

BACK TO BANKRUPTCY'S EQUITABLE ROOTS: RECALIBRATE THE DISCHARGEABILITY OF STUDENT LOANS THROUGH A MODIFIED EIGHTH CIRCUIT APPROACH

INTRODUCTION: THE NONEXISTENT LEGAL RELIEF FOR THE STUDENT LOAN CRISIS

In 2004 our nation's student loan debt stood at \$345 billion.¹ Today, the student loan debt has more than quintupled, swelling to over \$1.7 trillion² borrowed by over forty-four million past and current American students.³ Student loan debt is larger than credit card debt⁴ or automobile loan debt⁵ and has serious consequences for the student debtor. The looming debt has forced 40% of student debtors to delay major purchases, such as a house or car, and caused more than a quarter to move back in with their parents or family members.⁶ A similar percentage of student debtors have even delayed necessary further education they need.⁷

The relief available to student debtors under the United States Bankruptcy Code (Bankruptcy Code) is governed by § 523(a)(8). Under § 523(a)(8), a debtor may have their student loan debt discharged only if preventing the discharge of the student loan debt would impose an “undue hardship” on the debtor and the debtor's dependents⁸ (Undue Hardship

1. *Student Loan Data and Demographics, Center for Microeconomic Data*, FED. RESRV. BANK OF N.Y. (July 2018), <https://www.newyorkfed.org/microeconomics/topics/student-debt> [<https://perma.cc/DK5G-KTG4>] (choose “Student Loan Data and Demographics” under “Reports and Data” to access an Excel spreadsheet containing student loan data from 2018).

2. *U.S. Student Debt in Real Time*, STUDENT LOAN HERO BY LENDINGTREE, <https://studentloanhero.com/student-loan-debt-clock/> [<https://perma.cc/44NZ-AW3S>].

3. Of the forty-four million borrowers, 16.8 million are under age 30, 12.3 million are between ages 30–39, 7.3 million are between ages 40–49, 5.2 million are between ages 50–59, and 3.2 million are over the age of 60. See *Student Loan Data and Demographics*, *supra* note 1.

4. See Alina Comoreanu, *Credit Card Debt Study*, WALLETHUB (Dec. 8, 2020), <https://wallethub.com/edu/cc/credit-card-debt-study/24400#:~:text=Americans%20began%202020%20owing%20more,paydown%20ever%2C%20at%20%2460%20billion> [<https://perma.cc/GG7R-NWUW>]; *Student Loan Data and Demographics*, *supra* note 1.

5. See Jenn Jones, *Average Car Payment: Loan Statistics 2021*, LENDINGTREE, <https://www.lendingtree.com/auto/debt-statistics/> [<https://perma.cc/CJG7-GN4Z>] (last updated Feb. 5, 2021); *Student Loan Data and Demographics*, *supra* note 1.

6. See CHARLEY STONE, CARL VAN HORN & CLIFF ZUKIN, JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., *CHASING THE AMERICAN DREAM: RECENT COLLEGE GRADUATES AND THE GREAT RECESSION 13–14* (2012), http://media.philly.com/documents/20120510_Chasing_American_Dream.pdf [<https://perma.cc/GBF6-3WH6>].

7. See *id.*

8. The word “dependent” is not defined in the Bankruptcy Code. A leading definition used by the bankruptcy courts is “a person who reasonably relies on the debtor for support and whom the debtor

Exception).⁹ Because Congress has not provided a definition of “undue hardship,” the judiciary has been tasked with creating judicial standards to delineate the Undue Hardship Exception.

Currently, the leading majority standard is the three-part *Brunner* test (*Brunner* Test), which requires the debtor to demonstrate: (1) an inability to maintain minimal standard of living for himself and his dependents; (2) that additional circumstances exist indicating that the minimal standard of living will persist for the student loans’ repayment period; and (3) that good faith efforts to repay the loans have been made by the debtor (Good-Faith Prong).¹⁰ This standard employs an all-or-nothing discharge approach, meaning that the bankruptcy court must discharge the debtor’s entire student loan debt or none of it—the court has no ability to discharge a portion of the student loan debt.¹¹ The *Brunner* Test emerged out of a modification of the once-leading *Johnson* test (*Johnson* Test), which contained: (1) a mechanical test; (2) a good faith test; and (3) a policy test.¹² The once-widely-utilized *Bryant* Poverty test (*Bryant* Poverty Test) attempted to inject an element of objectivity into the *Johnson* Test by using the federal poverty guidelines as a basis for the debtor’s financial situation.¹³ The current minority standard is the Eighth Circuit’s totality-of-the-circumstances test (Totality of the Circumstances Test), which “examines all of the circumstances surrounding a debtor’s financial situation to determine whether a debtor qualifies for the [Undue Hardship Exception].”¹⁴

has reason to and does support financially.” *Smith v. U.S. Dep’t of Educ.* (*In re Smith*), 582 B.R. 556, 569 (Bankr. D. Mass. 2018) (quoting *Leslie Womack Real Est. v. Dunbar* (*In re Dunbar*), 99 B.R. 320, 324 (Bankr. M.D. La. 1989)). A debtor’s parent may be considered a dependent. *See Doe v. Educ. Credit Mgmt. Corp.* (*In re Doe*), 325 B.R. 69, 77 (Bankr. S.D.N.Y. 2005) (“Nothing in the Bankruptcy Code or case law suggests that a debtor should be forced to refuse to support a parent who has no other viable means in order to be better able to repay a student loan.”), *vacated pursuant to settlement* Mar. 23, 2006.

9. 11 U.S.C. § 523(a)(8).

10. *See Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *see also infra* note 96 and accompanying text.

11. *See* Frank T. Bayuk, Comment, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U. L. REV. 1091, 1102 (2004) (“[B]ecause the plain language mandates either full dischargeability or nondischargeability, ‘§ 523(a)(8) does not authorize a partial discharge of student loans.’” (quoting *United Student Aid Funds Inc. v. Taylor* (*In re Taylor*), 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998))).

12. *Pa. Higher Educ. Assistance Agency v. Johnson* (*In re Johnson*), 5 Bankr. Ct. Dec. 532, 544–45 (Bankr. E.D. Pa. 1979); *see also Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981).

13. *Bryant v. Pa. Higher Educ. Assistance Agency* (*In re Bryant*), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987); *see also Pa. Higher Educ. Assistance Agency v. Faish* (*In re Faish*), 72 F.3d 298, 304 (3d Cir. 1995).

14. Jennifer L. Frattini, Note, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEVS. J. 537, 564–65 (2001).

This Note examines the bankruptcy courts' attempt to satisfy the Undue Hardship Exception through the application of these four judicial tests. Through an analysis of each test's shortcomings, this Note makes apparent the reasons why it is imperative for Congress to provide a definition of "undue hardship." Not only have bankruptcy judges often bemoaned the duty to define "undue hardship,"¹⁵ but the four judicial tests employed by differing circuits have also created a lack of uniformity and consistency as to what constitutes "undue hardship" and, ultimately, whether a debtor is entitled to the discharge of their student loan debt.¹⁶ For example, a debtor residing in New York City will experience a much harder time establishing undue hardship than a debtor residing in St. Louis due to the different tests applied by the respective circuits.¹⁷ As it is unlikely that Congress will provide a definition of "undue hardship," this Note proposes a new test to be adopted uniformly by the bankruptcy courts for the Undue Hardship Exception. A test that is adopted uniformly by all circuits will bring much needed consistency for both the bankruptcy courts and the debtors who seek discharge. This Note's proposed test relies primarily on the current minority standard—the Eighth Circuit's Totality of the Circumstances Test—bolstered with additional factors and considerations.

This Note proceeds in three segments. Parts I and II provide the legislative histories of the Bankruptcy Code and of § 523(a)(8), respectively. The Note will contextualize the nature of § 523(a)(8) by the various amendments to the Bankruptcy Code and the general principles upon which bankruptcy law is founded.

Part III opens by describing Congress's failure to provide a definition for the Undue Hardship Exception. Then Part III discusses the various Undue Hardship Exception tests. The judiciary's consequent attempt to construct an adequate standard for the Undue Hardship Exception begins chronologically with the misguided *Johnson* Test. The *Bryant* Poverty Test follows with its laudable, yet flawed, effort to inject an element of objectivity to help address the *Johnson* Test's shortcomings. The current standard followed by a majority of the circuits, the *Brunner* Test, is then

15. See cases cited *infra* note 59.

16. See Kathryn E. Hancock, Student Article, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 L. & PSYCH. REV. 151, 165 (2009) ("The current body of case law may contain standards, but the way in which these standards are applied leads to decisions that are not uniform and many times unfair."); Frattini, *supra* note 14, at 538 (arguing through a recent case the "inequitable and detrimental effects that can result from judicial interpretations of undue hardship").

17. The Second Circuit applies the *Brunner* Test. See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). The Eighth Circuit applies the Totality of the Circumstances Test. See *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775 (8th Cir. 2009). With different standards, it comes as no surprise that the results may be different as well.

examined in depth. This section closes with the current Eighth Circuit's minority approach of the Totality of the Circumstances Test.

Part IV proposes a new standard for the federal judiciary to utilize in determining whether a student loan debtor has satisfied the Undue Hardship Exception. With an emphasis on bankruptcy's equitable nature, this Note's proposed test modifies the Totality of the Circumstances Test in three principal ways. Each modification is provided an explanation and analysis that helps demonstrate why the proposed test is superior to both the *Brunner* Test and the Totality of the Circumstances Test.

Finally, the Note concludes with a brief summary of the inadequacies of the *Brunner* Test and the Totality of the Circumstances Test that this Note's proposed approach attempts to remedy. As a result, this Note advocates for the uniform adoption of the proposed approach throughout the federal judiciary to provide the much-needed relief by American debtors.

I. HISTORY OF THE BANKRUPTCY CODE: THE CONGRESSIONAL JOURNEY LEADING TO THE NEAR-IMPOSSIBLE UNDUE HARDSHIP EXCEPTION

Currently, the Bankruptcy Code is codified in Title 11 of the United States Code and is subdivided into nine chapters.¹⁸ The United States Constitution grants Congress the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States."¹⁹ However, for much of United States history, a uniform bankruptcy system did not exist.²⁰ Congress exercised its express power and passed bankruptcy acts in 1800, 1841, 1867, and 1874.²¹ Yet, the early bankruptcy system's underlying administrative issues meant that each bankruptcy act was short-lived.²² It was finally through the Bankruptcy Act of 1898 that Congress was able to

18. 11 U.S.C. §§ 101–1532.

19. U.S. CONST. art. I, § 8, cl. 4. One commentator has found that "[t]he bankruptcy power clause was added to the Constitution with little discussion, late in the drafting process, as a corollary to the commerce clause." Karen M. Gebbia, *The Keepers of the Code: Evolution of the Bankruptcy Community*, 91 AM. BANKR. L.J. 183, 201 (2017).

20. See *Bankruptcy Act of 1898*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/bankruptcy-act-1898> [<https://perma.cc/S5RX-P6LG>]. Controversy over a uniform bankruptcy system involved key issues on "whether the bankruptcy system should (i) be primarily state or federal law, (ii) grant federal courts jurisdiction over nonbankruptcy questions, (iii) be administered primarily by creditors or the government, and, if the latter, (iv) be administered by an executive agency or judicial officers." Gebbia, *supra* note 19, at 199.

21. See Gebbia, *supra* note 19, at 210–11 (noting that these early bankruptcy acts "formulated the essential nature of the federal bankruptcy system and defined the fundamental balance of equities").

22. See *id.* at 202–03 (finding that these early bankruptcy acts were enacted "only when national financial panics overcame opposition to federal bankruptcy law As each financial panic subsided, the underlying concerns, combined with complaints of abuse in bankruptcy administration, and logistical challenges of managing bankruptcy proceedings in far-flung federal district courts, overwhelmed continued support for federal bankruptcy law").

establish a national bankruptcy system that would survive.²³ The Bankruptcy Act of 1898 survived because the act was not a response to “economically hard times and emergencies,” like the earlier bankruptcy acts, but because largescale industrialization that expanded commerce warranted a comprehensive bankruptcy act.²⁴ The Bankruptcy Act of 1898 laid the foundation for today’s bankruptcy regime. Namely, it created the idea of the fresh financial start principle,²⁵ which underlies modern bankruptcy law.²⁶ The fresh financial start principle, also known as the fresh start doctrine, functions “to give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt” (Fresh Financial Start Principle).²⁷ Ultimately, the Fresh Financial Start Principle warrants relieving debtors of their debt so that they can carry forward in their lives debt-free. The Fresh Financial Start Principle aims to further two additional fundamental policies: alleviation of debtor hardship and encouragement of participation in the economy.²⁸

The Amendatory Act of 1938—commonly referred to as the Chandler Act—amended the Bankruptcy Act of 1898.²⁹ The Chandler Act’s fifteen chapters composed a far-reaching statute not only in its scope, but also its purpose.³⁰ Liquidation³¹ provisions were extensively dealt with in the

23. See *id.* at 205 (noting that the Bankruptcy Act of 1898 was “largely a product of creditor efforts”).

24. David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today’s United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 174–75 (2000).

25. See *id.* at 175 (noting that, among other things, the act afforded relief to individuals, allowed individual debtors to claim exemptions to give them a chance to start over, allowed discharge of unpaid deficiencies, and established a uniform system of bankruptcy administration).

26. See *Harris v. Viegelahm*, 135 S. Ct. 1829, 1838 (2015) (“Shielding a Chapter 7 debtor’s postpetition earnings from creditors enables the ‘honest but unfortunate debtor’ to make the ‘fresh start’ the Bankruptcy Code aims to facilitate.” (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007))); *Marrama*, 549 U.S. at 367 (“The principal purpose of the Bankruptcy Code is to grant a “fresh start” to the “honest but unfortunate debtor.”” (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991))); *Grogan*, 498 U.S. at 286–87 (finding that a “fresh start” for the “honest but unfortunate debtor” is “a central purpose of the [Bankruptcy] Code.” (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934))).

27. *Layfield v. Dir. of Pub. Safety of Ala.* (*In re Layfield*), 12 B.R. 846, 848 (Bankr. N.D. Ala. 1981) (quoting *Loc. Loan Co.*, 292 U.S. at 244).

28. See John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1296 (2018) (finding that “one policy underlying the [Fresh Financial Start Principle] is relief from the hardship of unmanageable debt”); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (arguing that “discharge should be broadly available in order to restore the debtor to participation in the open credit economy”).

29. See Kennedy & Clift, *supra* note 24, at 176 (noting that the Chandler Act was a response to the Depression).

30. See *id.*; Gebbia, *supra* note 19, at 236 (finding that the Chandler Act failed to fix bankruptcy administration issues concerning judicial referees).

31. Liquidation “is used in a broad sense as equivalent to ‘winding up;’ that is, the comprehensive

Chandler Act's first seven chapters, and the rehabilitation of various classes of debtors was encompassed in chapters eight through fifteen.³²

While there were more bankruptcy amendments passed between 1938 and 1978,³³ the next major revision came through the Bankruptcy Reform Act of 1978 (Act of 1978), which created today's Bankruptcy Code.³⁴ The Act of 1978 brought two fundamental changes. The first was the elevation of bankruptcy judges into the federal judiciary.³⁵ The second was the broad expansion of the bankruptcy court's jurisdiction. Prior to the Act of 1978, the predecessor of the bankruptcy court, bankruptcy referees "had no jurisdiction until there had been a reference by the district court to the referee" and "the [bankruptcy] referee's powers were at all times subject to review by the district judge."³⁶ Through the Act of 1978, "the bankruptcy court essentially [gained] original, but not exclusive jurisdiction over all civil proceedings arising within a bankruptcy case."³⁷ This expansion of the bankruptcy court meant that bankruptcy judges were now better equipped to exercise their equitable powers³⁸ to alleviate the honest debtor. The Act of 1978 was amended in 1984, 1986, and 1994.³⁹

Next, in 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).⁴⁰ BAPCPA aimed to prevent the perceived abuse of individual debtors seeking relief pursuant to Chapter

process of settling accounts, ascertaining and adjusting debts, collecting assets, and paying off claims." *What Is Liquidation?*, THE L. DICTIONARY, <https://thelawdictionary.org/liquidation/> [https://perma.cc/VE2B-NA9H].

32. See Kennedy & Clift, *supra* note 24, at 176.

33. See Gebbia, *supra* note 19, at 236–40 (describing notable amendments in 1941, Referee Salary Act of 1946, and amendments in 1952).

34. One commentator argues that the Bankruptcy Reform Act of 1978 was the beginning of bankruptcy law's modern era. See Robert J. Landry, III, *Ten Years After Consumer Bankruptcy Reform in the United States: A Decade of Diminishing Hope and Fairness*, 65 CATH. U. L. REV. 693, 696 (2016).

35. See Charles A. Shanor, *An Overview of the Bankruptcy Reform Act of 1978*, 1979 NORTON ANN. SURV. BANKR. L. 8; see also Kennedy & Clift, *supra* note 24, at 178–79 (explaining that the "salaries of bankruptcy judges were substantially increased; bankruptcy judges were given the authority to appoint law clerks and also support staff to assist them").

36. Kennedy & Clift, *supra* note 24, at 175–76.

37. Kennedy & Clift, *supra* note 24, at 178; see also Shanor, *supra* note 35 ("[The bankruptcy court] is separate and independent from the district court, to which it had been attached since 1898.").

38. While no express grant of equitable powers exists, it has been long held that bankruptcy courts are "essentially courts of equity, and their proceedings inherently proceedings in equity." *Pepper v. Litton*, 308 U.S. 295, 304 (1939) (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934)). This means that bankruptcy courts "appl[y] the principles and rules of equity jurisprudence." *Id.* (citing *Larson v. First State Bank of Vienna, S.D. (In re Eggen)*, 21 F.2d 936, 938 (8th Cir. 1927)).

39. For an overview of these amendments, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 40–43 (1995).

40. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C. §§ 101–1502); see also Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L.J. 174, 175 (2012).

7 by shifting the individuals from Chapter 7 to Chapter 13 relief.⁴¹ While a Chapter 7 liquidation generally discharges unsecured debt, such as credit card debt, a Chapter 13 bankruptcy prevents the dischargeability of such consumer loans.⁴² Individual debtors, by being forced to file Chapter 13 bankruptcy, will have to “take personal responsibility and repay their unsecured creditors.”⁴³ Thus, BAPCPA has been argued to have created a shift in the fundamental policy of bankruptcy laws in favor of creditors.⁴⁴ Bankruptcy lawyers have “expressed full-throated opposition” to BAPCPA⁴⁵ and legal academics have called its substance into question.⁴⁶

II. HISTORY OF § 523(A)(8)

The Act of 1978 codified the dischargeability of student loan debt through bankruptcy.⁴⁷ Following § 439A of the Education Amendment Act,⁴⁸ the Act of 1978 did not allow the dischargeability of student loans for the first five years of the loan repayment period⁴⁹ unless the debtor could establish “undue hardship.”⁵⁰ When § 523(a)(8) was first enacted in the Act of 1978, its purpose was to “forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans.”⁵¹ Congress’s fear was

41. See Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL’Y REV. 135, 136–37 (2007).

42. See *id.* at 137–38.

43. *Id.* at 138.

44. See Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 375–76 (arguing that BAPCPA “radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors”).

45. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 803 (2010) (“In large measure, the organized bankruptcy bar viewed the legislation with disdain. Indeed, even though the principal advocates for the statute included the clients of a good slice of elite bankruptcy lawyers (creditor interests generally, and banks more specifically, provided the major impetus for the reforms), most of the bar expressed full-throated opposition.”); see also Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 AM. BANKR. L.J. 191, 191 (2005) (finding BAPCPA’s enactment to be “a story of money, political mean-spiritedness, and intellectual dishonesty”).

46. Brian Rothschild, *The Illogic of No Limits on Bankruptcy*, 23 EMORY BANKR. DEVS. J. 473, 475 n.1 (2007) (collecting BAPCPA criticism and describing the academic response as “consistently negative”).

47. See Frattini, *supra* note 14, at 539.

48. Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976)) (repealed 1978) (prohibiting discharge of student loans in bankruptcy for the first five years of loan repayment unless the debtor could establish undue hardship).

49. *Id.*

50. *Id.*

51. *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 755 (S.D.N.Y. 1985) (citing COMM’N ON THE BANKR. L. OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, pt. II, at 140 n.14 (1973)).

that students would finance their education through student loans, then immediately obtain a discharge through bankruptcy upon graduation without any attempt to repay.⁵²

In 1990, the five-year dischargeability exception was extended to seven years.⁵³ Then, in 1998, the Bankruptcy Code eliminated the seven-year dischargeability exception for federally-guaranteed student loans and provided that these loans could *only* be discharged through the Undue Hardship Exception.⁵⁴ Finally, starting in 2005, BAPCPA removed the seven-year dischargeability exception entirely, and the Undue Hardship Exception became the *only* available means for all educational loans—both government-issued and private student loans.⁵⁵ Legislative history regarding BAPCPA’s removal the seven-year dischargeability exception is “sparse.”⁵⁶ However, Representative Lindsey Graham of South Carolina seems to have originated the idea on May 5, 1999 when he stated, “we are trying to give the private lender the same protection under bankruptcy that the federally guaranteed loan program has.”⁵⁷ Representative Graham’s purpose was to provide private institutional lenders stronger protection by making discharge of student loans harder for their debtors.⁵⁸

III. WHAT IS THE UNDUE HARDSHIP EXCEPTION?

“Undue hardship” is undefined in the Bankruptcy Code.⁵⁹ Through a trial-and-error approach of creating, amending, and re-amending different standards,⁶⁰ the judiciary has attempted over the years to unpack what

52. See H.R. Doc. No. 93-137, pt. I, at 170; *see also id.* at 176–77 (reporting that the Commission found it “reprehensible” and “a threat to the continuance of educational loan programs” that “[s]ome individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstance”).

53. See Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3006(b), 104 Stat. 1388-25, 1388-28 to -29. See also Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 363–64 (2013).

54. See Higher Education Amendments of 1998, Pub. L. No. 104-244, § 971, 112 Stat. 1581, 1837.

55. See 11 U.S.C. § 523(a)(8).

56. *Nunez v. Key Educ. Res./GLESIS (In re Nunez)*, 527 B.R. 410, 413 (Bankr. D. Or. 2015) (“The legislative history with respect to BAPCPA’s amendments to § 523(a)(8) is sparse . . .”).

57. 145 Cong. Rec. 8567 (1999) (statement of Rep. Graham).

58. See *id.*

59. See *Speer v. Educ. Credit Mgmt. Corp. (In re Speer)*, 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (“[T]he statute Congress crafted gives the Courts absolutely no guidance as to what would constitute ‘undue hardship’ other than a Webster’s dictionary.”); *Kopf v. U.S. Dep’t of Educ. (In re Kopf)*, 245 B.R. 731, 736 (Bankr. D. Me. 2000) (“Without express statutory definition, ‘undue hardship’ has proved an early notion. Courts have long struggled to articulate its content.”).

60. See Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 149 n.64 (1996) (“The

exactly “undue hardship” means within the Bankruptcy Code.⁶¹ The lack of congressional guidance has left the judiciary on an island to create an “undue hardship” standard, and no uniform standard exists today.⁶²

A. The Johnson Test—A Misguided First Attempt at the Undue Hardship Exception

The *Johnson* Test was the federal judiciary’s first attempt at formulating an “undue hardship” standard.⁶³ The *Johnson* Test employs three prongs, each of which is necessary to determine whether the student debtor is entitled to the Undue Hardship Exception in § 523(a)(8).⁶⁴

The first prong is a mechanical analysis where the court asks whether “the debtor’s future financial resources for the longest foreseeable period of time allowed for the repayment of the loan be sufficient to support the debtor and his dependent[s] at a subsistence or poverty standard of living, as well as to fund repayment of the student loan[.]”⁶⁵ With this inquiry, the court is assessing the sufficiency of the debtor’s financial resources, both in the present and future, to determine whether the debtor and her dependents can live at or above poverty while simultaneously making repayments on the loans. “If the debtor is living above poverty level, and is still capable of making the minimal payments toward her loans, then the test is satisfied and the debt cannot be discharged.”⁶⁶ The test’s strict language of “subsistence or poverty” level has been derided as a “harsh standard” that “is contradictory to the basic principles of United States bankruptcy laws, which exist so that individuals who are over their heads in debt are not forced to live an oppressive lifestyle.”⁶⁷

The second prong is a good faith test where the court asks two questions: “(a) Was the debtor negligent or irresponsible in his efforts to minimize

variations [of undue hardship standards] that exist from court to court are staggering. Even courts purporting to use the same test will differ in the subtleties with which the test is applied.”)

61. See *Brunner v. N.Y. State Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 753 (S.D.N.Y. 1985) (“The existence of the adjective ‘undue’ indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans, but the statute otherwise gives no hint of the phrase’s intended meaning.”); Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 784 (2004) (observing that “[m]any bankruptcy courts have interpreted undue hardship harshly and narrowly”).

62. See Edward Paul Canterbury, Comment, *The Discharge of Student Loans in Bankruptcy: A Debtor’s Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149, 149 (2006) (noting that the undue hardship standard “has produced unpredictable and unfair results due to Congress’ failure to adequately define the contours of the standard”).

63. *Pa. Higher Educ. Assistance Agency v. Johnson* (*In re Johnson*), 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979); see also *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993).

64. *In re Johnson*, 5 Bankr. Ct. Dec. at 544–45.

65. *In re Roberson*, 999 F.2d at 1134.

66. Frattini, *supra* note 14, at 553.

67. *Id.* at 554.

expenses, maximize resources or secure employment? [and] (b) If ‘yes,’ then would lack of such negligence or irresponsibility have altered the answer to the mechanical test?”⁶⁸ With this inquiry, the court is determining whether the debtor has made good faith efforts to repay her student loans. If a debtor proves good faith efforts to repay her student loans, then the debt should be discharged.⁶⁹ However, if the court finds that the debtor did not act in good faith—namely, if the debtor acted negligently or irresponsibly—then “a presumption against discharge is established and the court must then proceed to the third prong of the [*Johnson Test*].”⁷⁰ This good faith test, however, has been criticized for being too subjective.⁷¹ In practice, the good faith test allows for an “overly critical” determination of what are “reasonable” actions by the debtor.⁷² Judges are afforded a “broad power” to “probe into the daily lives of debtors by arbitrarily deciding which actions of the debtor are proper and improper.”⁷³

If the debtor passes the first two prongs, then the court reaches the *Johnson Test*’s final prong. This last prong is a policy test where the court asks:

Do the circumstances—i.e., the amount and percentage of the total indebtedness of the student loan and the employment prospects of the petitioner indicate:

(a) [t]hat the dominant purpose of the bankruptcy petition was to discharge the student debt, or

(b) [t]hat the debtor has definitively benefitted financially from the education which the loan helped to finance?⁷⁴

In other words, based on the debtor’s financial circumstances, the bankruptcy petition’s main purpose must not be an attempt to discharge the student loan debt, and the debtor must not have gained a benefit financially from the education received by the student loans. If either question is answered in the affirmative, then the debt cannot be discharged.

68. *In re Roberson*, 999 F.2d at 1134–35; see also Frattini, *supra* note 14, at 554 (explaining that “the rationale behind the good faith test is consistent with both the [Bankruptcy] Code’s fresh start policy as well as the congressional objective of precluding intentional abusers from discharging their student loans, while granting relief to the ‘honest but unfortunate debtor.’”).

69. Frattini, *supra* note 14, at 554.

70. *Id.*

71. See, e.g., *id.*

72. *Id.*

73. *Id.* For an example of the prong’s harshness and subjectivity afford to the judges, see *Boston v. Utah Higher Educ. Assistance Auth.* (*In re Boston*), 119 B.R. 162, 165 (Bankr. W.D. Ark. 1990) (finding a debtor who attempted to find employment but was unsuccessful to fail the good faith prong because the court found that the debtor failed to prove the existence of other employment opportunities within the debtor’s home city or elsewhere).

74. *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993).

The *Johnson* Test's three prongs illustrate its complexity and inherent subjectivity, which has caused the test to be rejected by a majority of the courts.⁷⁵ While bankruptcy courts are guided by negligence principles to determine whether a debtor has fulfilled the good faith test, bankruptcy judges still possess the ability to peer into a debtor's personal life to determine subjectively whether good faith has been satisfied. Additionally, the last prong, the policy test, affords the bankruptcy courts too much subjectivity in determining whether the circumstances demonstrate that the "dominant" purpose of the bankruptcy petition was to discharge student loans. Nevertheless, the test has served as the foundation for the *Bryant* Poverty Test and the *Brunner* Test.

B. Bryant Poverty Test—A Flawed Attempt of Objectivity

In an attempt to address the *Johnson* Test's inherent subjectivity, the *Bryant* Poverty Test was created to "place the element of objectivity into the process of decision-making."⁷⁶ The *Bryant* Poverty Test has been proposed as follows:

We propose, as a starting position, to analyze the income and resources of the debtor and his dependents in relation to federal poverty guidelines established by the United States Bureau of the Census and determine the dischargeability of the student loan obligation on the basis of whether the debtor's income is substantially over the amounts set forth in those guidelines or not. If not, a discharge will result only if the debtor can establish "unique" and "extraordinary" circumstances which should nevertheless render the debt dischargeable. If the debtor's income is below or close to the guideline, the lender can prevail only by establishing that circumstances exist which render these guidelines unrealistic, such as the debtor's failure to maximize his resources or clear prospects of the debtor for future income increases. We feel that such a test will decrease, if not eliminate, the resort to the unbridled subjectivity which seems to pervade many of the decisions in this area.⁷⁷

In other words, the *Bryant* Poverty Test attempts to alleviate the subjectivity afforded to bankruptcy judges under the *Johnson* Test by using the federal poverty guidelines as an objective guide to measure the debtor's minimum

75. See *Bryant v. Pa. Higher Educ. Assistance Agency (In re Bryant)*, 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987) (criticizing the *Johnson* test as "unfortunately complicated" and creating a new test); *In re Roberson*, 999 F.2d at 1135 (expressly rejecting the *Johnson* Test).

76. *In re Bryant*, 72 B.R. at 915.

77. *Id.* (emphasis added).

standard of living.⁷⁸ If the debtor is found to earn an income below the federal poverty guidelines, then the debtor is below the minimal standard of living, which warrants the discharge of student loans. Conversely, if the debtor is earning an income above the federal poverty guidelines, then the debtor is above the minimal standard of living. If the debtor is earning an income above the federal poverty guidelines, the debtor has an opportunity to demonstrate dire circumstances that still warrant the student loan discharge.⁷⁹ However, like the *Johnson* Test, judges are afforded subjectivity in determining whether the debtor's dire circumstances are actually *so dire* as to render the student debt discharged.⁸⁰ Thus, the attempt to correct the *Johnson* Test's subjectivity through the federal poverty guidelines may be laudable, but the *Bryant* Poverty Test fails to eliminate it completely.

Additionally, scholars have scrutinized the use of the federal poverty guidelines as an objective measure for a debtor's minimal standard of living. One scholar has noted, "[o]ne of the foremost goals of the bankruptcy system is to give a fresh start to individuals plagued with debt so that they are not forced to live in poverty."⁸¹ But this does not mean that a debtor must live in poverty to receive a fresh start. A debtor may be in severe financial crisis unable to pay student loans even though they are not below the poverty level. Utilizing the federal poverty guidelines erroneously assumes that the debtor cannot afford to pay their student loan payments unless the debtor is living below poverty. The dire circumstances inquiry does not solve the problem because the considerable discretion afforded to judges renders the burden to prove dire circumstances remarkably high. Another critic has noted that individuals living near or at what the federal poverty guidelines consider as the bare subsistence level can barely afford

78. The court establishing the *Bryant* Poverty Test held that the federal poverty guidelines are an appropriate measure because they represent the bare subsistence level of income and serve as an eligibility criterion for federal assistance programs. *See id.* at 916.

79. *See* *Mayer v. Pa. Higher Educ. Assistance Agency (In re Mayer)*, 198 B.R. 116, 125–26 (Bankr. E.D. Pa. 1996). In *In re Mayer*, a debtor parent earning an income slightly above the applicable poverty guidelines successfully demonstrated that she reduced her standard of living so drastically by leaving her home to move in with her mother in a public housing unit. *Id.* The court, alluding to student loan payments, found that “[a]ny added expenses would simply be intolerable to impose upon her at present.” *Id.* at 126.

80. *See* *Reyes v. Okla. St. Regents for Higher Educ. (In re Reyes)*, 154 B.R. 320, 324 (Bankr. E.D. Okla. 1993). In *In re Reyes*, a family of six earning an income of \$23,529, which is approximately \$4,000 above the applicable poverty guideline, was prevented discharge of student loans. *Id.* The court found that the medical issues and associated hospitalizations of debtor's eldest son did not establish a dire circumstance. *Id.*

81. Frattini, *supra* note 14, at 557; *see also* *Correll v. Union Nat'l Bank of Pittsburgh (In re Correll)*, 105 B.R. 302, 306 (Bankr. W.D. Pa. 1989) (“We do not believe . . . Congress intended a fresh start under the Bankruptcy Code to mean that families must live at poverty level in order to repay educational loans.”).

a minimal standard of living, let alone attempt to pay back loans.⁸² Living on an income slightly above the federal poverty guidelines—thus, not technically considered living in poverty—is already an immense financial hardship.⁸³ At least one scholar has even argued that the federal poverty guidelines are “anything but objective . . . represent[ing] a normative standard reflecting the opinion of a governmental agency on the relative severity of income deprivation.”⁸⁴

Further, the Department of Education⁸⁵ and the court that created the *Bryant* Poverty Test⁸⁶ both view the federal poverty guidelines as extremely and unjustly low. The *Bryant* court attempted to solve the issue through a dire circumstances prong, which was not successful in practice given the inherent subjectivity and high burden for debtors. Moreover, many government departments do not use the federal poverty guidelines.⁸⁷ The federal poverty guidelines are calculated by taking the sum of three times the monetary amount a household spends on an economy food plan.⁸⁸ The federal poverty guidelines assume that “an average family’s total budget is three times the amount it spends on food.”⁸⁹ Using a food plan—particularly a food plan designed “for emergency or temporary dietary needs . . . [not] an adequate, permanent diet”⁹⁰—as the sole basis for the federal poverty guidelines thoughtlessly ignores other basic life necessities, let alone the need to repay student loan debt. It should come as no surprise that “[p]overty should be defined in terms of those who are denied the minimal levels of health, housing, food, and education that our present stage of scientific knowledge specifies as necessary for life as it is now lived in the United

82. See Salvin, *supra* note 60, at 162.

83. For example, the 2019 federal poverty guidelines state that a family of four is not living in poverty until the total annual family income is under \$25,750. See Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1167, 1168 (Feb. 1, 2019).

84. See Salvin, *supra* note 60, at 185, 185 n.281 (arguing that the federal government, through the Census Bureau, has admitted that the poverty guidelines are “necessarily subjective” (quoting BUREAU OF THE CENSUS, U.S. DEP’T OF COM., WORKERS WITH LOW EARNINGS: 1964–1990 B-3 (1992))).

85. See Salvin, *supra* note 60, at 188.

86. See *Bryant v. Pa. Higher Educ. Assistance Agency* (*In re Bryant*), 72 B.R. 913, 916 (Bankr. E.D. Pa. 1987) (“[T]he poverty-guideline figures are, in our view, extremely grim . . .”).

87. Until 1985, the Bureau of Labor Statistics calculated an alternative measure of poverty, which had substantially higher figures than the federal poverty guidelines. The Department of Labor continues to use the Bureau of Labor Statistic’s measure for certain programs. See ANDREW J. WINNICK, TOWARD TWO SOCIETIES: THE CHANGING DISTRIBUTIONS OF INCOME AND WEALTH IN THE U.S. SINCE 1960 24–25 (1989).

88. Gordon M. Fisher, *The Development and History of the U.S. Poverty Thresholds—A Brief Overview*, GOV’T STAT. SECTION/SOC. STAT. SECTION NEWSLETTER, Winter 1997, at 6, 6 (noting that the original poverty thresholds were based on a “economy food plan,” which is “the cheapest of four food plans developed by the Department of Agriculture,” and what “the Agriculture Department describe[s] . . . as being ‘designed for temporary or emergency use when funds are low’”).

89. Salvin, *supra* note 60, at 186.

90. *Id.*

States.”⁹¹ These individuals who unfortunately live at or near the poverty line are exactly the debtors the bankruptcy system was intended to help.

Additionally, in examining the legislative goals underlying the dischargeability for student loans, one court found that Congress was attempting to preclude “graduates [from escaping] their student loan obligations by filing bankruptcy on the eve of a lucrative career.”⁹² Student loan debtors scraping by at the poverty level certainly are not part of these dishonest deliberate debtors attempting to abuse the bankruptcy system.⁹³ For this reason, the *Bryant* court disagreed with the *Johnson Test*’s inquiring into the debtor’s purpose for filing bankruptcy as part of its policy prong because “avoiding the consequences of debts is normally the reason for filing for bankruptcy.”⁹⁴ However, as the Third Circuit noted, “[t]he purpose behind the debtor’s bankruptcy petition is not irrelevant . . . because one of the reasons that Congress enacted § 523(a)(8)(B) was in response to ‘reports of students discharging student loan debts after graduation and subsequently accepting high-paying jobs.’”⁹⁵ For these reasons in particular, then, the *Bryant Poverty Test* has not been widely followed in bankruptcy courts across the nation.

C. Brunner Test—A Misguided Majority Approach Influenced by the *Johnson Test*

Currently, the *Brunner Test* is followed by an overwhelming majority of circuits.⁹⁶ For example, the Fourth Circuit favors the *Brunner Test* because

91. SHARON M. OSTER, ELIZABETH E. LAKE & CONCHITA GENE OKSMAN, THE DEFINITION AND MEASUREMENT OF POVERTY 18 (1978).

92. *Andresen v. Neb. Student Loan Program, Inc.* (*In re Andresen*), 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999), *abrogated on other grounds by* *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549 (8th Cir. 2003); *see also* *Brunner v. N.Y. State Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 754 (S.D.N.Y. 1985) (citing COMM’N ON THE BANKR. L. OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, pt. II, at 140 n.14 (1973)).

93. *See* Frattini, *supra* note 14, at 557.

94. *Bryant v. Pa. Higher Educ. Assistance Agency* (*In re Bryant*), 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987).

95. *Pa. Higher Educ. Assistance Agency v. Faish* (*In re Faish*), 72 F.3d 298, 304 (3d Cir. 1995) (quoting Kurt Wiese, Note, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of “Undue Hardship”*, 26 ARIZ. L. REV. 445, 446 (1984)); *see also In re Brunner*, 46 B.R. at 755 (citing COMM’N ON THE BANKR. L. OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, pt. II, at 140 n.14 (1973)).

96. Professor John Patrick Hunt has found, “[i]n addition to the Second Circuit where it originated, the *Brunner* [T]est has been adopted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.” Hunt, *supra* note 28, at 1324 n.279 (collecting cases). In addition to Professor Hunt’s list, there are a number of more recent cases relying on the *Brunner Test*. *See* *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005); *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 358–59 (6th Cir. 2007); *Alderete v. Educ. Credit Mgmt. Corp.* (*In re Alderete*), 412 F.3d 1200, 1204 (10th Cir. 2005); *U.S. Dep’t of Educ. v. Gerhardt* (*In re Gerhardt*),

it “incorporates the congressional mandate to allow discharge of student loans only in limited circumstances.”⁹⁷ The Fourth Circuit has also cited its concern for “[u]niformity among the circuits” as support for the use of the *Brunner* Test.⁹⁸ Additionally, the Third Circuit stated, “[the] *Brunner* [Test] is the most consistent with the scheme that Congress established in 1978” for it “meets the practical needs of the debtor by not requiring that he or she live in abject poverty for up to seven years⁹⁹ before a student loan may be discharged.”¹⁰⁰ To satisfy the Undue Hardship Exception, the *Brunner* Test, like the *Johnson* Test, requires a three-part showing:

- 1) that the debtor cannot, based on current income and expenses, maintain a “minimal” standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and 3) that the debtor has made good faith efforts to repay the loans.¹⁰¹

For the first step, the debtor must persuade the court that if he has to repay his student loans, his current income and expenses preclude him from maintaining a minimal standard of living for himself and his dependents. Some courts have stated that, “[i]mplicit within this inquiry is the requirement that the debtor demonstrate that she is actively minimizing her current household living expenses and maximizing personal and professional resources.”¹⁰² If the debtor demonstrates this first step, the debtor must then establish that such financial situation will continue for a large part of the student loan repayment period as agreed upon in the loan agreement.

348 F.3d 89, 91 (5th Cir. 2003); *Educ. Credit Mgmt. Corp. v. Mosley* (*In re Mosley*), 494 F.3d 1320, 1324–25 (11th Cir. 2007); *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 155 F.3d 1108, 1112 (9th Cir. 1998); *In re Faish*, 72 F.3d at 306; *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 759 (7th Cir. 2015). “The First Circuit has declined to choose between the *Brunner* [Test] and [Totality of the Circumstances Test]” and the D.C. Circuit did not articulate a standard. *Hunt*, *supra* note 28, at 1324 n.279; *see Nash v. Conn. Student Loan Found.* (*In re Nash*), 446 F.3d 188, 190 (1st Cir. 2006) (“We see no need in this case to pronounce our views of a preferred method of identifying a case of ‘undue hardship.’”); *Gilchrist v. Dep’t of Educ.*, No. 88-5106, 1988 U.S. App. LEXIS 18806, at *2 (D.C. Cir. Dec. 30, 1988).

97. *In re Frushour*, 433 F.3d at 400.

98. *Id.*

99. “Seven years” refers to the now-abolished seven-year dischargeability exception. *See supra* note 55 and accompanying text.

100. *In re Faish*, 72 F.3d at 305; *see also Landry*, *supra* note 34, at 696.

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

102. *Healey v. Mass. Higher Educ.* (*In re Healey*), 161 B.R. 389, 394 (E.D. Mich. 1993); *see also Evans v. Higher Educ. Assistance Found.* (*In re Evans*), 131 B.R. 372, 375 (Bankr. S.D. Ohio 1991).

The *Brunner* court equated this second step to a “certainty of hopelessness” standard (Certainty of Hopelessness).¹⁰³ In other words, the first two steps require that the “debtor be presently earning an income that is insufficient for maintaining a minimal standard of living, but . . . also . . . that this condition will continue indefinitely.”¹⁰⁴ Once the debtor successfully demonstrates the onerous second step, the debtor must also prove that he has made good faith efforts to repay his student loans—the Good-Faith Prong.¹⁰⁵ As this last step in the *Brunner* Test is likened to the *Johnson* Test’s policy prong, there may be subjectivity issues embedded within it as well.¹⁰⁶

Certainty of Hopelessness requires showing that the debtor “truly is without hope” in repaying his student loans.¹⁰⁷ That is, the debtor must make a showing well beyond the debtor’s current temporary inability to make loan payments.¹⁰⁸ One court accurately captured just how inequitable the Certainty of Hopelessness is by expressing that the debtor must be “severely disadvantaged economically as a result of unique factors which are so much a part of the bankrupt’s life, present and in the foreseeable future, that the expectation of repayment is virtually non-existent, unless by that effort *the bankrupt strips himself of all that makes life worth living.*”¹⁰⁹ The unrealistic expectation of the Certainty of Hopelessness standard—and how high of a burden of proof it carries—demonstrates that it should not be utilized by bankruptcy courts performing their function as courts of equity¹¹⁰ in determining student loan dischargeability.¹¹¹

103. See *In re Brunner*, 46 B.R. at 755 (“Perhaps the best articulation of this doctrine is that . . . ‘dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.’” (quoting *Briscoe v. Bank of N.Y. (In re Briscoe)*, 16 B.R. 128, 131 (Bankr. S.D.N.Y.1981))).

104. Frattini, *supra* note 14, at 561.

105. This third step has been likened to the *Johnson* Test’s good faith prong. See *id.* at 563.

106. See *id.* at 554. For examples of the inherent subjectivity within this final step, see *Sands v. United Student Aid Funds, Inc. (In re Sands)*, 166 B.R. 299, 312 (Bankr. W.D. Mich. 1994); *Reilly v. United Student Aid Funds, Inc. (In re Reilly)*, 118 B.R. 38, 40 (Bankr. D. Md. 1990).

107. *Vujovic v. Direct Loans & The Educ. Res. Inst., Inc. (In re Vujovic)*, 388 B.R. 684, 692 (Bankr. E.D.N.C. 2008).

108. See *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 681 (6th Cir. 2005); *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778 (7th Cir. 2002).

109. *Barrows v. Ill. Student Assistance Comm’n (In re Barrows)*, 182 B.R. 640, 648 (Bankr. D.N.H. 1994) (emphasis added) (quoting *Courtney v. Gainer Bank (In re Courtney)*, 79 B.R. 1004, 1010 (Bankr. N.D. Ind. 1987)).

110. See *supra* note 38 and accompanying text.

111. For an example of the harshness of the Certainty of Hopelessness standard, see *Walcott v. USA Funds, Inc. (In re Walcott)*, 185 B.R. 721 (Bankr. E.D.N.C. 1995). Additionally, courts and commentators have criticized the *Brunner* Test’s second step for being too speculative—namely, “it requires a court to predict future events.” *Green v. Sallie Mae Servicing Corp. (In re Green)*, 238 B.R. 727, 735 (Bankr. N.D. Ohio 1999) (citing *Kraft v. N.Y. State Higher Educ. Servs. Corp. (In re Kraft)*, 161 B.R. 82, 86 (Bankr. W.D.N.Y. 1993)); see also *Dolph v. Pa. Higher Educ. Assistance Agency (In*

The *Brunner* Test's third and final step requires that the debtor demonstrate that he has made good faith efforts to repay his student loans. In other words, the Good-Faith Prong requires that the debtor's inability to repay student loans was not caused by his own fault.¹¹² While this prong was created in accordance with the legislative intent to prevent intentional abusers from filing bankruptcy "too soon after graduation . . . [without] adequate time to find employment and to attempt to pay off his student loans,"¹¹³ it is marred by the same subjectivity concerns pervading the *Johnson* Test.

One court's stringent application of the Good-Faith Prong demonstrates the prong's subjectivity issues and its inconsistency with bankruptcy's equitable nature. In *Stebbins-Hopf v. Texas Guaranteed Student Loan Corp.* (*In re Stebbins-Hopf*), the debtor and her family were suffering from significant health issues.¹¹⁴ The debtor had foot nerve damage, bronchitis, and arthritis; her mother had cancer, her adult daughter was an epileptic, and her grandchildren were asthmatic.¹¹⁵ She utilized her financial resources toward her and her family's medical expenses rather than fulfilling her student loan repayment obligations.¹¹⁶ The bankruptcy court held that the debtor failed to act in good faith by placing her family's health before her student loan obligations stating, "her moral obligation to family members who are not dependents does not take priority over her legal obligation to repay her educational loans."¹¹⁷ Under bankruptcy's equitable jurisprudence, one must strain to equate this type of debtor—a debtor who used her scarce financial resources to help her ailing family members—with the intentional abuser Congress originally had in mind for § 523(a)(8). Rather, as one commentator wrote, the debtor in *In re Stebbins-Hopf* "is exactly the type for which the bankruptcy system and the undue hardship exception for the discharge of student loans were devised."¹¹⁸

re Dolph), 215 B.R. 832, 837–38 (B.A.P. 6th Cir. 1998) ("[T]he question of what [a debtor's] future holds in store for him—be it a new and better job or be it a promotion with his present employer—is unknown, and any immediate evaluation of the likelihood for positive change in [a debtor's] present or future financial circumstances is speculative and not a firm basis for the Court to reach a decision.").

112. The Third Circuit has instructed that "[t]he [*Brunner* Test's Good-Faith Prong] is to be guided by the understanding that 'undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from "factors beyond his reasonable control.'" Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 305 (3d Cir. 1995) (quoting *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993)).

113. *Sands v. United Student Aid Funds, Inc.* (*In re Sands*), 166 B.R. 299, 312 (Bankr. W.D. Mich. 1994).

114. *Stebbins-Hopf v. Tex. Guaranteed Student Loan Corp.* (*In re Stebbins-Hopf*), 176 B.R. 784, 785 (Bankr. W.D. Tex. 1994).

115. *Id.*

116. *Id.* at 788.

117. *Id.*

118. Frattini, *supra* note 14, at 564.

While the *Brunner* Test is the leading standard within the federal judiciary for the Undue Hardship Exception, the utter harshness of the Certainty of Hopelessness second prong coupled with the bankruptcy court's inherent subjectivity in determining the Good-Faith Prong prevents honest debtors from receiving the help that the equitable nature of bankruptcy courts was designed to lend.

D. Totality of the Circumstances Test—A Step in the Right Direction

Currently, the Totality of the Circumstances Test is only followed by the Eighth Circuit.¹¹⁹ When applying the Totality of the Circumstances Test, a bankruptcy court “examines all of the circumstances surrounding a debtor’s financial situation to determine whether a debtor qualifies for the [Undue Hardship Exception], rather than applying a three part test.”¹²⁰ By eliminating the adherence to formalistic and rigid steps, as required by the *Johnson* Test, *Bryant* Poverty Test, and the *Brunner* Test, the Totality of the Circumstances Test allows the bankruptcy court to better perform its equitable powers.¹²¹ While examining all of the debtor’s relevant financial circumstances, the prime objective of the Totality of the Circumstances Test is to “determine whether the debtor is the intentional abuser that Congress sought to prevent from taking advantage of the system or a debtor truly in need of and entitled to a discharge.”¹²²

When applying the Totality of the Circumstances Test, the bankruptcy court considers the debtor’s past and future financial resources, the debtor’s reasonable living expenses, and any other relevant circumstance.¹²³ The “debtor has the burden of proving undue hardship by a preponderance of the evidence.”¹²⁴ While the debtor’s financial resources and standard of living are two necessary considerations, the bankruptcy court may consider any

119. See Hunt, *supra* note 28, at 1324–25 (“The only circuit in which a federal appellate court has embraced a test other than that of *Brunner* is the Eighth Circuit, which follows the ‘totality-of-the-circumstances’ test.”); see also Educ. Credit Mgmt. Corp. v. Jespersion, 571 F.3d 775, 779 (8th Cir. 2009).

120. Frattini, *supra* note 14, at 564–65.

121. See Coleman v. Higher Educ. Assistance Found. (*In re* Coleman), 98 B.R. 443, 451 (Bankr. S.D. Ind. 1989) (“Rigid adherence by the court to a particular test robs the court of the discretion envisioned by Congress in drafting [§ 523(a)(8)]. The court finds that the more equitable approach is to view each case in the totality of circumstances involved.”). For background on the bankruptcy court’s equitable nature, see *supra* note 38 and accompanying text.

122. Frattini, *supra* note 14, at 566.

123. See Jespersion, 571 F.3d at 779 (“Reviewing courts must consider the debtor’s past, present, and reasonably reliable future financial resources, the debtor’s reasonable and necessary living expenses, and ‘any other relevant facts and circumstances.’” (quoting Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003))).

124. *Id.* (noting that the burden is “rigorous”). To be able to differentiate between intentional abusers and honest debtors, it is reasonable to make the burden rigorous.

other factors that it deems relevant.¹²⁵ Given the “rigorous”¹²⁶ burden on the debtor and the two necessary considerations of the debtor’s financial resources and standard of living, “if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”¹²⁷

While the Totality of the Circumstances Test attempts to predict future events, which invites the possibility of speculation and subjectivity by the court like the *Johnson* Test, *Bryant* Poverty Test, and the *Brunner* Test, the Eighth Circuit has provided explicit instructions to help inject objectivity and to better prevent speculation. The Eighth Circuit has placed a focus on the debtor’s quantifiable financial documents stating the court’s “determination will require a special consideration of the debtor’s present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor’s financial position.”¹²⁸ Furthermore, the Eighth Circuit has

125. Other factors taken into consideration include:

- (1) Total incapacity now and in the future to pay one’s debts for reasons not within the control of the debtor.
- (2) Whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment.
- (3) Whether the hardship will be long-term.
- (4) Whether the debtor has made payments on the student loan.
- (5) Whether there is permanent or long-term disability of the debtor.
- (6) The ability of the debtor to obtain gainful employment in the area of study.
- (7) Whether the debtor has made a good faith effort to maximize income and minimize expenses.
- (8) Whether the dominant purpose of the bankruptcy petition was to discharge the student loans.
- (9) The ratio of the student loan to the total indebtedness.

VerMaas v. Student Loans of N.D. (In re VerMaas), 302 B.R. 650, 656–57 (Bankr. D. Neb. 2003) (quoting *Morris v. Univ. of Ark. (In re Morris)*, 277 B.R. 910, 914 (Bankr. W.D. Ark. 2002)). Another noteworthy factor considered is whether the debtor has a Certainty of Hopelessness. See *Mulherin v. Sallie Mae Servicing Corp. (In re Mulherin)*, 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003); *DeBrower v. Pa. Higher Educ. Assistance Agency (In re DeBrower)*, 387 B.R. 587, 591 (Bankr. N.D. Iowa 2008). It is important to note that in the *Brunner* Test, the Certainty of Hopelessness is essentially a requirement. See *supra* note 103 and accompanying text; Frattini, *supra* note 14, at 561. For the Totality of the Circumstances Test, the Certainty of Hopelessness seems to be merely considered as a factor. See *Jespersion*, 571 F.3d at 783–84 (Smith, J., concurring) (“[F]airness and equity require each undue hardship case to be examined on the *unique facts and circumstances* that surround the particular bankruptcy.” (alteration and emphasis in original) (quoting *In re Long*, 322 F.3d at 554)). However, the language of the opinion of a few bankruptcy courts within the Eighth Circuit seems to suggest that the Certainty of Hopelessness may be a requirement rather than a factor. See, e.g., *In re VerMaas*, 302 B.R. at 657 (“The hardship must be more than mere unpleasantness. [It] must present a certainty of hopelessness and not a mere present inability to meet financial commitments due to a current, temporary state of unemployment.” (alteration in original) (quoting *Randall v. Norwest Student Loan Servs. (In re Randall)*, 255 B.R. 570, 577 (Bankr. D.N.D. 2000))). For more on Certainty of Hopelessness, see *supra* notes 103–104 and accompanying text.

126. *Jespersion*, 571 F.3d at 779.

127. *Id.* (quoting *In re Long*, 322 F.3d at 554–55).

128. *In re VerMaas*, 302 B.R. at 656 (quoting *In re Long*, 322 F.3d at 554–55). For example, the *VerMaas* court, as part of its determination, focused on the quantifiable expenses of the debtor, such as credit card debt as shown through bank statements. *Id.* at 658.

clearly instructed that speculation is not permitted by a court.¹²⁹ These instructions are certainly not ideal, yet they provide more protection for the debtor against the court's subjectivity and speculation than the other tests.

By focusing on a multitude of factors—rather than a three-part test—the Totality of the Circumstances Test avoids “[r]igid adherence . . . [that] robs the court of the discretion envisioned by Congress in drafting [§ 523(a)(8)].”¹³⁰ Additionally, viewing each case through the Totality of the Circumstances Test is more consonant with the equitable nature of bankruptcy because the test “allows the court to more uniformly manage the equities of each case in view of the legislative intent and policies of the Bankruptcy Code.”¹³¹ Commentator Kurt Wiese has stated that the Totality of the Circumstances Test is most aligned with the intent of the Bankruptcy Reform Act of 1978.¹³²

However, the test is not without its criticisms. Even with the Eighth Circuit's attempt to infuse objectivity and to curb speculation, it has been argued that the Totality of the Circumstances Test can lead to “unpredictable and inconsistent standards of undue hardship” because the test is nonetheless inherently subjective and contains “numerous and varying factors different courts [can] consider.”¹³³ In fact, “[u]nder the current standard [of the Totality of the Circumstances Test] courts may choose from a multitude of factors and apply any combination of them to a given case, which only adds to the ambiguity and complexity of determining what constitutes undue hardship.”¹³⁴ Courts must address this failure to provide more definite guideposts on which factors to consider, because otherwise bankruptcy judges are left open to consider any factor in determining undue hardship.

129. See *Jespersion*, 571 F.3d at 780 (“A court may not engage in speculation when determining net income and reasonable and necessary living expenses. To be reasonable and necessary, an expense must be ‘modest and commensurate with the debtor’s resources.’” (quoting *In re DeBrower*, 387 B.R. at 590) (citing *Rose v. Educ. Credit Mgmt. Corp.* (*In re Rose*), 324 B.R. 709, 712 (B.A.P. 8th Cir. 2005))).

130. *Coleman v. Higher Educ. Assistance Found.* (*In re Coleman*), 98 B.R. 443, 451 (Bankr. S.D. Ind. 1989) (noting that the rigid adherence to the *Johnson* Test, *Bryant* Poverty Test, and the *Brunner* Test “would work to penalize the truly honest and desperate debtor and clash with the notions of a fresh start”).

131. *Id.*

132. Kurt Wiese, Note, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of “Undue Hardship”*, 26 ARIZ. L. REV. 445, 447 (1984) (“The drafters [of the Bankruptcy Reform Act of 1978] said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor’s circumstances.”).

133. Frattini, *supra* note 14, at 565.

134. *Id.* at 566. See also *supra* note 125 for various factors considered by courts in the past.

IV. PROPOSAL—ALIGN THE DISCHARGEABILITY OF STUDENT LOANS WITH BANKRUPTCY'S EQUITABLE NATURE BY ADOPTING A MODIFIED VERSION OF THE EIGHTH CIRCUIT'S TOTALITY OF THE CIRCUMSTANCES TEST

To help remedy the issues surrounding the Undue Hardship Exception of § 523(a)(8), Congress should revise the statute to clarify the meaning of “undue hardship.” Given that Congress has not provided a definition for more than four decades,¹³⁵ a legislative definition that would bring uniformity and consistency seems unlikely. In the meantime, the judiciary must utilize its powers to adopt a new test to apply the Undue Hardship Exception.

Although the *Brunner* Test is precedent in nine federal circuits,¹³⁶ the courts should forego the rigid three-part test and adopt a modified version of the Totality of the Circumstances Test. The modified Totality of the Circumstances Test (Modified Test) would replace its current third consideration, “any other relevant facts and circumstances,” with a reinforced *Brunner* Test's Good-Faith Prong,¹³⁷ which would limit the possibility of courts considering any and all factors.¹³⁸ Although the *Brunner* Test's Good-Faith Prong has its shortcomings,¹³⁹ a modified version is essential to capture Congress's original intent—that is, to help truly honest debtors. In reinforcing the Good-Faith Prong, courts should provide clear instructions on its application with a focus on the Bankruptcy Code's equitable nature in order to reduce the court's subjectivity and prevent another situation like Ms. Stebbins-Hopf's from occurring.¹⁴⁰ Furthermore, keeping the Modified Test aligned with the Bankruptcy Code's equitable nature, bankruptcy courts should be permitted to use their equitable powers and allow a partial discharge of the debtor's student loans, rather than the current approach's all-or-nothing stance.¹⁴¹ Within this Modified Test, the Certainty of Hopelessness—as a factor or requirement—would be entirely omitted.¹⁴²

135. See *supra* notes 59–62 and accompanying text. The Undue Hardship Exception was first codified in the Bankruptcy Reform Act of 1978. See *supra* notes 47–50 and accompanying text.

136. See cases cited *supra* note 96.

137. For a refresher on the *Brunner* Test's Good-Faith Prong, see *supra* notes 105–106, 112–114 and accompanying text.

138. See *supra* note 125. The numerous factors that have been considered by the various bankruptcy courts within the Eighth Circuit demonstrate a need to prevent *any* factor from being considered. See Frattini, *supra* note 14, at 565 (“[T]he subjectivity inherent with [the Totality of the Circumstances Test], combined with numerous and varying factors different courts consider, can lead to unpredictable and inconsistent standards of undue hardship.”).

139. See *supra* notes 113–118 and accompanying text.

140. See *supra* notes 114–118 and accompanying text.

141. See *supra* note 11 and accompanying text.

142. See *infra* Section IV.B.

A. Inclusion of a Reinforced Version of the Brunner Test's Good-Faith Prong

Rather than eliminating the *Brunner Test's* Good-Faith Prong, a reinforced version is necessary since Congress, when enacting § 523(a)(8), was fearful of intentional abusers.¹⁴³ If the Good-Faith Prong were eliminated, the test would stray from Congress's original intent. Additionally, this reinforced Good-Faith Prong will allow the scope of potential debtors seeking discharge to be narrowed to those who are truly honest debtors.¹⁴⁴

The *Brunner Test's* current Good-Faith Prong presents issues of subjectivity because courts do not have proper guidance for applying the prong. The guidance that undue hardship “encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from ‘factors beyond his reasonable control’”¹⁴⁵ fails to appreciate the foundational principle that bankruptcy courts are courts of equity.¹⁴⁶ When applying the *Brunner Test's* Good-Faith Prong, it is crucial that the court be guided with an eye towards equitable relief. To help realign this Good-Faith Prong onto the right track, further instructions should be given regarding the “principles and rules of equity jurisprudence.”¹⁴⁷ For example, a proper instruction may mandate that the bankruptcy court apply the Good-Faith Prong in a manner consistent with the Fresh Financial Start Principle underlying today's bankruptcy system.¹⁴⁸ Requiring the application of the Good-Faith Prong so as to permit the debtor to have a “new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt”¹⁴⁹ would help mitigate the court's subjectivity. Proper guidance that brings the Bankruptcy Code's equitable nature to the forefront of the analysis would curb the subjectivity issues pervading the *Brunner Test's* Good-Faith Prong.

143. See *supra* notes 51–52 and accompanying text.

144. One scholar has argued that the Good-Faith Prong be excluded entirely. See G. Michael Bedinger VI, Note, *Time for a Fresh Look at the “Undue Hardship” Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1829 (2014) (noting that the Good-Faith Prong is “detrimental because it adds a layer of difficulty for the debtor while lacking a foundation in the statute and legislative history”).

145. Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 305 (3d Cir. 1995) (quoting *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993)).

146. See *supra* note 38.

147. *Pepper v. Litton*, 308 U.S. 295, 304 (1939).

148. For more on the Fresh Financial Start Principle, see *supra* notes 25–28 and accompanying text.

149. *Layfield v. Dir. of Pub. Safety of Ala. (In re Layfield)*, 12 B.R. 846, 848 (Bankr. N.D. Ala. 1981) (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

B. The Certainty of Hopelessness Inquiry Has No Place in the Dischargeability of Student Loans

Within the Eighth Circuit's Totality of the Circumstances Test, the Certainty of Hopelessness has been considered as a relevant factor in determining whether the debtor has met her burden of satisfying the Undue Burden Exception.¹⁵⁰ This harsh and unrealistic factor has no place in determining the dischargeability of student loans, which is to be guided by equitable considerations, giving particular attention to the Fresh Financial Start Principle underlying the Bankruptcy Code.¹⁵¹ In fact, courts and scholars consistently argue that the Certainty of Hopelessness standard is unsupported by § 523(a)(8)'s language and the policies underlying the Bankruptcy Code.¹⁵² To require that the debtor demonstrate a Certainty of Hopelessness "would be to sacrifice the notion of [the Fresh Financial Start Principle] at the altar of 'undue hardship.'"¹⁵³

C. Courts Should Utilize the Bankruptcy Code's Equitable Powers and Grant Partial Discharge of Student Loans

As the term's name implies, a partial discharge is the court's "flexible" approach to discharge a portion of the debtor's student loans, rather than the all-or-nothing treatment that is currently required by § 523(a)(8).¹⁵⁴ This partial discharge approach has been argued to be permitted under § 105(a) of the Bankruptcy Code.¹⁵⁵ That is, the bankruptcy court may exercise the powers granted to it under §105(a) and discharge only a portion of the debtor's student loans. Section 105(a) has been interpreted as "a 'catch-all' provision, giving bankruptcy courts a broad delegation of power, rather than

150. See *supra* note 125.

151. See *supra* notes 25–28 and accompanying text.

152. See *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 799 (B.A.P. 1st Cir. 2010); *Speer v. Educ. Credit Mgmt. Corp.* (*In re Speer*), 272 B.R. 186, 191–92 (Bankr. W.D. Tex. 2001) ("[Some] courts view 'undue hardship' as meaning that a debtor must demonstrate . . . a 'certainty of hopelessness.' This Court has difficulty with such a strict interpretation for the honest, but financially strapped debtor with student loans. This is especially so in light of the fact that the predominant goal of the Bankruptcy Code is to provide such honest and financially strapped debtors a fresh start from burdensome debt. The difficulty in reconciling the [Undue Burden Exception] with the overriding policy goals of bankruptcy has finally compelled this Court to express in writing its continuing frustrations with student loan dischargeability issues in general." (citations omitted)).

153. *Kopf v. U.S. Dep't of Educ.* (*In re Kopf*), 245 B.R. 731, 744 (Bankr. D. Me. 2000).

154. See Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 IOWA L. REV. 733, 762 (1990); Bayuk, *supra* note 11, at 1105. For a refresher on the current all-or-nothing discharge approach, see *supra* note 11.

155. Section 105(a) of the Bankruptcy Code, in relevant part, states, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]." 11 U.S.C. § 105(a).

specific enumerations, to carry out the mandates and policies of the [Bankruptcy Code].”¹⁵⁶ The power granted to the bankruptcy court by § 105(a) is an equitable power.¹⁵⁷ The significance of § 105(a) is that student loans can be partially discharged *even without a finding of undue hardship*.¹⁵⁸ Nevertheless, even with this equitable power to partially discharge student loans, “a great majority of courts do not go so far as to dispense with the undue hardship requirement.”¹⁵⁹ In fact, to support the notion that § 523(a)(8) permits only an all-or-nothing discharge, some courts have adopted a “strict” approach reasoning through the statutory construction and plain meaning of § 523(a)(8) that a partial discharge is impermissible, and thus, either all of the debtor’s student loans are discharged or none are.¹⁶⁰

Even if the statutory construction and plain meaning argument against partial discharge holds merit, that the bankruptcy courts are ultimately courts of equity should dictate that the partial discharge of student loans under § 105(a) as applied to § 523(a)(8) should be allowed. Thus, equipped with the Modified Test to determine whether the debtor has demonstrated the Undue Hardship Exception, and to properly carry out their equitable functions,¹⁶¹ bankruptcy courts must have the power to provide partial discharge of student loans even without a showing of undue hardship. Applying the principles of equity jurisprudence, including the Fresh Financial Start Principle,¹⁶² if a partial discharge of student loans will provide the debtor with equitable relief, then the bankruptcy court should be able to grant such partial discharge.

156. Bayuk, *supra* note 11, at 1106.

157. *See id.* (noting that § 105(a) power is an “equity power . . . necessary to the proper functioning of the bankruptcy courts, as such courts are, after all, courts of equity”).

158. *See* Tenn. Student Assistance Corp. v. Hornsby (*In re Hornsby*), 144 F.3d 433, 440 (6th Cir. 1998) (“Where a debtor’s circumstances do not constitute undue hardship, some bankruptcy courts have thus given a debtor the benefit of a ‘fresh start’ by partially discharging loans . . .”). Rather than a finding of undue hardship, the court stated that partial relief may be provided from “oppressive financial circumstances.” *Id.* While the court fails to define “oppressive financial circumstances,” it may be presumed that it is less demanding than a showing of undue hardship.

159. Bayuk, *supra* note 11, at 1107.

160. Amanda M. Foster, Comment, *All or Nothing: Partial Discharge of Student Loans is Not the Answer to Perceived Unfairness of the Undue Hardship Exception*, 16 WIDENER L.J. 1053, 1083–84 (2007) (noting that “courts adopting the strict approach have found ‘debt,’ as used in the Bankruptcy Code, means the entire student loan debt, not individual loans”); *see also* Bayuk, *supra* note 11, at 1101–04.

161. *See supra* note 38 and accompanying text.

162. *See supra* notes 25–28 and accompanying text.

CONCLUSION

The student loan crisis affecting millions of Americans spanning multiple generations is unquestionably a significant barrier to personal advancement. Congress's failure to provide a definition for "undue hardship" coupled with the federal judiciary's inadequate development of acceptable tests to define the Undue Hardship Exception has left honest American debtors to suffer financially and socially with no end in sight.

In confronting the student loan crisis, our bankruptcy courts have lost sight of their equitable foundation. Since the first Undue Hardship Exception test, the *Johnson* Test, the courts have failed to provide the help that debtors drowning in thousands of dollars desperately need. The *Brunner* Test, adopted by an overwhelming majority of our federal circuits, has failed to not only remove the subjectivity afforded to judges, but has moreover required the Certainty of Hopelessness, which, by its nature, is in stark contrast to the principles of equity. While the Modified Test is by no means ideal, it will serve as a starting point that is aligned with the equitable principles underlying bankruptcy. The Modified Test's departure from the *Brunner* Test's rigid three-part analysis will permit the bankruptcy courts to properly utilize their equitable powers afforded under the Bankruptcy Code, such as the ability to partially discharge a student debt. Additionally, the reinforced Good-Faith Prong and the elimination of the Certainty of Hopelessness will reduce the court's subjective inquiry and prevent the intrusive probing of a debtor's personal life.

Not every American student aspiring to pursue a respectable profession is blessed with parents or family members who can fund their college education. Within a society that makes a college education mandatory for success, there must be an available outlet that provides relief if one's mandatory education—that required tens or hundreds of thousands of dollars—has failed to provide the means to be a healthy contributing member of society.

Terry Ha