

# Time for a Fresh Look at the “Undue Hardship” Bankruptcy Standard for Student Debtors

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*ABSTRACT: In 1978, Congress enacted 11 U.S.C. § 523(a)(8), thereby restricting the availability of student-loan discharge for student debtors. The statute required a student debtor to establish that repaying the loan would cause “undue hardship” in order for a court to grant discharge. “Undue hardship” lacked a definition in § 523(a)(8), however, and courts derived a number of different tests to measure a debtor’s inability to make future loan payments. Circuits were split over two tests: the Brunner test and the totality test. Additionally, regardless of which test a court applied, some courts required the debtor to prove a “certainty of hopelessness” for any future loan repayment. This Note examines different circuits’ approaches to the “undue hardship” determination and advocates for a congressional solution that would codify the Eighth Circuit’s totality test and create a partial discharge provision for debtors who have met the “undue hardship” requirement. The Note argues, in the absence of congressional action, courts should interpret “undue hardship” in a fashion consistent with this Note’s proposed amendments to § 523(a)(8). Alternatively, courts should look to Congress’s definition of “undue hardship” in 11 U.S.C. § 524(m) to provide a basis for interpreting § 523(a)(8). These solutions would provide more clarity to the “undue hardship” standard in changing economic and social times while respecting Congress’s intent and the “fresh start” purpose of the Bankruptcy Code.*

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## I. INTRODUCTION

Congress passed 11 U.S.C. § 523(a)(8) in 1978 to make the discharge of educational loan debt more difficult for student debtors.<sup>1</sup> The language of the statute required that loan payments impose an “undue hardship” on a debtor or a debtor’s dependents before a court could grant a discharge.<sup>2</sup> Congress did not define “undue hardship” in § 523(a)(8), however, and courts created numerous tests to apply this standard.<sup>3</sup> Some courts have required that a debtor exhibit a “certainty of hopelessness” of ever repaying the loan before the court will offer a discharge.<sup>4</sup>

This Note examines the repercussions of a court applying either the *Brunner* test or the totality test to the “undue hardship” requirement and the effects of the “certainty of hopelessness” standard. Part II discusses the history of § 523(a)(8), the various standards courts use to apply the statute’s “undue hardship” test, and the reasons why it is crucial that Congress and the courts re-examine the statute without delay. Part III addresses the benefits of applying the totality test instead of the *Brunner* test and the dangerous nature of the “certainty of hopelessness” requirement. Part IV then proposes both congressional and judicial solutions to clarify the ambiguity of § 523(a)(8)’s “undue hardship” test and offers a model statute to remedy current issues.

## II. EVOLUTION OF 11 U.S.C. § 523(A)(8)

In 1978, Congress enacted § 523(a)(8) with the intention of making the discharge of educational loans difficult for student debtors.<sup>5</sup> Originally, Congress allowed two opportunities for a student debtor to discharge student debt through bankruptcy: after five years of repayment or upon a showing that the debt posed an “undue hardship” on the debtor.<sup>6</sup> However, Congress left “undue hardship” undefined in the context of § 523(a)(8), leaving courts to devise their own interpretations. Two primary tests emerged in different circuits—the *Brunner* test and the totality test—each of which relies upon separate factors to determine whether an “undue hardship” exists.<sup>7</sup> Some courts, applying either of the two tests, imposed an

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1. 11 U.S.C. § 523(a)(8) (1978).

2. *Id.*

3. See *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003) (citing *Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 2003)) (confirming application of the totality test); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (establishing the *Brunner* test).

4. *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 359 (6th Cir. 2007); *Mulherin v. Sallie Mae Servicing Corp.* (*In re Mulherin*), 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003).

5. *Cline v. Ill. Student Loan Assistance Ass’n* (*In re Cline*), 248 B.R. 347, 351 (B.A.P. 8th Cir. 2000) (Schermer, J., dissenting).

6. 11 U.S.C. § 523(a)(8).

7. See *supra* cases cited note 3.

additional, harsher requirement that student debtors exhibit a “certainty of hopelessness” of repaying their debt before a court could find an “undue hardship” and discharge the loan.<sup>8</sup> Subsequently, in 1998, Congress removed the provision allowing discharge after a certain number of years, leaving the showing of “undue hardship” as a student debtor’s only possibility of relief.<sup>9</sup> The judicially created *Brunner* test, totality test, and “certainty of hopelessness” requirement, however, have remained unchanged despite the evolving nature of the statute. These three standards, crafted by courts for use in a twentieth-century world under a twentieth-century statute, require immediate attention in the wake of the 2008 economic recession that significantly altered the United States’ economic and social circumstances.

Subpart A discusses the legislative history of § 523(a)(8), and Subpart B outlines the emergence of the *Brunner* test, the totality test, and the certainty of hopelessness standard. Subpart C then places the “undue hardship” inquiry in the larger economic context of the post-2008 student debtor.

A. *LEGISLATIVE HISTORY: EXCEPTIONS TO THE DISCHARGE OF EDUCATIONAL LOANS*

In 1973, reports of “deadbeat” dropouts and graduates trying to shirk their federal loan payments prompted the Federal Department of Health, Education, and Welfare to approach the Congressional Committee on Bankruptcy Laws.<sup>10</sup> To protect the federal loan system, the Department encouraged the Congressional Committee to pass legislation making it more difficult for debtors to discharge federal educational loans through bankruptcy.<sup>11</sup> In response, Congress amended the Federal Higher Education Act in 1976 to prohibit a debtor from discharging a federal educational loan during the first five years of repayment unless the debtor could establish that the loan imposed an “undue hardship” on the debtor or the debtor’s dependents.<sup>12</sup> In other words, after five years, a court would not require a debtor to show “undue hardship” to discharge an educational debt. In 1990, Congress extended the five-year period to seven years,<sup>13</sup> and in 1998,

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8. See *infra* Part II.B.3.

9. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

10. 51 CAUSES OF ACTION 2D 512 (2012) (“It was thought that an unfavorable public image might discredit and threaten the newly formed student loan system.”). But see Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009) (“Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy.”).

11. CAUSES OF ACTION 2D, *supra* note 10, at 512.

12. 11 U.S.C. § 523(a)(8) (1978); BANKRUPTCY LAW MANUAL § 8:13 (2013) (citing 20 U.S.C. § 1087-3 (1976)).

13. CAUSES OF ACTION 2D, *supra* note 10, at 512; BANKRUPTCY LAW MANUAL, *supra* note 12, § 8:13 (“Subsequent amendments relentlessly expanded the coverage of this exception to discharge.”).

Congress completely abolished the amendments that allowed discharge without a showing of “undue hardship” after a prescribed number of years.<sup>14</sup> Consequently, all educational loans are currently excepted from discharge unless a debtor can show that repayment of the debt imposes an “undue hardship.”<sup>15</sup>

The revisions of § 523(a)(8) reflect deepening concerns in Congress about students’ ability to cast off their debt.<sup>16</sup> Congress essentially found a creditor’s interest in educational loan repayment outweighs a debtor’s “fresh start” interest.<sup>17</sup> The Bankruptcy Code’s “fresh start” policy justifies situations in which it may be proper to discharge debt because “excessive debt . . . [might] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance.”<sup>18</sup> Thus, under § 523(a)(8), a creditor’s interest prevails unless a debtor can prove an “undue hardship,” which rebuts the presumption that an educational loan is excepted from discharge.<sup>19</sup>

#### B. THE COURT’S ROLE: WHAT IS “UNDUE HARDSHIP”?

The current version of 11 U.S.C. § 523(a)(8) states, in relevant part:

A discharge under . . . this title does not discharge an individual debtor from any debt—

...

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14. BANKRUPTCY LAW MANUAL, *supra* note 12, § 8:13.

15. *Id.* In 2005, Congress extended the definition of educational loans to apply to “loans on which the interest paid is deductible for federal income tax purposes,” thereby excepting private loans from discharge. *Id.*; see 11 U.S.C. § 523(a)(8); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (removing the amendment allowing the discharge of a federally insured educational debt after a certain number of years).

16. Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 147 (1996).

17. See *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003) (“Congress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligation from doing so.”); *Hiatt v. Ind. State Student Assistance Comm’n*, 36 F.3d 21, 24 (7th Cir. 1994) (citing *Nunn v. Washington* (*In re Nunn*), 788 F.2d 617, 619 (9th Cir. 1986)).

18. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985) (quoting John C. Weistart, *The Costs of Bankruptcy*, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 107, 111) (internal quotation marks omitted).

19. *Nielsen v. ACS, Inc.* (*In re Nielsen*), 473 B.R. 755, 758 (B.A.P. 8th Cir. 2012) (“In contrast to many other types of debts, § 523(a)(8)’s exclusion of student loans from discharge is ‘self-executing’ in the sense that, ‘[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.’” (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004)).

(8) unless excepting such debt from discharge under this paragraph would impose an *undue hardship* on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit . . . or . . .

. . . .

(B) any other educational loan that is a qualified education loan . . . .<sup>20</sup>

Though Congress has frequently amended § 523(a)(8),<sup>21</sup> legislators have never defined “undue hardship” in this statute.<sup>22</sup> The lack of legislative guidance has prompted the courts to create their own standards in an attempt to find a workable test that reflects Congress’s intent.<sup>23</sup> A majority of courts follow the standard the Second Circuit created in *Brunner v. New York State Higher Education Services Corp.*,<sup>24</sup> while the Eighth Circuit has adopted a totality of the circumstances test.<sup>25</sup> Courts applying either test may

20. 11 U.S.C. § 523(a)(8) (2012) (emphasis added).

21. See *supra* notes 11–15 and accompanying text.

22. See *In re Long*, 322 F.3d at 554 (“However, the clarity that is found in the legislative purpose and policy surrounding § 523(a)(8)(B) is decidedly absent in the meaning Congress ascribed to the term ‘undue hardship.’”). For a different context in which Congress does define “undue hardship,” see *infra* note 127.

23. See *In re Long*, 322 F.3d at 554 (“A divergent body of appellate authority has attempted to unwrap the ‘undue hardship’ enigma.”). The Commission on the Bankruptcy Laws of the United States recommended to Congress that the analysis of whether a student loan imposes an “undue hardship” should include specific factors:

[T]he rate and amount of [the debtor’s] future resources should be estimated reasonably in the terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and [the debtor’s] dependents, at a minimal standard of living within their management capability, as well as to pay the educational debt.

*Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981) (second and third alteration in original) (quoting H.R. DOC. NO. 93-137, pt. 2, 140 n.17 (1973)).

24. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987); BANKRUPTCY LAW MANUAL, *supra* note 12, § 8:13; see *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005) (“An overwhelming majority of circuits has now adopted the Second Circuit’s three-part *Brunner* test.”); *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002); *United Student Aid Funds Inc. v. Pena* (*In re Pena*), 155 F.3d 1108, 1111–12 (9th Cir. 1998); W. HOMER DRAKE, JR., BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER § 6:20 (3d ed. 2012).

25. *In re Long*, 322 F.3d at 554; DRAKE, *supra* note 24, § 6:20. The First Circuit is the only other circuit to adopt the totality test. See *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010) (“After several decades of case law interpreting [the term “undue hardship”], essentially two tests have emerged—the so-called

additionally require the student debtor to show a “certainty of hopelessness” before discharging the debt.<sup>26</sup>

### 1. The Majority Approach: The *Brunner* Test

In *Brunner*, the Second Circuit held a debtor could not discharge her federal educational loans because she failed to meet the “undue hardship” requirement in § 523(a)(8).<sup>27</sup> The court first observed that “there is very little appellate authority on the definition of ‘undue hardship.’”<sup>28</sup> The court proceeded to outline a three-pronged test to decide if an “undue hardship” was present:

(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.<sup>29</sup>

The test established in *Brunner* has three conjunctive requirements; failing one will result in a court excepting the debt from discharge.<sup>30</sup>

Applying the *Brunner* test, the *Brunner* court found the debtor did not meet the “undue hardship” requirement because she failed to establish prongs two and three.<sup>31</sup> Under the second prong, the debtor did not possess the “additional circumstances” needed to show that she would not find work during the loan repayment period.<sup>32</sup> The court offered examples of “additional circumstances,” including being disabled or elderly, having dependents, and “a total foreclosure of job prospects in her area of training.”<sup>33</sup> The debtor similarly failed the good-faith prong because she filed for the discharge within one month of her first payment being due, and she did not first request a deferment.<sup>34</sup> These factors showed that the debtor had exhibited neither “additional circumstances” nor a good-faith effort to repay her loans, and thus the debt did not impose an “undue hardship” and its discharge was not appropriate.<sup>35</sup>

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*Brunner* test and the ‘totality of the circumstances’ test.”); CAUSES OF ACTION 2D, *supra* note 10, at 530–31.

26. See *infra* note 45 and accompanying text.

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

28. *Id.*

29. *Id.*

30. *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002).

31. *Brunner*, 831 F.2d at 396–97.

32. *Id.*

33. *Id.*

34. *Id.* at 397.

35. *Id.* at 396–97.

The *Brunner* court acknowledged that the first prong of its test, requiring a minimal standard of living, “has been applied frequently as the minimum necessary to establish ‘undue hardship,’” but that the second prong was necessary in response to legislative intent.<sup>36</sup> Interpreting Congress’s intent as making educational debt more difficult to discharge than other debts, the court required the additional showing of prongs two and three in a conjunctive formulation.<sup>37</sup>

## 2. The Minority Approach: The Totality Test

The Eighth Circuit explicitly rejected the test enunciated in *Brunner*.<sup>38</sup> Rather, in *In re Long*, the court applied a totality of the circumstances test (“totality test”) to evaluate whether a debtor had established “undue hardship.”<sup>39</sup> In the totality test analysis, a court considers: “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.”<sup>40</sup> The Eighth Circuit continues to implement the totality test rather than the *Brunner* test because, in the court’s view, Congress intended to allow courts wide discretion to consider a debtor’s entire predicament when it declined to enumerate the qualities of an “undue hardship.”<sup>41</sup>

The Eighth Circuit, in *In re Long*, remanded the case because the lower court failed to analyze the debtor’s “undue hardship” under the totality test.<sup>42</sup> The court summarized the totality standard: “Simply put, 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.”<sup>43</sup> On remand, the court found the debtor’s net monthly income after monthly expenses, varying between \$62 and \$367, was sufficient to pay her \$54 monthly payment

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36. *Id.* at 396.

37. *Id.*

38. *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003) (holding that the court “prefer[s] a less restrictive approach to the ‘undue hardship’ inquiry” than the *Brunner* test).

39. *Id.*

40. *Id.* (citing *Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981)).

41. *Id.*

42. Applying the totality test, the lower court reversed its decision and held that the debtor’s loans were excepted from discharge. *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 292 B.R. 635, 639 (B.A.P. 8th Cir. 2003). The reversal was not so much a result of the new standard, however, as the lower court had originally applied a “clearly erroneous” rather than a “de novo” standard of review. *In re Long*, 322 F.3d at 553.

43. *In re Long*, 322 F.3d at 554–55.



under the Income Contingent Repayment Plan (“ICRP”).<sup>44</sup> Therefore, the court did not discharge the student loan debt because of the lack of “undue hardship.”

### 3. Two Diverging Tests Find Common Ground: A “Certainty of Hopelessness”

Although the *Brunner* test and the totality test each stress different factors, both tests may additionally require a debtor to show a “certainty of hopelessness” that the debtor will *ever* have the ability to repay the loan before the court will discharge the debt.<sup>45</sup> The “certainty of hopelessness” standard generally provides that “[w]hen a debtor truly is without hope, the debtor may prevail and the burden of the student loan may be lifted.”<sup>46</sup> Interestingly, neither the *Brunner* test nor the totality test included a “certainty of hopelessness” requirement in their foundational opinions.<sup>47</sup> This is significant because a showing of a “certainty of hopelessness” is a uniquely severe and demanding interpretation of Congress’s original “undue hardship” language.<sup>48</sup> Nevertheless, *Brunner* courts frequently apply a “certainty of hopelessness” standard when considering whether a debtor’s second-prong “additional circumstances” will lead to a life-long inability to repay debt,<sup>49</sup> and some courts using the totality test require a debtor to prove a “certainty of hopelessness” before granting relief.<sup>50</sup> Application of

44. *In re Long*, 292 B.R. at 639. See *infra* Part III.B for a discussion of the ICRP’s influence on the “undue hardship” determination.

45. See *Cheesman v. Tenn. Student Assistance Corp.* (*In re Cheesman*), 25 F.3d 356, 362 (6th Cir. 1994) (applying the *Brunner* test); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993) (same); *DeBrower v. Pa. Higher Educ. Assistance Agency* (*In re DeBrower*), 387 B.R. 587, 590 (Bankr. N.D. Iowa 2008) (applying the totality test); *Mulherin v. Sallie Mae Servicing Corp.* (*In re Mulherin*), 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003) (same).

46. *Vujovic v. Direct Loans* (*In re Vujovic*), 388 B.R. 684, 692 (Bankr. E.D.N.C. 2008).

47. See *In re Long*, 322 F.3d at 554; *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *Andrews v. S.D. Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702, 704 (8th Cir. 1981).

48. See *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 799 (B.A.P. 1st Cir. 2010) (“Requiring the debtor to present additional evidence of ‘unique’ or ‘extraordinary’ circumstances amounting to a ‘certainty of hopelessness’ is not supported by the text of § 523(a)(8). The debtor need only demonstrate ‘undue hardship.’”); *VerMaas v. Student Loans of N.D.* (*In re VerMaas*), 302 B.R. 650, 657 (Bankr. D. Neb. 2003) (“In the end, the Court must be convinced that it is hopeless that the loans will ever be repaid.” (quoting *Wilson v. Educ. Credit Mgmt. Corp.* (*In re Wilson*), 270 B.R. 290, 294 (Bankr. N.D. Iowa 2001)) (internal quotation marks omitted)).

49. *Spence v. Educ. Credit Mgmt. Corp.* (*In re Spence*), 541 F.3d 538, 544 (4th Cir. 2008); *Educ. Credit Mgmt. Corp. v. Mosley* (*In re Mosley*), 494 F.3d 1320, 1326 (11th Cir. 2007); *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 359 (6th Cir. 2007) (“To satisfy the second [*Brunner*] prong, Barrett must show that circumstances indicate a ‘certainty of hopelessness, not merely a present inability to fulfill financial commitment.’” (quoting *In re Roberson*, 999 F.2d at 1136)).

50. *In re Mulherin*, 297 B.R. at 564; *In re DeBrower*, 387 B.R. at 591; *U.S. Dep’t of Educ. v. Meling*, No. Co1-2027 MJM., 2002 WL 32107248, at \*5 (N.D. Iowa Jan. 22, 2002).

the “certainty of hopelessness” standard is not uniform or predictable. Moreover, this highly demanding requirement is entirely judge-created, and it resulted from Congress’s decision to leave the “undue hardship” standard bereft of a definition.

To show a “certainty of hopelessness,” a debtor must exhibit more than a temporary inability to make loan payments.<sup>51</sup> Under both the *Brunner* test and the totality test, a judge’s speculation concerning the duration of the debtor’s inability to make loan payments—essentially, how certain the debtor’s hopelessness is—is the crucial factor in the “certainty of hopelessness” analysis.<sup>52</sup> For example, in *In re Roberson*, the debtor filed for bankruptcy with over \$34,000 in debt and approximately \$19,000 in assets.<sup>53</sup> The debtor had recently lost his driver’s license, lost his job, and experienced a divorce that left him without his home and paying weekly child support.<sup>54</sup> The debtor’s annual income was \$6000 the year he filed to discharge his student loans.<sup>55</sup> Notwithstanding the debtor’s irrefutable financial difficulties, the Seventh Circuit adopted the *Brunner* test and concluded that, under the “certainty of hopelessness” standard,<sup>56</sup> the debtor’s condition did not meet the “undue hardship” exception because the “debtor’s dire straits [were] only temporary.”<sup>57</sup>

C. THE TIME IS RIPE FOR A RE-EXAMINATION OF THE “UNDUE HARDSHIP” ANALYSIS

Scholars, courts, and students have written volumes upon “undue hardship” since the term entered § 523(a)(8) in 1978. However, recent changes in our economic and social structures demand an immediate re-examination of the “undue hardship” tests. Notably, the economic downturn that began in 2008 has pushed more young people into college—students whose tuition is generally funded by federal student loans—and has made

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51. *In re Barrett*, 487 F.3d at 359; *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); *In re Roberson*, 999 F.2d at 1136; *Briscoe v. Bank of N.Y. (In re Briscoe)*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981).

52. *See In re Mulherin*, 297 B.R. at 566 (explaining that a court must find a “certainty of hopelessness” to discharge a loan in the totality of circumstances test); *see also* *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005) (holding that a “certainty of hopelessness” determination is prospective in nature).

53. *In re Roberson*, 999 F.2d at 1134. Approximately \$11,000 of the debtor’s assets was an illiquid interest in the house that the debtor’s recently divorced wife possessed. *Id.* at 1137.

54. *Id.* at 1134.

55. *Id.*

56. *Id.* at 1136.

57. *Id.* at 1137 (holding that although the debtor lived in “a one room apartment with no kitchen or toilet” and his “short-term outlook is dismal,” the debtor “simply needs to get through some tough times”) (internal quotation marks omitted). *See generally* *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994) (Guy, J., dissenting) (citing cases where the debtors possess a “certainty of hopelessness” because of disability, illness, age, or poor education).

their job search tougher upon graduation.<sup>58</sup> The additional “certainty of hopelessness” requirement only serves to present another, higher bar for student debtors to surmount before regaining economic stability in a shaky market.

The Federal Reserve Bank of New York released a report in February 2013 that painted a grim picture of student debtors’ and the economy’s current condition.<sup>59</sup> The report found the percentage of student debtors under the age of thirty who were at least ninety days late on their student loan payments had increased from 21% in 2004 to 35% in 2012.<sup>60</sup>

Debtors who are late on their student loan payments are significantly “more likely to also be late on auto-loan, credit-card and mortgage payments,”<sup>61</sup> creating a spiraling event that affects the entire economy. While late payment rates are increasing, *more* young adults are taking out student loans: the number of 25-year-olds with student debt increased from 33% in 2008 to 43% in 2012.<sup>62</sup> The increasing cost of tuition is also boosting the average student debtor’s total debt—approximately 38% of student debtors owed between \$10,000 and \$50,000 in 2005, while that figure soared to 47% in 2012.<sup>63</sup> These recent economic and social changes have contributed to a \$966 billion student-loan debt in the United States, a figure that increased 11% in 2012 alone and 51% since 2008.<sup>64</sup> The \$966 billion of student loans—much of which are not being repaid on time—demands that Congress and the courts take a fresh look at a student-loan discharge policy that is based exclusively on a congressionally undefined showing of “undue hardship” that courts are interpreting with outdated

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58. See RICHARD FRY, PEW RESEARCH CTR., COLLEGE ENROLLMENT HITS ALL-TIME HIGH, FUELED BY COMMUNITY COLLEGE SURGE 1–2 (2009), *available at* <http://www.pewsocialtrends.org/files/2010/10/college-enrollment.pdf> (“The share of 18- to 24-year-olds attending college in the United States hit an all-time high in October 2008, driven by a recession-era surge in enrollments . . . [The 2008 recession] has driven the national unemployment rate to its highest level in more than a quarter of a century and has had an especially harsh impact on young adults.”).

59. DONGHOON LEE, HOUSEHOLD DEBT AND CREDIT: STUDENT DEBT, FED. RESERVE BANK OF N.Y. (2013), *available at* [www.newyorkfed.org/newsevents/mediaadvisory/2013/Leco22813.pdf](http://www.newyorkfed.org/newsevents/mediaadvisory/2013/Leco22813.pdf).

60. Ruth Simon & Rachel Louise Ensign, *Student-Loan Delinquencies Among the Young Soar*, WALL ST. J. (Feb. 28, 2013), <http://online.wsj.com/news/articles/SB1000142412788732397810457833222805526516>. The percentage in 2008 was 26%. *Id.* These figures exclude students and former students who are not yet required to make payments (44% of student borrowers), including student debtors who have obtained a loan deferral or forbearance. *Id.* Since debtors do not typically request a deferral or forbearance unless they are experiencing difficulty making loan payments, the percentage of student debtors making late payments is realistically much larger. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* The percentage of high borrowers, defined as borrowing \$100,000 or more, has likewise increased from 1.7% in 2005 to 3.7% in 2012. *Id.*

64. *Id.*

judicial tests designed to operate under the pre-1998, more flexible discharge statute.

The continuing spread of the “certainty of hopelessness” requirement into both the *Brunner* test and the totality test presents an additional hurdle for a student debtor to surmount before discharging educational debt.<sup>65</sup> The use of such a rigid and “tough standard”<sup>66</sup> seems likely only to aggravate, rather than ameliorate, the current surge in student indebtedness framed by an economic recession.<sup>67</sup>

### III. TOTALITY TEST: CERTAINLY A BETTER CHOICE THAN *BRUNNER*, BUT STILL HOPELESS

According to a recent study, approximately 86% of courts use either the *Brunner* test or the totality test.<sup>68</sup> Broken down, about 70% of courts prefer to follow *Brunner* and 16% employ the totality test.<sup>69</sup> There are numerous differences between the tests, however, which render the totality test more preferable in light of Congress’s intent and current economic trends.<sup>70</sup> Despite the totality test’s strengths, there remains the risk that courts using the totality test may place improper weight on certain factors when determining a debtor’s ability to repay, such as availability of the ICRP and religious tithing. This Part’s comparative analysis is essential to the Note’s

65. *Hicks v. Educ. Credit Mgmt. Corp.* (*In re Hicks*), 331 B.R. 18, 28 (Bankr. D. Mass. 2005) (“Requiring the debtor to present additional evidence of . . . ‘extraordinary’ circumstances amounting to a ‘certainty of hopelessness’ is not supported by the text of § 623(a)(8). The debtor need only demonstrate ‘undue hardship’ . . . [W]hether or not this Court subjectively views the debtor’s circumstances as . . . ‘extraordinary’ is, in a word, overkill.”).

66. *Coatney v. U.S. Dep’t of Educ.* (*In re Coatney*), 345 B.R. 905, 910 (Bankr. C.D. Ill. 2006) (quoting *Simmons v. U.S. Dep’t of Educ.* (*In re Simmons*), 334 B.R. 632, 636 (Bankr. C.D. Ill. 2005)).

67. *See supra* text accompanying notes 59–64. Burdening student-debtors under the “certainty of hopelessness” standard may force debtors to live for decades under their debt when discharge, or partial discharge, would allow for a “fresh start” and more long-term benefit to society. *See supra* note 18 and accompanying text.

68. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 487 (2005).

69. *Id.* These figures are not surprising; nine out of eleven circuits use the *Brunner* test, or roughly 82%, and two circuits use the totality test, or roughly 18%.

70. Both *Brunner*-test and totality-test courts generally agree that Congress intended to make discharge difficult in order to combat the risk of undeserving student debtors perfidiously escaping their debts. *See Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1306 (10th Cir. 2004) (“Congress was primarily concerned about abusive student debtors . . . . Section 523(a)(8) was designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings.”) (applying the *Brunner* test); *Cline v. Ill. Student Loan Assistance Ass’n* (*In re Cline*), 248 B.R. 347, 351 (B.A.P. 8th Cir. 2000) (“Congress’ intent in excepting student loans from discharge was clear: Congress wanted to prevent the ‘undeserving student borrower from abusing the bankruptcy process.’” (quoting *Andresen v. Neb. Student Loan Program, Inc.* (*In re Andresen*), 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999))) (applying the totality test).

legislative and judicial solutions in Part IV, where the totality test's factors will be employed to the exclusion of the *Brunner* test and the "certainty of hopelessness" standard.

#### A. WHY DO A MAJORITY OF COURTS FOLLOW THE BRUNNER TEST?

The *Brunner* test requires that a debtor initiate "good faith efforts" to make loan payments, while the totality test does not find this factor dispositive.<sup>71</sup> A "good faith" requirement is detrimental because it adds a layer of difficulty for the debtor while lacking a foundation in the statute and legislative history. Moreover, the *Brunner* test's conjunctive structure extinguishes the inquiry of a debt's dischargeability, perhaps prematurely, if the debtor fails any one of the test's prongs.<sup>72</sup> The totality test, on the other hand, possesses the flexibility to consider "any additional facts and circumstances unique to the case" without relying on any one factor as dispositive.<sup>73</sup> As a result of its inherent flexibility, the totality test more aptly fits the undefined, amorphous "undue hardship" standard.<sup>74</sup>

The 1973 Report on the Commission on the Bankruptcy Laws of the United States may provide the most complete insight into Congress's intent:

[Student loans] should not be dischargeable as a matter of policy before [the debtor] has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt.

In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt *should be adequate to maintain the debtor and*

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71. Compare *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396-97 (2d Cir. 1987) (excepting debts from discharge when the debtor did not exhibit a good faith effort to repay her loan because she filed for discharge within a month of her first payment being due, and she did not first attempt to obtain a deferment of payment), with *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("The debtor should not be obligated to prove a negative, that is, that he did not act in bad faith, and, consequently, acted in good faith.").

72. *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002) ("If the debtor fails to establish any one of the elements, the [*Brunner*] test has not been met and the court need not continue with the inquiry." (citing *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993))).

73. *Hicks v. Educ. Credit Mgmt. Corp.* (*In re Hicks*), 331 B.R. 18, 26 (Bankr. D. Mass. 2005) (internal quotation marks omitted).

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

*his dependents at a minimal standard of living within their management capability, as well as to pay the educational debt.*<sup>75</sup>

Using the Commission's explanation as a template,<sup>76</sup> the *Brunner* test unceremoniously added a second and third requirement to Congress's intended standard.<sup>77</sup> The augmented severity of the *Brunner* test places the "fresh start" purpose of the Bankruptcy Code in peril because courts may deny discharge to qualified debtors.<sup>78</sup>

Why, then, do nine circuits and approximately 70% of the courts choose to implement the *Brunner* test?<sup>79</sup> The court in *In re Grigas*, when confronted with the choice between the *Brunner* test and the totality test, followed *Brunner* for two reasons: (1) *Brunner* provides "concrete factors" that increase predictability; and (2) many other courts had already chosen *Brunner*, which also increases predictability.<sup>80</sup> Indeed, predictability reduces the volume of litigation because debtors often know whether their claim will succeed before commencing an action, but predictably applying an unfair standard does more harm than good to the Bankruptcy Code's "fresh start" policy.<sup>81</sup> Moreover, the text of § 523(a)(8) does not recommend applying

75. *In re Hicks*, 331 B.R. at 26 (alterations in original) (quoting H.R. DOC. NO. 93-137, pt. 2, at 140 & n.15, 141 n.17 (1973)).

76. Congress did not contradict the Commission's explanation of "undue hardship," adopting the Commission's "undue hardship" language without altering it.

77. While *Brunner*'s first prong is accounted for in the Commission's Report, there is no mention of either "additional circumstances" or a "good faith" requirement. See *In re Hicks*, 331 B.R. at 26 ("While under the totality of the circumstances approach, the court may also consider 'any additional facts and circumstances unique to the case' that are relevant to the central inquiry (i.e., the debtor's ability to maintain a minimum standard of living while repaying the loans), the *Brunner* test imposes two additional requirements on the debtor that *must* be met if the student loans are to be discharged."). These additional requirements are also absent from the text of § 523(a)(8) itself. See *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("[T]he 'good faith' requirement of *Brunner* is 'without textual foundation.'" (quoting *In re Hicks*, 331 B.R. at 28)).

78. BANKRUPTCY SERVICE, LAWYER'S EDITION § 27:13 (2014) ("One of the fundamental policies of the Bankruptcy Code is the fresh start afforded debtors through the discharge of their debts.") (citing 11 U.S.C. § 523(a)); see also Salvin, *supra* note 16, at 178 ("It is apparent that hardship tests limiting the discharge of educational loans to debtors in dire circumstances are too stringent to protect a debtor's fresh start.").

79. Pardo & Lacey, *supra* note 68, at 487 n.342.

80. *Grigas v. Sallie Mae Servicing Corp.* (*In re Grigas*), 252 B.R. 866, 874 n.8 (Bankr. D.N.H. 2000) ("[T]his Court strives to create uniformity within this district in an effort to foster predictability . . ."). However, the same court did not use the *Brunner* test six years earlier. See *Barrows v. Ill. Student Assistance Comm'n* (*In re Barrows*), 182 B.R. 640, 648-50 (Bankr. D.N.H. 1994) (adopting neither the *Brunner* test nor the totality test explicitly, although the factors on which the court relied more closely resembled the totality test because there was no "good faith" requirement, and no one factor appeared dispositive). Ten years later, the Bankruptcy Appellate Panel of the First Circuit formally adopted the totality test. *In re Bronsdon*, 435 B.R. at 800.

81. As a modernized adage opines, "practice doesn't make perfect, perfect practice makes perfect." For an in-depth look at the Bankruptcy Code's "fresh start" policy, see Jackson, *supra*

“concrete” factors, especially not a mandatory showing of “good faith” to make payments.<sup>82</sup> Neither of the *Grigas* court’s two reasons thus carry sufficient weight to warrant adopting the *Brunner* test over the totality test.

The totality test more accurately reflects Congress’s intentions because the lack of clear guidance in § 523(a)(8)’s text suggests that Congress intended for the courts to have discretion in assessing a debtor’s complete situation.<sup>83</sup> Courts applying the totality test essentially ask whether a debtor’s future earnings will allow the debtor to make loan repayments while still maintaining “reasonable necessary living expenses.”<sup>84</sup> This inquiry coincides with the Commission Report’s definition of “undue hardship” without applying the more rigorous, legislatively unjustified *Brunner* requirements.<sup>85</sup>

### B. THE TOTALITY TEST’S POTENTIAL DOWNFALLS

The totality test more appropriately reflects Congress’s intent to give the courts latitude in deciding whether a debtor can afford a debt, but it may occasionally sweep too broadly in its “undue hardship” analysis. For example, courts must decide whether a debtor’s access to the ICRP<sup>86</sup> always prevents a debt from being an “undue hardship.” Additionally, courts must consider whether a debtor’s religious tithing is a “reasonable necessary living expense,”<sup>87</sup> or whether it should preclude a court from discharging a student’s educational loans. A totality-test court must grapple with these sensitive issues because Congress did not define “undue hardship” in § 523(a)(8).

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note 18, at 1420 (“Professor John Weistart has suggested that ‘excessive debt, with its attendant pressure on family and emotional stability and job security, . . . [might] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance.’” (alteration in original) (quoting Weistart, *supra* note 18, at 111)).

82. See *supra* note 71 and accompanying text; see also *Oyler v. Educ. Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 385 (6th Cir. 2005) (adopting the *Brunner* test because it “easily accommodates factors [the court] look[s] to in evaluating undue hardship,” and because it is a “simpler rubric”).

83. See *Long v. Educ. Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003) (“We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B).”); see also *In re Bronsdon*, 435 B.R. at 800 (“The Panel is persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8).”).

84. *In re Long*, 322 F.3d at 554.

85. See *supra* note 75–77 and accompanying text; see also *In re Long*, 322 F.3d at 554 (“We prefer a less restrictive approach to the ‘undue hardship’ inquiry [than the *Brunner* test].”).

86. Under the ICRP, a debtor’s loan payments are determined by “adjusted gross income, HHS Poverty Guidelines and special circumstances.” *Vest v. U.S. Dep’t of Educ.* (*In re Vest*), Bankr. No. 10-01950-als7, Adv. No. 10-30106-als, 2011 WL 4479688, at \*2 (Bankr. S.D. Iowa May 26, 2011). After twenty-five years of payments, the debt is forgiven. *Id.* However, loan forgiveness is a taxable event. See *Income-Contingent Repayment Plans*, 34 C.F.R. § 685.209 (2014).

87. *In re Long*, 322 F.3d at 554.

In 2005, the Bankruptcy Appellate Panel of the Eighth Circuit applied the totality test and found the availability of the ICRP to be the dispositive factor in its “undue hardship” analysis.<sup>88</sup> In *In re Parker*, the bankruptcy court initially discharged the debtor’s debt despite the availability of the ICRP.<sup>89</sup> On appeal, the appellate panel reversed, holding that “[t]he Debtor clearly has the ability to make payments on the student loan” through the ICRP.<sup>90</sup> The appellate panel did not reverse any of the lower court’s other findings, thus basing its reversal solely on the availability of the ICRP.<sup>91</sup>

Perhaps not coincidentally, the ICRP advertises itself as a method “to meet your Direct Loan obligations *without causing undue financial hardship*.”<sup>92</sup> This language is an overt attempt to circumvent the express language in § 523(a)(8). Unsurprisingly, creditors often adopt this argument: the mere existence of the ICRP “makes ‘undue hardship’ non-existent.” One year after *Parker*, however, the Bankruptcy Appellate Panel for the Eighth Circuit reversed course and made clear that, under the totality test, the availability of the ICRP is only one factor among many in the “undue hardship” analysis.<sup>93</sup>

In 2006, the court reasoned in *In re Lee* that the ICRP and “undue hardship” analyses rely on different indicators, despite both calculating a debtor’s ability to pay,<sup>94</sup> and the two analyses serve “fundamentally different purpose[s].”<sup>95</sup> Moreover, the court acknowledged that the ICRP results in a “potentially significant tax bill” when the loan is discharged after twenty-five years of payments, and the mere possibility of this alternative route should not bar an honest debtor from discharging debt under § 523(a)(8).<sup>96</sup>

88. Michaela White, *Student Loan Discharge*, NACIT ACAD. FOR CONSUMER BANKR. EDUC. (Aug. 21, 2011), <http://considerchapter13.org/2011/08/21/student-loan-discharge-2/> (citing *Parker v. Gen. Revenue Corp.* (*In re Parker*), 328 B.R. 548, 553 (B.A.P. 8th Cir. 2005)).

89. *Parker v. Gen. Revenue Corp.* (*In re Parker*), 322 B.R. 856, 862 (Bankr. E.D. Ark. 2005) (holding that excepting the debt from discharge would cause an “undue hardship” because, upon loan forgiveness after twenty-five years of payments, the debtor would be subject to a non-dischargeable tax on this “phantom income”), *rev’d* 328 B.R. 548 (B.A.P. 8th Cir. 2005).

90. *In re Parker*, 328 B.R. at 553.

91. *Id.* at 552–53.

92. *Vest v. U.S. Dep’t of Educ.* (*In re Vest*), Bankr. No. 10-01950-als7, Adv. No. 10-30106-als, 2011 WL 4479688 (Bankr. S.D. Iowa May 26, 2011) (emphasis added) (quoting *Repayment Plans*, FED. STUDENT AID, <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlindex2.html> (last visited May 24, 2011)).

93. *Lee v. Regina Bank Student Loans* (*In re Lee*), 352 B.R. 91, 95–96 (B.A.P. 8th Cir. 2006) (“Placing too much weight on the ICRP would have the effect in many cases of displacing the individualized determination of undue hardship mandated by Congress in § 523(a)(8) since the payments on a student loan will almost always be affordable . . .”).

94. *Id.* at 95–97 (holding that the ICRP presumes an ability to pay while “undue hardship” is “a case-by-case analysis of a debtor’s income in relation to her reasonable expenses”).

95. *Id.* at 96 (holding that the purpose of the ICRP is “to assist borrowers avoiding default” while the Bankruptcy Code’s purpose is “to provide a fresh start . . .”).

96. *Id.* at 96–97 (“The ICRP provides temporary relief from the burden of a student loan, but it does not offer a fresh start.”).



Whether to consider tithing has similarly been a contentious issue when deciding if a debtor has unnecessary expenses. In *United States Department of Education v. Meling*, the district court held the debtor's tithing was reasonable because the debtor was a "deeply religious person."<sup>97</sup> The district court in *In re Halverson* similarly found "[t]ithing is not *per se* unnecessary and unreasonable."<sup>98</sup> These open-ended standards may prove difficult to apply in future cases where the debtor tithes a significant portion of his income and is only a "moderately" religious person. Thus, although the totality test's consideration of such expansive factors could prove to be detrimental to the Bankruptcy Code's "fresh start" policy if factors such as the ICRP and tithing are given too much weight, the totality test is a better alternative than the *Brunner* test's conjunctive requirements that lack statutory foundation.

C. A CERTAINTY OF HOPELESSNESS: ARE THERE NO PRISONS? NO WORKHOUSES?<sup>99</sup>

Another factor complicating the "undue hardship" determination, and possibly the most devastating, is the "certainty of hopelessness" standard.<sup>100</sup> Courts applying the totality test and the *Brunner* test intermittently apply this cynical standard.<sup>101</sup> Similar to the *Brunner* test's "good faith" requirement, "certainty of hopelessness" lacks any textual foundation in § 523(a)(8).<sup>102</sup> The "certainty of hopelessness" bar is unnecessarily high when compared to the language of § 523(a)(8), and it hinders the Bankruptcy Code's "fresh start" policy.<sup>103</sup> In contrast to courts that apply the totality test in isolation, courts applying the totality test in conjunction with the "certainty of

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97. U.S. Dep't of Educ. v. Meling, No. Co1-2027 MJM, 2002 WL 32107248, at \*5 (N.D. Iowa Jan. 22, 2002) (tithe was \$100 per month).

98. Halverson v. U.S. Dep't of Educ. (*In re Halverson*), 401 B.R. 378, 387 (Bankr. D. Minn. 2009) (tithe was approximately \$200 per month).

99. CHARLES DICKENS, A CHRISTMAS CAROL 101 (Richard Kelly ed., Broadview Literary Texts 2003) (1843) ("'Have they no refuge or resource?' cried Scrooge. 'Are there no prisons?' said the Spirit, turning on him for the last time with his own words. 'Are there no workhouses?' The bell struck twelve."). The "certainty of hopelessness" requirement analogously considers whether a debtor has any respite, often concluding that this is fatal hope that will preclude the debtor from achieving discharge.

100. See *supra* Part II.B.3.

101. *Supra* note 45 and accompanying text.

102. Hicks v. Educ. Credit Mgmt. Corp. (*In re Hicks*), 331 B.R. 18, 28 (Bankr. D. Mass. 2005).

103. See 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 hardship 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." (citation omitted)). The court felt compelled, against Judge Frank Monroe's wishes, to follow the Fifth Circuit's trend and apply the *Brunner* test. *Id.* at 193.

hopelessness” standard assume that proving a “certainty of hopelessness” is *necessary* for a finding of “undue hardship” and discharge.<sup>104</sup>

The “certainty of hopelessness” standard enhances § 523(a)(8)’s language to such an extent that, for a court to find “undue hardship,” a debtor must show that his present and future income will render the possibility of repayment “virtually non-existent, unless by that effort the bankrupt strips himself of all that makes life worth living.”<sup>105</sup> This unrealistic standard poses problems not only for debtors, but for their lawyers and judges as well.

The requirement forces a debtor to perform the demoralizing and demeaning task of presenting evidence that the debtor has lost *all* hope for the future.<sup>106</sup> Only if a debtor is devoid of hope does he merit a “fresh start,”<sup>107</sup> but even a debtor with a limited income may harbor a remote “hope” of paying.<sup>108</sup> Similarly, a lawyer representing a debtor in a § 523(a)(8) action faces the herculean task of proving that a future event, an inability to repay debt, is *certain*.<sup>109</sup> Judges thus sift this bizarre and speculative evidence to decide if a debtor’s conditions are likely to prevent loan repayment in the future.<sup>110</sup> Here, the “future” implies anything from next month to years down the road.

104. See *Mulherin v. Sallie Mae Servicing Corp.* (*In re Mulherin*), 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003) (“Section 523(a)(8) ‘undue hardship’ only exists in cases where there is a ‘certainty of hopelessness’ that the debtor will ever be able to repay the loan.” (citing U.S. Dep’t of Educ. v. Meling, No. Co1–2027 MJM, 2002 WL 32107248, at \*5 (N.D. Iowa Jan. 22, 2002))).

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

106. See Ron Lieber, *Degrees of Debt: Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html> (interviewing a student-debtor who was rendered blind from diabetes after graduating with \$89,000 in student loans and said, “It’s like you’re not worth much in society.”).

107. *Kopf v. U.S. Dep’t of Educ.* (*In re Kopf*), 245 B.R. 731, 744 (Bankr. D. Me. 2000) (“To conclude that the debtor must demonstrate something approaching a ‘certainty of hopelessness’ or ‘total incapacity’ would be to sacrifice the notion of ‘fresh start’ at the altar of ‘undue hardship.’”).

108. *Salvin*, *supra* note 16, at 179 (“[T]ests that require . . . a ‘certainty of hopelessness’ appear too strict. Many debtors may be unable to satisfy these standards even though they possess only a marginal ability to afford adequate levels of food, clothing, shelter, and transportation. Saddling such debtors with continuing liability for student loans is likely to cause a level of discouragement inconsistent with the policy of the fresh start.” (footnotes omitted)).

109. See Lieber, *supra* note 106 (“Lawyers sometimes joke about the impossibility of getting over this high bar, even as they stand in front of judges. ‘What I say to the judge is that as long as we’ve got a lottery, there is no certainty of hopelessness,’ said William Brewer Jr., a bankruptcy attorney in Raleigh, N.C. ‘They smile, and then they rule against you.’”).

110. See *id.* (“The debtor had a history of hospitalization for mental illness but testified that she did not suffer from depression at all. ‘She was so mortified about the desperation of her situation that she was committing perjury on the stand,’ Ms. Kenner said. ‘It just blew me away.

## IV. POTENTIAL SOLUTIONS

In 2001, bankruptcy Judge Frank Monroe vividly summarized the overriding problems with § 523(a)(8).<sup>111</sup> Particularly, Judge Monroe lamented the cruel results of the *Brunner* test and the general divergence between the “undue hardship” standard and the Bankruptcy Code’s “fresh start” purpose.<sup>112</sup> These frustrations, held by the very judges who make “undue hardship” determinations, reflect the need for reform of § 523(a)(8).

Importantly, courts conceived the *Brunner* test, the totality test, and “certainty of hopelessness” interpretations of “undue hardship” before Congress finished tightening the belt on § 523(a)(8).<sup>113</sup> Only after courts created these tests did Congress shorten and then eliminate the provision allowing a debtor to obtain a discharge after a certain number of years without showing an “undue hardship.” And only after courts began using these tests did Congress amend § 523(a)(8) to include private educational loans.<sup>114</sup> Additionally, since the inception of the judicially created “undue hardship” analyses, studies have shown that student debtors are not the untrustworthy scoundrels that Congress envisioned in 1978.<sup>115</sup> As a result of these changing circumstances, coupled with the economic downturn of 2008, the courts’ present application of the “undue hardship” test no longer meets the current debtor’s needs and requires reform.

Moreover, the inherent *uncertainties* involved in applying the “certainty of hopelessness” standard or the “undue hardship” tests outlined above

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That’s the craziness that this system brings us to.”). Carol Kenner was a federal bankruptcy judge in Massachusetts for eighteen years. *Id.*; see also *Speer v. Educ. Credit Mgmt. Corp.* (*In re Speer*), 272 B.R. 186, 195 (Bankr. W.D. Tex. 2001) (“[Creditor] believes that [debtor] is capable of other employment that would be more lucrative or that he could supplement his present income with other part-time work. However, as is always the case, the educational loan creditor presented *no* evidence of this—it simply and boldly made the unsubstantiated assertion.”).

111. *In re Speer*, 272 B.R. at 191–93 (“1. *What could Congress possibly be thinking?, or Why does the government hate the little man?* . . . This Court believes that it is time to reconcile the ‘undue hardship’ standard with the underlying fresh start policy of the Bankruptcy Code. ‘Undue hardship’ should not be interpreted so harshly as to leave debtors personally liable for student loans they have no *real* ability to repay for the rest of their lives. To the contrary, to provide such debtors the fresh start they deserve, undue hardship should be found to exist for any debtor who, although doing his best under the circumstances, will not be able to maintain the basic necessities of life (shelter, food, medical care, clothing, etc.) and at the same time repay student loan debt. . . . 2. *Let’s make it as tough as humanly possible to discharge a student loan or the Brunner test.*”).

112. *Id.* at 191.

113. See *supra* Part II.A.

114. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23.

115. Pardo & Lacey, *supra* note 68, at 477–78 (“The data we have analyzed persuade us that the debtors in this study legitimately needed a fresh start. . . . [and § 523(a)(8)] has been applied to a group that Congress certainly did not contemplate when it enacted the provision—that is, nonabusive student loan debtors.”).

create an atmosphere ripe for litigation.<sup>116</sup> When a debtor has little to lose (attorney fees and time) and everything to gain (debt discharge), courts' inconsistent rulings provide an incentive for debtors to roll the dice.<sup>117</sup> These problems must be solved by Congress or the courts themselves.

#### A. CONGRESSIONAL SOLUTION

Michaela White suggests, tongue-in-cheek, that perhaps the test for dischargeability should be that a debtor who can afford to litigate his debt is not under an "undue hardship."<sup>118</sup> Despite the absurd nature of this idea, the underlying rationale is sound: Congress needs to enact a definitive standard to deter unnecessary litigation. Pardo and Lacey, noting that the current system favors wealthy, repeat-player creditors, propose that the only solution is a bright line rule that will clear the waters that the courts have muddied.<sup>119</sup> An amendment or complete remodeling of § 523(a)(8) by Congress would naturally be the most efficient method for eliminating the current arbitrary nature in which courts decide educational debt exception cases. The last time Congress amended § 523(a)(8) was in 2005, three years before the 2008 recession, but the amendment only broadened the category of loans subject to the "undue hardship" scheme by incorporating private educational loans, without providing any increased guidance to courts or debtors.<sup>120</sup>

The nation's economic affairs are currently in a weakened state, and the plight of student debtors is worsening, suggesting that this is a prime moment for Congress to re-evaluate § 523(a)(8). This Note proposes amending the current version of § 523(a)(8) by adding the following provisions:

(C) For the purposes of this section, a debt imposes an undue hardship when (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding the

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116. See *supra* Part III.C.

117. Pardo & Lacey, *supra* note 10, at 190–91 ("By signaling that undue hardship discharge litigation is a crapshoot, the doctrine produces noise rather than clarity. The perception that outcomes are highly uncertain under the fact-intensive decision standard of undue hardship may produce, in turn, a climate that encourages parties to engage in an adversary proceeding." (footnote omitted)).

118. White, *supra* note 88, at 2.

119. Pardo & Lacey, *supra* note 68, at 521 ("Perhaps, then, the time has come to rearticulate 'undue hardship' as a bright-line rule that will cabin judicial discretion.").

120. BANKRUPTCY LAW MANUAL, *supra* note 12, § 8:13 ("The 2005 Act rearranged the wording of [§ 523(a)(8)], but its main thrust was to expand the exception to discharge even further so that it now encompasses all student loans on which the interest paid is deductible for federal income tax purposes . . . thus making this exception applicable to loans made by for-profit and nongovernmental entities.").

debtor's particular bankruptcy case show that the debtor could not repay the debt while maintaining a minimal standard of living.

(D) When such debt imposes an undue hardship on the debtor and the debtor's dependents, as much of the loan may be discharged as necessary to relieve the debtor and the debtor's dependents from the undue hardship; the amount discharged may be less than the full balance of the loan.

The proposed amendment relies on the totality test's factors, to the exclusion of the *Brunner* test, to define "undue hardship" for the reasons enumerated in Part III. The totality test provides the courts with a uniform set of factors to consider without imposing the additional burdens of "good faith" and "additional circumstances" that make discharge unnecessarily difficult. The proposed amendment also relieves debtors of the demoralizing task of meeting the judicially created "certainty of hopelessness" requirement and relieves judges of the raw speculation involved therein.

Section (D) of the proposed amendment allows for partial discharge. Notably, Thad Collins, now Chief Judge Collins of the United States Bankruptcy Court for the Northern District of Iowa, proposed a "middle-ground" approach in 1990, where Congress would amend § 523(a)(8) to allow courts to grant partial discharge of student loans, as opposed to the current all-or-nothing approach.<sup>121</sup> This approach has steadily gained acceptance in the federal circuit courts under the theory that 11 U.S.C. § 105(a) grants bankruptcy courts the power to partially discharge a student debtor's loan.<sup>122</sup> Courts disagree, however, whether the student debtor must make an initial showing of "undue hardship" before the court partially discharges the loan.<sup>123</sup> Retaining the "undue hardship" showing in the above amendment more closely reflects Congress's intent of ensuring that educational debt is not too easy to discharge. Allowing a partial discharge, rather than complete discharge, also increases the likelihood the federal government's debt will be repaid at least in part.

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121. 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).

122. E.g., *DeMatteis v. Case W. Reserve Univ.*, (In re DeMatteis), 97 F. App'x 6, 9 (6th Cir. 2004).

123. Compare *Miller v. Pa. Higher Educ. Assistance Agency* (In re Miller), 377 F.3d 616, 620 (6th Cir. 2004) ("Therefore, when a debtor does not make a showing of undue hardship with respect to the entirety of her student loans, a bankruptcy court may—pursuant to its § 105(a) powers—contemplate granting . . . a partial discharge of the debtor's student loans."), with *Saxman v. Educ. Credit Mgmt. Corp.* (In re Saxman), 325 F.3d 1168, 1174 (9th Cir. 2003) ("A debtor who wishes to obtain a discharge of his student loans must therefore meet the [undue hardship] requirements of § 523(a)(8) as to the portion of the debt to be discharged before that portion of his or her debt can be discharged.").

*B. JUDICIAL SOLUTION*

If Congress leaves § 523(a)(8) in its ambiguous state, the federal circuits should uniformly allow partial discharge of educational debt if a debtor can show an “undue hardship” under the totality test, without including the “certainty of hopelessness” standard. The tenuous rationale most circuits cite for adopting the *Brunner* test is that the *Brunner* test was already in use.<sup>124</sup> However, the court’s “oath is to do justice, not to perpetuate error.”<sup>125</sup> As discussed above, the use of the totality test without the influence of the “certainty of hopelessness” standard provides the optimum outcome for both the government and student debtors in a time of economic uncertainty. The problems apparent in the *Brunner* test and the “certainty of hopelessness” requirement were entirely judge-created; therefore, if Congress remains inactive, the issues should be judge-resolved by adopting the principles espoused in this Note’s statutory amendment. To gain statutory support for overruling the dangerous “certainty of hopelessness” precedent, courts may also look to 11 U.S.C. § 524(m) for inspiration.

A solution from the courts must be mindful not to disregard Congress’s intent or the “fresh start” policy of the Bankruptcy Code. Fortunately, Congress indirectly provided insight into its intention in 2005 when it amended 11 U.S.C. § 524(m) to include a definition of “undue hardship.”<sup>126</sup> Section 524(m) states: “[I]t shall be presumed that such [reaffirmation] agreement is an undue hardship on the debtor if the debtor’s monthly income less the debtor’s monthly expenses . . . is less than the scheduled payments on the reaffirmed debt.”<sup>127</sup> Section 524(m) is similarly situated to § 523(a)(8) in Chapter 5 of the Bankruptcy Code, though it deals with reviving a discharged debt. The definition of “undue hardship” in § 524(m) is arguably too lax to be applied verbatim in the § 523(a)(8) context, but it nevertheless provides a compelling launchpad for judicial interpretation of “undue hardship” in the educational loan exception context. Because § 524(m) is only concerned with a debtor’s current situation, courts would need to add a future-looking element to respect Congress’s intent and the Bankruptcy Code’s purpose.

The statutory interpretation technique of borrowing and applying a definition from one code section to another has support in the Supreme Court.<sup>128</sup> In a bankruptcy case, the Court held “[s]tatutory construction . . .

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124. See *supra* note 80 and accompanying text.

125. *Montgomery v. Stephan*, 101 N.W.2d 227, 229 (Mich. 1960).

126. See *White*, *supra* note 88, at 2 (stating that courts have not applied this standard to the dischargeability of student loans).

127. 11 U.S.C. § 524(m)(1) (2012).

128. *Pardo & Lacey*, *supra* note 68, at 510–11 (second alteration in original) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.”<sup>129</sup> In § 523(a)(8), “undue hardship” certainly appears “ambiguous in isolation,” as evidenced by the numerous interpretations of the “undue hardship” test in different or even the same courts.<sup>130</sup> Therefore, courts should use the “remainder of the statutory scheme,” or § 524(m), to interpret the “same terminology . . . used elsewhere in a context that makes its meaning clear,” meaning the explicit definition of “undue hardship” in the subsequent section of the same chapter of the Bankruptcy Code.<sup>131</sup>

Pragmatically, courts should apply the § 524(m) definition of “undue hardship” through the Eighth Circuit’s totality test, strictly forbidding the use of the “certainty of hopelessness” requirement.<sup>132</sup> This approach affirms Congress’s intent that discharging educational loans should be a difficult process, while still encouraging the “honest debtor” to obtain a fresh start.<sup>133</sup> The “undue hardship” definition borrowed from § 524(m) does not have a “good faith” or “certainty of hopelessness” requirement, and courts should not read these severe standards into the determination. A court will still account for a debtor’s “past, present, and reasonably reliable future financial resources” under the totality test, ensuring that a student on the edge of a profitable career does not abuse the bankruptcy system.<sup>134</sup>

## V. CONCLUSION

Courts continue to struggle with applying a consistent standard to student debtors under § 523(a)(8). The clearest way to remedy the situation is for Congress to define “undue hardship” in the context of § 523(a)(8). If Congress fails to act, however, the courts themselves must adopt a unified standard that reflects Congress’s intent, the purpose of the Bankruptcy Code, and the need for consistency and fairness in the court system. The most effective method is for the courts to allow partial discharge of student debt upon a showing of “undue hardship” through the totality test criteria, without requiring the overly severe “certainty of hopelessness” standard. Alternatively, courts could look to the nearby definition of “undue hardship” in § 524(m) to begin the transition to the new standard. These solutions would provide necessary assistance to student debtors and the government, in the form of increased repayment, during a challenging economic period.

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129. *Id.* (quoting *Timbers of Inwood*, 484 U.S. at 371).

130. *See id.* (quoting *Timbers of Inwood*, 484 U.S. at 371).

131. *See id.* (quoting *Timbers of Inwood*, 484 U.S. at 371).

132. The language of § 524(m) closely resembles that of the totality test. *See supra* note 40 and accompanying text (the essential thrust of the totality test closely parallels the definition of “undue hardship” in § 524(m)).

133. *See supra* note 17–18 and accompanying text.

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