *See* Douglas Biber, *Corpus-Based and Corpus-Drive Analyses of Language Variation and Use*, *in* THE OXFORD HANDBOOK OF LINGUISTIC ANALYSIS 193, 193 (Bernd Heine & Heiko Narrog eds., 2d ed. 2015).

[164] *Id.*

sources, including newspapers, books, academic articles, magazines, television transcripts, legal documents, and many other written materials.[165]

Linguists curate their corpora from specific, hand-selected sources, which helps them understand how particular groups of people use language in context. These groups of people are called language or "speech" communities.[166] Language communities can be as broad or as narrow as the linguist's imagination allows, depending on which voices, ideas, and/or time periods are included in the corpus.[167] With a large enough corpus, linguists can detect patterns in a language community's word or phrase usage—usage that the community itself may not be cognizant of when speaking or writing.[168]

Linguists typically use three types of tools to analyze a corpus: (1) frequency, or how often a word/phrase appears in the corpus;[169] (2) collocation, or a word/phrase's tendency to appear next to other words/phrases;[170] and (3) context, or how a word/phrase is used and understood in a document's larger framework.[171] Depending on the corpus's capabilities, a linguist may refine a word/phrase search by filtering for era, document type, genre, part of speech, or other available function.

LCL, the legal variation of corpus linguistics pioneered by Justice Thomas R. Lee and Stephen C. Mouritsen, is a tool for assessing how certain language communities understand the ordinary meaning of legal text.[172] It does not, however, function as a theory of legal interpretation, despite its deep connections to textualism. It cannot tell a judge what to do with language usage evidence. But it can produce language evidence the courts otherwise must speculate over, broaden the range of linguistic context, and check a judge's motivated reasoning.[173]

---

[165] *See* Mark Davies, *The 385+ Million Word* Corpus of Contemporary American English *(1990–2008+): Design, Architecture, and Linguistics Insights*, 14 INT'L J. CORPUS LINGUISTICS 159, 161–62 (2009). At the time of this publication, COCA contains over one billion words. *See* CORPUS OF CONTEMP. AM. ENG., https://www.english-corpora.org/coca/ (last visited Apr. 2, 2022).

[166] Lee & Mouritsen, *supra* note 22, at 830–31; Solan & Gales, *supra* note 26, at 1337.

[167] For example, a linguist could hypothetically create a corpus of post-1960s Black women's literature, or a corpus of American politicians' social media posts, or a corpus of international treaties written in the German language, etc. The sky truly is the limit. It all simply depends on whose viewpoint the linguist cares about when interpreting the meaning of language.

[168] Biber, *supra* note 163, at 193, 197.

[169] SUSAN HUNSTON, CORPORA IN APPLIED LINGUISTICS 21 (Michael H. Long & Jack C. Richards eds., 2002).

[170] *Id.* at 20–21.

[171] *Id.* Many scholars refer to this tool as KWIC, or Keyword in Context. *See* Davies, *supra* note 165, at 167–68.

[172] *See* Lee & Mouritsen, *supra* note 22.

[173] Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 297–300 (2021).

B. *Strengths and Weaknesses*

In addition to being informationally rich, LCL's other strengths lie in its transparency and reliability.[174] It is designed to act as a scientific experiment, where anyone can repeat (or "peer review") a judge's or attorney's search, and either verify or falsify/refute the original experimenter's results.[175] LCL injects an unprecedented level of data-based objectivity into judicial decision-making—addressing the judiciary's counter-majoritarian difficulty head-on via linguistic insight from "the people" of the United States.[176] In other words, LCL rejects the traditional notion that a judge can offer an unsupported, unelected "because I said so" as his or her reasoning and get away with it. Because of its scientific nature, LCL also highlights the limits of current tools that courts use to understand legal text.[177] Current tools include judicial intuition, dictionaries, etymology, and canons of construction.

Judicial intuition (or discretion), as mentioned above, is susceptible to a judge's personal policy preferences, regardless of whether the judge acknowledges it.[178] Moreover, even when a judge actively removes policy bias, they are still susceptible to "false consensus bias," or the perception that other people interpret language the same way as oneself.[179] For example, Professors Lawrence M. Solan and Tammy Gales highlighted this idea by describing an experiment where study participants were asked to interpret the terms of a contract.[180] Data ultimately showed that each participant grossly overestimated the likelihood that other participants understood the contract in the same way.[181]

---

[174] *Id.* at 297–98.

[175] *See* Mouritsen, *supra* note 25; Solan & Gales, *supra* note 26.

[176] Mouritsen, *supra* note 25, at 201–02; ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d. ed. 1986) ("The root difficulty is that judicial review is a counter-majoritarian force in our system . . . . But the [] [phrase the "power of the people"] . . . is an abstraction. Not necessarily a meaningless or pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and is the reason the charge can be made that judicial review is undemocratic.").

[177] Lee & Mouritsen, *supra* note 173, at 285–90.

[178] Rantoul, *supra* note 162, at 318.

[179] Solan & Gales, *supra* note 26, at 1331.

[180] *Id.* at 1334.

[181] *Id.* at 1333–34 (citing Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1290 (2008)).

Likewise, dictionaries also have their limits. Not only do dictionaries often fail to contextualize words,[182] but they may also have multiple senses missing[183] and are beholden to suggested usages from the human dictionary drafter.[184] Because of these shortcomings, scholars and judges alike often criticize dictionary use as subject to cherry-picking and bias.[185]

Etymology and canons of construction fare no better. Etymology, or a word's "historical pedigree in other languages,"[186] is not so easily transferrable for understanding legal language in modern-day English. English words derived from ancient foreign tongues are not always cognates. If they were, "*December* would mean the tenth month, and an *anthology* would mean a bouquet of flowers."[187]

And finally, interpretive principles of legal language, or "canons of construction," have their own weaknesses. These rules of thumb are flawed not only because they sound insufferably pretentious in their original Latin,[188] but

---

[182] Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359, 1367 (2017); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 283 (2019) (stating that words draw meaning from other words surrounding them, but dictionaries provide the meanings of words in isolation); Friedemann Vogel et al., *Computer-Assisted Legal Linguistics: Corpus Analysis as a New Tool for Legal Studies*, 43 L. & SOC. INQUIRY 1340, 1346 (2018).

[183] Stephen C. Mouritsen, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1924 (2010) ("A dictionary cannot tell us precisely what meaning a word must bear in a particular context, because the lexicographer cannot know *a priori* every context in which the term will be found.").

[184] *Id.*

[185] For example, Judge Posner criticizes the use of dictionaries in *United States v. Costello*, 666 F.3d 1040, 1043–44 (7th Cir. 2012) (summarizing literature critical of judicial reliance on dictionaries to ascertain ordinary meaning, focusing on the gap between context-sensitive use of words, and the acontextual nature of dictionary definitions), as does Associate Chief Justice Thomas R. Lee of the Utah Supreme Court in *State v. Rasabout*, 356 P.3d 1258, 1271–73 (Utah 2015) (Lee, J., concurring). *See* John D. Ramer, *Corpus Linguistics: Misfire or More Ammo for Ordinary-Meaning Canon?*, 116 MICH. L. REV. 303, 307–08 (2017) (explaining that, when two judges find support in different dictionaries, "the dispute is . . . based on the judges' differing intuitions about the word's ordinary meaning."); Jacob Crump, *Corpus Linguistics in the* Chevron *Two-Step*, 2018 BYU L. REV. 399, 401 (2018) ("[T]he temptation is for judges to reflexively turn to dictionaries to marshal support for their own intuitions about linguistics ambiguity and the reasonableness of various interpretations. But the problem is, this type of reasoning allows judges to look out over the crowd of dictionary definitions and pick out their friends.").

[186] Lee & Mouritsen, *supra* note 173, at 288.

[187] *Id.* (footnote omitted).

[188] Googling the constant barrage of Latin phrases in law school was irritating when plain English worked better. I certainly grew weary of trying to remember canons like *ejusdem generis* or *noscitur a sociis*. The late Justice Scalia agrees, too. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Princeton Univ. Press 2018) ("Textualism is often associated with

also because "[t]he linguistic premises that undergird them are untested."[189] Courts failed "for centuries . . . [to question] whether (or when) [canons] are consistent with ordinary language usage."[190] Moreover, "[m]any of the canons are subject to counter-canons, which open the door to the very subjectivity and motivated reasoning that resort to ordinary meaning claims to avoid."[191]

Of course, for fairness' sake, this is not to suggest that other methods of legal interpretation are unhelpful. "It's just that they may not always be independently up to the task of gauging ordinary meaning."[192] What's more, LCL itself has a few potential pitfalls of which any judge or practitioner must be aware.

First, we must consider whether judges and attorneys should undertake corpus analysis in the first place.[193] They are not titled as official "linguists," after all. This preliminary question, however, delves into some needless hand-wringing that ignores one glaring reality: It is a judge's and attorney's *job* to interpret and apply language. It's a fact that legal experts often wear the linguist's hat, regardless of whether they want to label it that way.[194] That said, if attorneys or judges feel uncomfortable initiating their own analyses, they always have the option of requesting expert linguistic testimony.[195]

Second, there is the "notice" issue. Should judges avoid using corpus linguistics unless the parties brief it in an adversary proceeding?[196] And even if they are briefed, should judges avoid using it, since "corpus linguistics" means very little to the average Joe?[197] The answer is no. Corpus linguistics is about the common judicial task of language analysis, where multiple interpretive tools (briefed or not) are available to them.[198] It is *not* about fact-finding best left to juries.[199] Furthermore, briefing or no briefing, judges and attorneys already use interpretive methods that seem obscure to the lay person, such as canons of construction. If it helps unearth reasonable answers to legal questions, why not utilize corpus linguistics in the same way?[200]

---

rules of interpretation called the canons of construction—which have been widely criticized, indeed even mocked, by modern legal commentators. Many of the canons were originally in Latin, and I suppose that alone is enough to render them contemptible.").

[189] Lee & Mouritsen, *supra* note 173, at 289.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 290.

[193] Lee & Mouritsen, *supra* note 22, at 865.

[194] *Id.* at 866.

[195] *Id.* at 871–72.

[196] *See* Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1514–16 (2017).

[197] *Id.*

[198] Lee & Mouritsen, *supra* note 22, at 868–71.

[199] *Id.*

[200] *Id.*

Third, consider the debate over which flavor of "ordinary meaning" wins the day. When a judge interprets a word, should they care about a word's possible meaning, common meaning, most frequent meaning, exclusive meaning, or prototypical meaning?[201] Should we assume some senses might be missing from the corpus?[202] Should we care about what ordinary people thought of the legal language at the time of its drafting, or should we assume the meaning evolves over time?[203] In essence, "we have no ordinary meaning of 'ordinary meaning.'"[204] Scholars need to conduct more research to resolve this problem. Until then, this issue is likely subject to Congress-endorsed judicial discretion.

Finally, we must be mindful of the language community.[205] Audience matters, especially since legal language affects many walks of life. Unfortunately, some corpora have glaring document omissions, and some available data may include undesirable cultural biases against traditionally marginalized groups.[206] Scholars should conduct more research into this area as well, ensuring we have unbiased, well-rounded corpora to glean from. In the meantime, legal experts may take comfort that corpus linguistics is so informationally rich that we can physically see and check patterns of bias in the first place—a capability that other methods of textual interpretation fail spectacularly.

All things considered, LCL's many strengths warrant inclusion into our arsenal of legal interpretation methods. When Congress permits judicial discretion in legal interpretation, it is helpful knowing that judges have LCL to achieve more thoughtful, well-rounded, transparent, and (hopefully) diverse solutions to tough problems. As Lee and Mouritsen aptly stated, "our argument is simply that linguistic corpora may provide language evidence through which judges and lawyers can test their intuitions about the meaning of a legal text."[207]

C. *Current Application and a Pre-Analysis "To-Do" List*

In recent years, state and federal courts (including the Supreme Court of the United States) have transformed LCL from a mere academic exercise into a

---

[201] *Id.* at 800–01, 817–18, 858–59, 874 (using the example of "no vehicles in the park," Lee and Mouritsen debate over the numerous directions a word's "ordinary meaning" could hypothetically go).

[202] *Id.* at 844–45.

[203] *Id.* at 826.

[204] Lee & Mouritsen, *supra* note 22, at 798.

[205] *See* Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401, 430–35 (2019); Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 458–60 (2018). *But see* Lee & Mouritsen, *supra* note 173, at 300–04.

[206] *See* Matthew Jennejohn et al., *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767 (2021) (identifying sexism in the Corpus of Historical American English (COHA)).

[207] Lee & Mouritsen, *supra* note 173, at 347.

practicable method of legal interpretation.[208] Professor Kevin P. Tobia, one of LCL's most vocal critics, asserts that if the courts want to take (what he believes is) the ill-advised risk and adopt LCL into the legal family, they would be remiss if they did not endorse some best practices for practitioners and judges.[209] For the sake of providing additional guidance for judges and practitioners in such a fledgling enterprise as LCL, Tobia's eight standards are briefly outlined below.

The first two standards address language community issues: "Analyze texts from the relevant time," and "[u]se representative and balanced corpora."[210] As stated in Section III.B, audience matters because the law affects many walks of life. Thus, targeted corpora are necessary, albeit a bit elusive. Helpfully, Tobia does resolve the "originalism" question for purposes of this Article, arguing that these two standards matter specifically because LCL "seeks evidence of 'ordinary' or 'public' meaning, a notion that is justified as a popular and democratic criterion of interpretation, related to reliance and notice values."[211]

---

[208] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2238–39 (2018) (Thomas, J., dissenting) (citing corpus linguistic evidence that "[t]he phrase 'expectation(s) of privacy' does not appear in" Founding-era sources); Caesars Ent. Corp. v. Int'l Union of Operating Eng'rs, 932 F.3d 91, 95 (3d Cir. 2019) (citing "most common synonyms" of the relevant term, "previously," and the "words that most often co-occurred" with it); Wilson v. Safelite Grp., Inc., 930 F.3d 429, 444 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in judgment) (taking frequency data as evidence of ordinary meaning); State v. Lantis, 447 P.3d 875, 880–81 (Idaho 2019) (noting that in the corpus linguistics search concerning the phrase "disturbing the peace," "88.4% referenced a public, external, physical peace" and that this finding supported the court's "conclusion that 'disturbing the peace' has a meaning that nearly always refers to public, external peace"); Richards v. Cox, 450 P.3d 1074, 1079 (Utah 2019) (citing frequency data to interpret the meaning of "employment"); Fire Ins. Exch. v. Oltmanns, 416 P.3d 1148, 1163 n.9 (Utah 2018) (Durham, J., concurring in part and concurring in result) (advocating corpus linguistics as a tool to identify the "most frequent meaning" and "most common meaning" (internal quotations omitted)); State v. Rasabout, 356 P.3d 1258, 1275–82 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in judgment) (taking frequency data as evidence of ordinary meaning); *In re* Adoption of Baby E.Z., 266 P.3d 702, 725–26 (Utah 2011) (Lee, J., concurring in part and concurring in judgment) (same).

[209] Kevin Tobia, *Post: The Corpus and the Critics*, U. CHI. L. REV. ONLINE (Mar. 5, 2021), https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/. I perceive that Tobia's anxieties regarding LCL use stem from the fact that LCL went largely untested before judges began using it in real cases. *See* Lee & Mouritsen, *supra* note 22. Innovators such as Lee and Mouritsen might have created the prototype for LCL, but they failed to conduct sufficient clinical trials on a crash dummy (so to speak) before presenting the final product to the market for general consumption. Admittedly, this is a serious error on the LCL community's part. It is not necessarily a fatal one, however. This Article is an attempt to bridge the clinical trial literature gap. It simulates an LCL analysis in a controlled environment, demonstrating to judges and practitioners how LCL functions in a mock case. That said, I do call for additional literature for applied LCL in all legal areas. We cannot begin to develop effective "best practices" without understanding how LCL interacts with a variety of legal language.

[210] Tobia, *supra* note 209.

[211] *Id.*

The third and fourth standards address word/phrase frequency issues: "Don't commit the nonappearance or uncommon use fallacies," and "Don't commit the comparative use fallacy."[212] In other words, do not assume that because a word sense appears more often in the corpus than others, it is crowned "ordinary meaning" by default. Furthermore, do not assume that because a word sense does not appear in a corpus, it does not exist.[213]

Next, standard five suggests that we "[t]ake account of the 'context' of the language."[214] Tobia argues the best context to understand legal language is in its natural habitat—legal language.[215] Divorcing legal language from the original context and comparing it to poorly crafted, non-legal corpus search findings only impairs understanding.[216]

Standards six and seven go hand-in-hand: "Acknowledge that corpus data might ultimately be unhelpful," and "Acknowledge the possibilities of linguistic indeterminacy."[217] Sometimes the corpus data will provide no insight. Sometimes antitextualists will use LCL to support their theory that words are meaningless. Be prepared to address both if they arise.

And finally, standard eight: "Do not rely on 'intuition' that may be biased."[218] Tobia suggests that for optimal results, judges and attorneys should employ "'blind' coders" to analyze LCL data.[219] This would neutralize the tendency for interested parties to code for a specific outcome when assessing word frequency in corpus data.[220]

Moving to Part IV below, this Article implements Tobia's suggestions by demonstrating an example of an LCL analysis—specifically, the "undue hardship" language found under section 523(a)(8). Adding to Tobia's suggestions, I suggest my own steps for proper LCL use and application—more specifically, framing the linguistic question, and then implementing a framework for LCL experiment design and data evaluation.

---

[212] *Id.*

[213] This call for balancing perspectives regarding frequency makes sense, given that the entire point of LCL is to check a judge's false consensus bias.

[214] Tobia, *supra* note 209.

[215] *Id.*

[216] Because a bright-line rule here may prove unnecessarily restrictive (and perhaps a touch anti-democratic/elitist), I do recommend relying on LCL's twin strengths to settle the context issue: repeatability and falsifiability. If a party opponent finds a design flaw in the original experiment, *e.g.*, results with context that allegedly misses the mark, tweak the issue. Usher in competing experts. Compare and contrast findings. Peer review both. Take the issue on appeal. Such is the uncomfortable, evolving nature of science and adversary proceedings.

[217] Tobia, *supra* note 209.

[218] *Id.*

[219] *Id.*

[220] I have no objections for the most part, although there is a question of how feasible blind coding is for a judge who undertakes LCL *sua sponte*.

IV. CORPUS LINGUISTICS AND "UNDUE HARDSHIP"

A. *Preliminary and Normative Questions*

In his *Brunner* and *Long* research, Professor John Patrick Hunt offers an excellent starting point for framing (and researching) this Article's linguistic question: What is the ordinary legal meaning of "undue hardship?"[221] Using dictionaries, federal courts' interpretations of undue hardship in non-bankruptcy contexts, and available section 523(a)(8) legislative history, Hunt ascertained that the correct modifier for "undue" is neither "unusual" nor "extreme."[222] Rather, Hunt argues that the most correct modifier is "unjustified,"[223] signaling a favorable outlook for the *Long* standard over *Brunner*.

Staying mostly true to Hunt's framing, this Article begins this LCL analysis by pairing Hunt's linguistic question with LCL's most commonly used legal theory (namely, ordinary public meaning): What is the ordinary public meaning of undue hardship to both legal and lay communities, spanning the timeframe between section 523(a)(8)'s inception and its multiple revisions?

As an explanation for this framing, because "undue hardship" is legal language from the United States Code that governs the entire country, the proper language community is the American public, both legal and lay. Such a framing caters to our respect for American representative democracy. To humor Tobia, however, this analysis does include the undue hardship language as an undivided phrase lifted directly from the statute, simply to see how both legal and lay people treat it. Is it generally seen as a legal term of art or a lay statement? And how is it measured? A rigid test? A flexible standard? Or something else?

In addition to the language community, this analysis requires the relevant timeframe and corpora. Because (1) the undue hardship language originated from the 1973 Bankruptcy Commission's recommendations;[224] (2) the circuit courts issued their *Brunner* and *Long* precedents between 1987 and 2003;[225] and (3) the last intensive bankruptcy code amendments post-BAPCPA occurred in 2010,[226] I set the timeframe for 1970 through 2010. I rounded down to 1970 for ease in filtering corpus results.[227] This framing remains sensitive to the evolving nature of the United States Code.

As for the corpora, I pinpointed three that contained the most comprehensive and balanced American documents: the Corpus of Contemporary American

---

[221] John Patrick Hunt, *Bankruptcy as Consumer Protection: The Case of Student Loans*, 52 ARIZ. ST. L.J. 1167, 1177–88.

[222] *Id.*

[223] *Id.*

[224] *See supra* note 40.

[225] *See supra* Section II.B.1.

[226] The Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3561.

[227] This is merely a recommended experiment layout. Peer review and variable changes are allowed and encouraged in future LCL analyses.

English (COCA); the Corpus of Historical American English (COHA); and the Corpus of Supreme Court Opinions of the United States (COSCO-US). COCA contains over 1 billion words from American English texts spanning from 1990 through 2019.[228] Decades are balanced by genre, including "TV and movie subtitles, spoken, fiction, popular magazines, newspapers, and academic journals."[229] Similarly, COHA contains more than 475 million words of American English texts from 1820 through 2010.[230] Sources include TV/movie subtitles, fiction from Project Gutenberg, Making of America, scanned books, archive.org, and COCA.[231] "Non-fiction sources are balanced across the Library of Congress classification system."[232] And finally, COSCO-US contains 98 million words from "all opinions in the United States Reports and opinions published by the Supreme Court through the 2017 term."[233] These corpora, while not necessarily perfectly representative, are the best corpora currently available for this LCL analysis that values public opinion.

B. *Crunching the Numbers*

Using the relevant search phrase "undue hardship," I initially coded the concordance lines into five distinct yet overlapping categories: (1) legal context; (2) lay (*i.e.*, non-legal) context; (3) measurement via a "standard;" (4) measurement via a "test;" and (5) no offered measurement.[234] For purposes of this experiment, a "standard" was defined as a flexible, factor-intensive measuring stick that addressed a fact pattern on a case-by-case basis. A "test," on the other hand, was defined as any measurement that either required adherence to a bright-line rule, or strictly required the facts to conform to a multi-part checklist.

Key words and contexts indicating a standard included terms such as "standard," "factor(s)," "case-by-case basis," and/or other broad phrasing that required highly fact-specific analysis, *e.g.*, "significant expense or difficulty," "anything beyond de minimus cost," and "reasonable accommodation." Conversely, key words and contexts indicating a "test" included bright-line rules with specific numbers or test prongs, e.g. requiring Medicaid recipients to "pay

---

[228] CORPUS OF CONTEMP. AM. ENG., https://www.english-corpora.org/coca/ (last visited Apr. 2, 2022).

[229] *Id.*

[230] CORPUS OF HIST. AM. ENG., https://www.english-corpora.org/coha/ (last visited Apr. 2, 2022).

[231] *Id.*

[232] *Id.*

[233] CORPUS OF SUP. CT. OPINIONS OF THE U.S., https://lawcorpus.byu.edu/ (last visited Apr. 2, 2022).

[234] Concordance lines are a list or index of specific words found in a corpus that show every contextual occurrence of the word(s). *See Using Concordance Lines*, ACAD. VOCABULARY, https://www.nottingham.ac.uk/alzsh3/acvocab/concordances.htm (last visited Apr. 2, 2022).

20 percent of their health care works undue hardship on Medicaid patients," and "requiring sale of property at sacrifice price."

Together, the three corpora produced 208 hits between 1970 and 2010: eight hits in COHA, sixty-six hits in COCA, and 134 hits in COSCO-US. Because treatment of undue hardship often varied within the same document, no documents or usages were flagged as duplicates. Overall, approximately 47.1% of all concordance lines measured undue hardship as a standard, 2.8% measured it as a test, and 50% declined to offer any measurement metric. Each individual corpus's concordance lines essentially matched the overall averages. COCA measured approximately 59% of lines as a standard and 4.5% as a test, with 36.4% declining to measure. COHA measured approximately 37.5% as a standard and 12.5% as a test, with 50% declining to measure. And finally, COSCO-US measured approximately 41% as a standard and 1.4% as a test, with 57.6% declining to measure.

As for legal versus lay usage, 88% of all concordance lines in COCA and COHA used undue hardship in a legal context. COSCO-US, being entirely legal, was not included in the legal versus lay analysis.

From here, I narrowed down the legal versus lay context even further, trying to determine which legal and lay contexts undue hardship appeared in the most. Lay contexts included Medicaid issues, corporate culture, international and American domestic politics, gender and racial diversity, renewable energy matters, night-life and club culture, and dramatized crime. Legal contexts, on the other hand, most commonly included disputes over the Americans with Disabilities Act of 1990 (ADA) and the Civil Rights Act of 1964 (CRA). ADA context appeared in COCA, COHA, and COSCO-US 12.5%, 42.4%, and 20.8% of the time, respectively. Likewise, CRA context appeared in COCA, COHA, and COSCO-US 12.5%, 30.3% and 35.8% of the time, respectively. In both ADA and CRA contexts, the Supreme Court defined undue hardship exclusively as a standard.

Other legal contexts varied, each appearing six times or fewer in all three corpora combined. These outlier contexts included tax law, criminal law and criminal procedure, non-CRA First Amendment issues, Social Security, immigration, attorney work product confidentiality issues, and civil procedure. Undue hardship definitions in these contexts overwhelmingly favored measurement as a standard or no measurement at all. The most prominent legal context outside ADA and CRA contexts was in COSCO-US, with bankruptcy/student loan debt context appearing 31.3% of the time. These bankruptcy concordances, of course, declined to offer a measurement metric for undue hardship.

Collocate analysis across all three corpora offered additional support for the data above. Setting the range to four words to the left and right of undue hardship, no single word dominated the data. However, most collocates included words commonly found in legal contexts, specifically ADA and CRA disputes. Nouns and adjectives that occurred twice or more included "accommodation," "employer," "employee(s)," "reasonable," "business,"

"disabled," "argument," and "debt(or)." Verbs that occurred twice or more included "cause" and "impose."

C. *Understanding the Numbers*

Now for the nitty-gritty: What does the data tell us? Statistically speaking, undue hardship as a phrase is generally used in a legal context over a lay context, even in the corpora like COCA and COHA with non-legal sources. Furthermore, undue hardship had no clear definition in approximately half of all instances, perhaps indicating that it is tough to measure. However, when undue hardship *was* defined, it was predominantly measured as a flexible, factor-intensive standard, rather than a bright-line or multi-prong test that requires a party to clear multiple hurdles.

The most common legal contexts in all three corpora were in ADA and CRA matters. In the same vein, the concordance lines referencing ADA and CRA Supreme Court cases exclusively treated "undue hardship" as a standard, not a test. That said, the Supreme Court concordance lines did make it clear that undue hardship, while a fact-specific inquiry, is a difficult standard to prove, usually finding in favor of the protected party. Finally, the Supreme Court has never directly addressed how "undue hardship" should be measured in bankruptcy and student loan debt discharge, despite its numerous findings on similar language in ADA and CRA issues.

If we care about statistical significance and apply the data accordingly, it appears that the *Brunner* and *Long* courts' analyses were both right and wrong. *Brunner* was correct in giving great deference to the protected party (*i.e.*, the government for taking on a risky portfolio),[235] but it was incorrect in measuring undue hardship with a test. Statistically, the preferred usage in the corpora data is a fact-specific standard in both legal and lay contexts, where each debtor would be treated on a case-by-case basis—though weighing in favor of the government as a priority unsecured creditor (a consideration that *Long* does not address). Based on the COSCO-US concordance lines in particular, the Supreme Court presumably preferred this outcome because of (1) the lack of legislative history for the phrase and/or (2) the lack of a well-defined, in-text mandate from Congress. Without more, it appears the Supreme Court cautiously exercised judicial discretion and applied a looser measurement metric.

LCL data in hand and policy considerations applied, I propose a new, LCL-backed, hybrid rule to replace both the *Brunner* test and the *Long* standard: "Undue hardship" under section 523(a)(8) is measured by examining the totality of the debtor's particular circumstances, weighed in a light most favorable to the creditor issuing the qualified educational loan.

Not only does the data support this new rule, but the new rule interprets section 523(a)(8) in the statute's most current iteration, while also balancing competing policy concerns between student loan debtors and their creditors.

---

[235] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985).

According to the *Brunner* court, "undue hardship" in the 1980s heavily favored creditors only because student loan debtors had a path to discharge after five years of payments per the 1978 Act's language. Today, the five-year discharge bar no longer exists in the current bankruptcy code, rendering *Brunner*, *Long*, and their progeny not only obsolete, but quite harmful to student loan debtors. These considerations in mind, it does not take a large leap of faith to rewrite old precedent in favor of a new test via LCL's more transparent methodology.

CONCLUSION

Student loan debt is a problem. In the 1970s, Congress began with a relatively friendly posture toward student loan debtors, treating all student loan types like any other dischargeable consumer debt in bankruptcy. As history marched forward, however, its stance became increasingly unsympathetic under credit lobby pressure. This resulted in general non-dischargeability for all student loan types beginning in the late 1990s and early 2000s, absent a finding of undue hardship under section 523(a)(8). The longstanding question for the Courts then became: "Just *how* arduous did Congress intend 'undue hardship' to be?" The circuit courts ultimately split over the issue, with the majority subscribing to the easily applicable *Brunner* test over the more work-intensive, fact-specific *Long* standard.

Scholars extensively debated *Brunner*'s methodology. Many agreed that the *Brunner* test and its interpretation of undue hardship has no basis for being so strict. This debate has only increased in prominence during COVID-19, where the high student debt load and its contributing factors cannot be ignored.

Without any guarantees that Congress will clarify the statutory language, how judges interpret undue hardship can mean the difference between financial health and ruin for American college students. Luckily, LCL provides a new method for interpreting undue hardship—a welcome development, considering BAPCPA's painfully opaque language.

Does this mean LCL is the answer to all bankruptcy code problems? Not at all. But it *is* an additional tool in the modern judge's interpretive arsenal, so long as the judge adheres to some best practices. And based on current LCL data, it appears there is a reliable basis for dispensing with *Brunner*. In sum, it is time to let corpus linguistics give struggling student loan debtors a feasible way out from under the load.

Let's hear John Oliver talk about *that*.