ONE STANDARD TO RULE THEM ALL: AN ARGUMENT FOR CONSISTENCY IN EDUCATION DEBT DISCHARGE IN BANKRUPTCY PROCEEDINGS

I. INTRODUCTION

During the time the Bankruptcy Code was drafted in the early 1970's, legislators were concerned recent graduates were filing bankruptcy to rid themselves of student loan debt and leaving tax payers with the bill for their education.[1] However, contrary to sensationalist media reports, instances of recent graduates abusing the bankruptcy system were minimal.[2] As a result of these concerns, Congress passed § 523(a)(8) of the Bankruptcy Code to limit the instances of bankruptcy abuse by recent graduates.[3] When concerns about education debt discharge subsided, and the 1978 bankruptcy reform was law.[4] As a result of the passing of § 523(a)(8), there are additional and significant hurdles for the discharge of student loan debt in a bankruptcy proceeding.[5] Because abusive discharge of student loan debt was hardly a problem to begin with, the requirements enacted by Congress and subsequent judicial doctrines no longer reflect practical realities.[6] Further, the breadth of judicial interpretations of the ambiguous code section create a gamut of results.

This article argues that a single, consistent judicial interpretation of the term "undue hardship" in § 523(a)(8) should be adopted. Section II discusses why resolving the issues with student loan discharge in bankruptcy should be addressed now. Section III discusses the significant transformation § 523(a)(8) underwent in the years since it was passed. Section IV introduces and discusses the judicial interpretations of the "undue hardship" standard and how those interpretations changed over time. Section V argues for the adoption of a single standard for student loan discharge: a modified Totality of the Circumstances test. Section VI concludes by discussing the need for consistency in education debt discharge in bankruptcy and resolution of these issues.

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1. *See* B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH. L. REV. 89, 97–99 (2002).

2. 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, 420 (2005).

3. Huey, *supra* note 1, at 99–100.

4. *See id.* at 98–99.

5. Cameron M. Fee, *An Attempt at Post Mortem Revival: Has § 1322(b) (1) Been Euthanized?*, 31 AM. BANKR. INST. J. 38, n.4 (2012).

6. *See* Pardo & Lacey, *supra* note 2.

II. STUDENT LOAN DISCHARGE IS READY FOR RESOLUTION.

A. *The Current State of Affairs is Drastically Different from that Envisioned by the Drafters of § 523(a)(8).*

The cost of education is significantly higher today than when § 523(a)(8) was drafted.[7] Students must take out large sums of money to pay for growing education costs without a guarantee that they will be able to payoff the debts.[8] Although credit ratings are not used to determine whether or not education loans should be extended to students, there is a recent push to make it easier for low-income families, people with bad credit, and former debtors to take on student loan debt so their children can attend college.[9] While this legislation allows students who would not otherwise be able to attend college to do so, certainly a favorable proposition, it could be setting up thousands of families for failure.[10] Some analysts find the student loan crisis eerily similar to the housing crisis in 2008.[11] The belief that student loans pose a serious threat to the economy is so strong that a group of scholars found it necessary to hold a summit at Georgetown University in May of 2014.[12] What is clear from all the recent change and activity with student loans is that something needs to change.

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7. 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, 1053–54 (2007); Harlin D. Hale & Conrad C. Steele, *A Little Education About Student Loan Dischargeability*, 33 AM. BANKR. INST. J. 30 (2014), at 30.

8. While the graduation employment rate from college does not look too stark, the reality is that many college graduates are taking jobs that do not require degrees. So, while the numbers look good, a cursory glance behind them will show that at least half are not working in jobs that require a degree. Tyler Kingkade, *Unemployment for Recent College Graduates by Major*, HUFFINGTON POST (Jun. 19, 2013, 11:34 AM), http://www.huffingtonpost.com/2013/06/19/unemployment-college-graduates-majors_n_3462712.html. Further, since 1985, the cost of a college degree has increased 500 percent. Steve Odland, *College Costs Out of Control*, FORBES (Mar. 24, 2012, 5:20 PM), http://www.forbes.com/sites/steveodland/2012/03/24/college-costs-are-soaring/#2715e4857a0b2b59ad33641b. With all of these factors working together, it is a wonder why more Americans are not defaulting on their education debt.

9. Josh Mitchell, *Parents Poised to Gain Easier Access to College Loans*, WALL STREET J. (Sep. 12, 2014, 1:23 PM), http://www.wsj.com/articles/parents-poised-to-gain-easier-access-to-college-loans-1410542622.

10. *Id.*

11. William J. Bennett, *The Looming Crisis of Student Loan Debt*, CNN (Dec. 6, 2012, 8:55 AM), http://www.cnn.com/2012/12/06/opinion/bennett-student-debt/.

12. *See* Hale & Steele, *supra* note 7, at 30.

B. *There are Significant Inconsistencies in the Application of § 523(a)(8) Between Circuit Courts.*[13]

Currently, the U.S. Circuit Courts of Appeal differ in their interpretation of § 523(a)(8).[14] When Congress initially enacted the section, it never defined the term "undue hardship," leaving the courts to wrestle with the difficulties of teasing out what its intent.[15] This led to a whole host of interpretations that have come and gone as the section was amended and times changed.[16] However, there are currently two primary tests to determine if the debtor has met the requirements of § 523(a)(8): the *Brunner* test and the Totality of the Circumstances test.[17] Also, in an effort to mitigate the harsh rule in § 523(a)(8) and the tests created to interpret it, some courts devised the concept of partial discharge.[18] Partial discharge, however, creates further discrepancies, even throughout the circuits that have formally adopted one test over the other.[19]

Neither the Supreme Court nor Congress created a single, consistent standard. The only thing that each of these tests have in common is an extremely high bar to meet the "undue hardship" requirements for discharge.[20] When the standards are different, the results will be different. A debtor in San Francisco, for example, faces a far more daunting prospect of discharge than their counterpart in Boston because of the different standards applied.[21] Beyond making it more difficult for debtors to discharge their education debts and take advantage of bankruptcy's fresh start,[22] "amendments have been made to

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13. This section will simply highlight the differences and lack of uniformity between all of these tests. Each test will be discussed in section V., *infra*.

14. *See* Pardo & Lacey, *supra* note 2, at 411.

15. 11 U.S.C. § 523(a)(8) (West 2012). *See* Hale & Steele, *supra* note 7, at 31; Huey, *supra* note 1, at 101–02.

16. Huey, *supra* note 1, at 102.

17. *See* Pardo & Lacey, *supra* note 2, at 487–88.

18. *See* Foster, *supra* note 7, at 1055.

19. *Id.* at 1072–73.

20. *See* Pardo & Lacey, *supra* note 2, at 487.

21. The First Circuit adopted a different test than the Ninth Circuit, and as a result, the standards for the debtors' discharge are different. Not only are the First and Ninth Circuits far apart geographically, but ideologically as well. *Compare In re* Roth, 490 B.R. 908, 916–17 (B.A.P. 9th Cir. 2013) (utilizing the *Brunner* test), *with In re* Bronsdon, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) (utilizing the Totality of the Circumstances test).

22. *See Bankruptcy Basics*, UNITED STATES COURTS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (last visited Feb. 16, 2016) (discussing the fresh start principle of bankruptcy).

Section 523(a)(8)" since it was enacted in 1978.[23] As more Americans expend large sums of money on loans, and as student loans now account for more debt than credit cards,[24] a resolution to the uncertainty of discharge of student loans is critical.[25] The time is right to address this issue and create a uniform standard.

III. THE HISTORY OF EDUCATION LOAN DISCHARGEABILITY AND § 523(a)(8).

Before delving into the complexities of education debt discharge reform, it is critical to understand the considerable change § 523(a)(8) underwent since it was first proposed in the early 1970s. An understanding of the evolution of § 523(a)(8) will further demonstrate how different the standards of discharge are and how this evolution changed the burden on debtors more than was intended.

Bankruptcy and debtor protection is a core American value with its roots in the Constitution.[26] However, it was not until the Bankruptcy Act of 1898 that the United States had a comprehensive system of bankruptcy laws.[27] And, it was not until the 1970s that these laws got a significant face-lift to bring about bankruptcy law as it is known today.[28] In 1970, Congress created the Commission on the Bankruptcy Laws of the United Sates (the "Commission") to study and begin working on bankruptcy reform.[29] The Commission's findings, published in 1973, became the core of the Bankruptcy Reform Act of 1978.[30]

Around the time the Bankruptcy Reform Act of 1978 was in committee, significant changes were occurring in the education-lending arena.[31] Not long before Congress created the

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23. Adam J. Williams, Comment, *Fixing the "Undue Hardship" Hardship: Solutions for the Problem of Discharging Educational Loans Through Bankruptcy*, 70 U. PITT. L. REV. 217, 222 (2008).

24. Daniel De Vise, *Student loans surpass auto, credit card debt*, WASH. POST, (Mar. 6, 2012), http://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQARFQnuR_blog.html.

25. Andrew P. MacArthur, *Pay To Play: The Poor's Problem in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 478 (2009) (explaining that discharge of credit card debt was arguably a major factor in the passing of the 2005 BAPCPA).

26. *See* U.S. CONST. art. I, § 8, cl. 4.

27. Williams, *supra* note 23, at 219.

28. Huey, *supra* note 1, at 93–94.

29. Williams, *supra* note 23, at 219.

30. *Id.*

31. Although Congress was supplementing higher education costs since the end of the Second World War, developments in these programs extended the funding through things like the GI Bill and eventually the Higher Education Act of 1965. *See* Williams, *supra note* 23, at 220–21.

Commission, education loans guaranteed by the U.S. government became widely available for the first time.[32] At the time the Commission was working on its report, there was significant and largely unfounded concern that these new education loan programs were being abused by recent graduates looking to cheat the system.[33] As a result, Congress enacted § 523(a)(8) to address perceived abuses.[34] Curiously, in 1978, Congress became aware that the reports of education debt discharge abuse in bankruptcy proceedings were significantly rarer than originally thought.[35] However, Congress chose not to address or resolve the issue in its 1979 amendment.[36]

When enacted in 1978, § 523(a)(8) looked far different than it does today.[37] The original section changed in two significant ways: the scope of the loans included in the section and the requirements for discharge.[38] In 1979, Congress amended the section, expanding its scope from including only loans made by the government or an institution of higher learning, to include any loans affiliated with government programs.[39] In 1984, Congress amended the scope of the section to include any government backed or government insured education loan,[40] not just loans for "higher education."[41] The scope of the section was last amended in 2005 to include private education loans as well.[42]

The other significant change § 523(a)(8) underwent is the decreased availability of discharge.[43] As originally drafted, § 523(a)(8) allowed for the discharge of student loan debt for two classes of debtors: those debtors who made payments on their education debt for at least five years and those who had not

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32. Foster, *supra* note 7, at 1053, 1056 (describing the inception of the federal student loan program in 1965).

33. Williams, *supra* note 23, at 219–20.

34. Congress also enacted a similar provision limiting student loan dischargeability in bankruptcy in the Higher Education Act of 1976. Foster, *supra* note 7, at 1060–61 (citing H.R. DOC. NO. 93-137, pt. 2 at 136).

35. H.R. REP. NO. 95-595, at 133 (1977).

36. 124 CONG. REC. 1791-92, 1798 (1978).

37. *See* Huey, *supra* note 1, at 99–101.

38. Pardo & Lacey, *supra* note 2, at 427.

39. Bankruptcy Act, Pub.L. No. 96-56, § 3(1), 93 Stat. 387 (1979).

40. No longer are government education loans used only for college, but these loans are now available for trade schools and other educational and vocational institutions. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 375–76 (1984).

41. 11 U.S.C. § 523(a)(8) (West 2012).

42. *Id. See* G. Michael Bedinger, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1821 n.15 (2014).

43. Pardo & Lacey, *supra* note 2, at 427–28.

repaid their loans for the five-year minimum period, but could prove "undue hardship" should payments continue.[44] In 1990, Congress increased the duration of the first discharge option from five to seven years.[45] But, in 1998 Congress did away with the second path to discharge all together and required all debtors to show undue hardship to discharge education debt.[46] The removal of the second path to discharge marked a significant change in course for Congress. Congress no longer attempted to prevent abuse by recent graduates seeking to emerge from college debt-free, but upped the ante by creating the presumption that all debtors were trying to abuse the student loan and bankruptcy systems. Critically, the current section of 523(a)(8) increased in breadth to include any education loan, and increased the difficulty of discharge through the elimination of the five-year time period.[47] As a result of these significant changes, the current § 523(a)(8) is very different than what was originally enacted.

IV. THE JUDICIAL STANDARDS DIFFER GREATLY

While the Code is clear in its mandate that student loans be non-dischargeable absent a showing of "undue hardship,"[48] like so many other things in the Code,[49] "undue hardship" is undefined.[50] By leaving the requirement for discharge undefined, Congress left the judiciary to its own devices to create a definition. As a result of this ambiguous term, a myriad of approaches developed over the years.[51] Many of the tests to determine "undue hardship" fell by the wayside as the Code section was amended and more popular tests prevailed.[52] In

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44. Seth J. Gerson, *Separate Classification of Student Loans in Chapter 13*, 73 WASH. U. L. REV. Q. 26, 281–82 (1995).

45. *Id.* at 282.

46. *Id.*

47. Pardo & Lacey, *supra* note 2, 427–28 n. 116, 518.

48. 11 U.S.C. § 523(a)(8) (West 2012).

49. *See* 11 U.S.C. § 101 (West 2012).

50. Although the 2005 BAPCPA introduced § 524(m) which is the only other section that now includes the term "undue hardship," all of the judicial tests or doctrines were already created and established by the time the BAPCPA amendment came about. So, as a result, none of the judicial interpretations of § 523(a)(8) got the benefits of further guidance as to congressional intent. Pardo & Lacey, *supra* note 2, at 511–12 (citing Pub. L. No. 109-8, 119 Stat. 23.); Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395 (2nd Cir. 1987); Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549 (8th Cir. 2003).

51. Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2nd Cir. 1987); Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 553; Pa. Higher Educ. Assistance Agency v. Johnson, 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979) *invalidated by*, *In re* Faish, 72 F.3d 298 (3rd Cir. 1995); Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987) *invalidated by*, *In re* Faish, 72 F.3d 298 (3rd Cir. 1995).

52. *See In re* Faish, 72 F.3d at 303–04.

years past, the *Johnson* test[53] and the *Bryant* poverty test[54] were readily employed. Now, there are only two tests used to determine "undue hardship": the *Brunner* test[55] and the Totality of the Circumstances test.[56] However, further inconsistencies developed because some courts allow partial discharge while others do not.[57] As a result of the implementation of partial discharge, inconsistencies increased even within jurisdictions that adopted the same test for discharge.[58]

A. *The Majority Approach: the Brunner Test*

The yardstick adopted by a significant majority of circuit courts is the *Brunner* test.[59] The *Brunner* test requires the debtor to prove three elements: (1) the debtor is currently unable to maintain a minimal standard of living for herself and her dependents; (2) that these circumstances are likely to persist, and; "(3) that the debtor has made a good faith effort to repay the loans."[60] The *Brunner* test was created in the Southern District of New York in 1985,[61] and adopted by the Court of Appeals for the Second Circuit in 1987.[62] This test is typically interpreted to have an extremely high bar to discharge.

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53. Similarly to both the *Brunner* test and the Totality of the Circumstances test, the *Johnson* test is three parts: a mechanical test, a good faith test, and a policy test. The Mechanical test is a forward-looking inquiry very similar to that in the second element of the *Brunner* test. The good faith prong is looks to see if there was anything within the debtor's control that could have been done to increase recovery. The policy test looks to see if the student loan debt was the driving force behind the bankruptcy filing, and if the debtor is attempting to abuse the bankruptcy system. However, the *Johnson* test met its demise because it was too complicated and narrow. *Id.*

54. The *Bryant* poverty test has not been around since the revisions to the code in the 1990's. Under the *Bryant* poverty test, the debtor is allowed to discharge their debt if they live below the federal poverty line or if there are some unique or extenuating circumstances. Bryant v. Pa. Higher Educ. Assistance, 72 B.R. 913, 914 (Bankr. E.D. Pa. 1987).

55. Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

56. Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 550 (8th Cir. 2003).

57. *Compare In re* Barron, 264 B.R. 833 (Bankr. E.D. Tex. 2001), *with In re* Roach, 288 B.R. 437, 439 (Bankr. E.D. La. 2003).

58. Foster, *supra* note 7, at 1056–57.

59. Hale & Steele, *supra* note 7, at 30. (noting that there are at least six circuits applying the *Brunner* test: the Second, Third, Fifth, Sixth, Seventh, and Ninth); *In re* Cox, 338 F.3d 1238 (11th Cir. 2003); *In re* Polleys, 356 F.3d 1302 (10th Cir. 2004); *In re* Frushour, 433 F.3d 393 (4th Cir. 2005).

60. Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

61. Brunner v. N.Y. State Higher Educ. Serv. Corp., 46 B.R. 752, 756 (S.D.N.Y. 1985).

62. Brunner, 831 F.2d at 395–96.

The *Brunner* test reflects the societal choice that we do not wish the Code's "fresh start" to be absolute.[63] Section 523 is the codification of an overriding societal interest in not discharging particular debts.[64] The *Brunner* test applies the idea that society would much rather let education debts be exempt from discharge because of the public good associated with student loans: allowing more people to have access to loans and education despite the associated risk of repayment.[65] One of the reasons that education loans are made so widely available to students regardless of credit is because the government guarantees these debts and makes sure that they get repaid.[66] The value of making education more accessible is of more value to society than allowing debtors a fresh start.[67] Other commenters argue that non-dischargeability is the risk associated with student loans; that is, when a prospective student becomes a debtor in order to finance their education, they make the conscious decision to leverage their future against this education.[68] Like so many ventures, sometimes things do not go as planned.[69] Arguably, borrowers knowingly accepted their education debts with notice that the loans were extremely unlikely to be discharged in bankruptcy and were not entitled to a lower bar to discharge.[70] The *Brunner* test merely reflects this choice.

The *Brunner* test also discourages fraud.[71] A lower standard creates further incentive for recent college graduates to lie about their financial condition and seek discharge through bankruptcy.[72] By having such a high standard, it basically takes a "don't bother" stance to discharge and reduces filings.[73]

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63. The "Fresh Start" principal is not absolute in bankruptcy. The Code does not allow debtor to discharge debts from fraud or domestic support obligations, to name a couple. Pardo & Lacey, *supra* note 2, at 413–19.

64. *See, e.g., id.* at 418, n.50 (11 U.S.C. § 523(a)(15) "amended the provision such that nonsupport domestic-relations debt is now dischargeable").

65. *Id.* at 413–14.

66. Foster, note 7, at 1056–57. Would allowing discharge really frustrate or undermine the purposes of the Higher Education Act of 1965? The Commission report given to Congress in 1978 surveying the period of time when student loans were readily available indicated that less than 1% of student borrowers discharged their education loans in bankruptcy. Pardo, *supra* note 2, at 423.

67. Pardo & Lacey, *supra* note 2, at 413–19.

68. H. R. Rep. No. 95-595, at 133 (1978), reprinted in 1978 U.S.C.C.A.N 5963, 6094.

69. "If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow." *In re* Roberson, 999 F.2d at 1137 (7th Cir. 1993).

70. Pardo & Lacey, *supra* note 2, at 418.

71. *In re* Polleys, 356 F.3d 1302, 1307 (10th Cir. 2004).

72. *Id.* at 1306.

73. *Id.*

Arguably, having a lower standard encourages potential debtors to take a chance and attempt to discharge their education debt.[74] Discouraging debtors from attempting to discharge their education debts reduces litigation costs and conserves judicial resources. By making the bar to discharge nearly unreachable, the *Brunner* test prevents fraud and abuse of the bankruptcy system.[75] However, the *Brunner* test's extremely high bar to discharge is also seen as excessive.[76] If Congress wanted § 523(a)(8) to operate as a scare tactic, it would have said so.[77]

Fraud prevention is not the only way in which the *Brunner* test is overkill; § 523(a)(8) makes no mention of the third element of the *Brunner* test: good faith.[78] There is no requirement in § 523(a)(8) that the debtor make an attempt to repay the loans at all, only that the debtor prove that repaying the debt would cause an undue hardship.[79] One of the most cited reasons for the adoption of the *Brunner* test by circuits is that it maintains the policy principle that we do not want debtors to abuse the student loan programs or the bankruptcy code.[80] This argument does not make much sense. There are many safeguards in the Code that adequately address debtors who try to abuse it by needlessly discharging their education loan obligations.[81] Every consumer chapter requires the debtor to show good faith at least once starting with the time of filing.[82] Bankruptcy judges are given great equitable powers in order to prevent abuse through plan confirmation,[83] channeling provisions,[84] and § 105(a).[85] With

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74. *See* Foster, *supra* note 7, at 1059 (quoting Under Secretary of the Treasury, Edward J. Gannon).

75. Pardo & Lacey, *supra* note 2, at 423–24 (quoting H. R. Rep. No. 95-595, at 133 (1978), reprinted in 1978 U.S.C.C.A.N 5963, 6423–25).

76. *See also id.* at 423 (less than 1% of federal student loans were discharged during the period prior to the enactment of § 523(a)(8)).

77. *Id.* at 515 (noting Congress' propensity to include good faith requirements in the Code where it thinks they are needed).

78. 11 U.S.C. § 523(a)(8) (West 2012).

79. *Id.*

80. *See In re* Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004).

81. All chapters in which a consumer debtor may file require a determination of good faith in order to be confirmed. *See* 11 U.S.C. § 707(b)(3) (West 2012); 11 U.S.C. § 1129(a)(3) (West 2012); 11 U.S.C. § 1325(a)(3) (West 2012) (requiring that a plan be proposed in good faith); 11 U.S.C. § 1325(a)(7) (West 2012) (requiring that debtor file bankruptcy in good faith). *See also* 11 U.S.C. § 105(a) (West 2012).

82. 11 U.S.C. § 1325(a)(3) (West 2012) (requiring that a plan be proposed in good faith); 11 U.S.C. § 1325(a)(7) (West 2012) (requiring that debtor file bankruptcy in good faith).

83. 11 U.S.C. § 707(b)(3) (West 2012); 11 U.S.C. § 1129 (a)(3) (West 2012); 11 U.S.C. § 1325(a)(3) (West 2012) (requiring that a plan be proposed in good faith); 11 U.S.C. § 1325(a)(7) (West 2012) (requiring that debtor file bankruptcy in good faith).

84. 11 U.S.C. § 707(b)(2) (West 2012) (the "Means Test").

these built in safeguards for abuse, certainly the judiciary is clever enough to catch abusive filers attempting to rid themselves of the vast burdens of student loan debt under false pretenses.

The *Brunner* test is also extremely antiquated.[86] When the Second Circuit adopted this standard, a showing of "undue hardship" was only required for those debtors who sought to discharge their student loans within the five-year period after they became due, assumedly the five-year period after the end of the debtors education.[87] This standard effectively prevents the recent graduate from sticking the taxpayers with the bill for their education, and is fairer to other classes of student loan debtors who would not be afforded similar aid.[88] Because the *Brunner* test was created to apply to specific filers, it does not make sense to apply it to all debtors. Not only have § 523(a)(8) and the Code changed since the creation of the *Brunner* test, but so have the realities of education loans.[89]

B. *The Minority Approach: the Totality of the Circumstances Test.*

Only the First and Eighth Circuits adopted a "Totality of the Circumstances" test to determine if a debtor would suffer "undue hardship" by repaying education loans.[90] Created by the Eighth Circuit,[91] the Totality of the Circumstances test looks at three basic factors: "(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."[92] This test, while amorphous, takes into account the bankruptcy court's significant

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85. 11 U.S.C. § 105(a) (West 2012) (granting bankruptcy courts broad equity powers).

86. *See In re* Turturo, 522 B.R. 419, 425–26 (Bankr. N.D.N.Y. 2014).

87. *In re* Adamo, 619 F.2d 216, 218 (2nd Cir. 1980). Both the *Brunner* and the Totality of the Circumstances tests were created without the benefits of 524(m). Pardo & Lacey, *supra* note 2, at 511–12.

88. Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html?_r=0.

89. *Id.*

90. *See In re* Bronsdon, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

91. Although this test has its roots in the 1981 case In re *Andrews*, it was not until 2003 that the Eighth Circuit explicitly adopted the Totality of the Circumstances test. Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549 (8th Cir. 2003); *In re* Andrews, 661 F.2d 702, 704 (8th Cir. 1981).

92. *Long*, 322 F.3d at 554.

equity powers.[93] Although the Totality of the Circumstances test is still a significant bar to discharge, it is not as debilitating as the majority's *Brunner* test.[94]

Because the Totality of Circumstances test does not let a single factor bar a debtor from discharge, it better encompasses the fresh start principals of the Code.[95] The *Brunner* test takes an elemental approach; that is, a failure on any of the three elements constitutes a denial of discharge.[96] Because the Totality of the Circumstances test only requires the court to weigh the factors, the test is forgiving and equitable.[97] This approach allows a debtor who might have a weak argument for discharge on one factor, but nonetheless would suffer undue hardship because of another factor, to still obtain a discharge.

The Totality of the Circumstances test takes into account the equity powers of bankruptcy courts through its catchall third factor.[98] The third factor of the Totality of the Circumstances test allows a court to look at whatever evidence a debtor or creditor can produce to show an "undue hardship."[99] This test allows a court to look at the whole picture based on evidence from both sides.[100] By allowing the court to examine any extenuating circumstances, bankruptcy judges can ensure an equitable result for both parties.

However, this highly flexible standard and "catchall" third element arguably reduces consistency because, as courts employ the test to each unique case, the relevant factors to be considered in cases grows ever longer.[101] The concern is that whenever a debtor has some extreme extenuating circumstances that warrant a dismissal, the presence of similar circumstances will create a rule that loosens the standards for discharge.[102] This

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93. *Id.*

94. *See e.g.*, *Bronsdon*, 435 B.R. at 794. Finding that a debtor in her 60's, with no dependents or debilitating medical malady was facing a sufficient hardship for discharge under § 523(a)(8). *Id.* It is also worth noting that although the debtor expended over $80,000 on undergraduate and law school education, she was unable to pass the bar exam after three attempts and her employment outlook was extraordinarily bleak. *Id.* However, as the court noted, the debtor would have likely had her education debt discharged regardless of the test employed. *Id.*

95. *In re* Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) (citing *In re* Afflitto, 273 B.R. 162, 170 (Bankr. W.D. Tenn. 2001)).

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

97. *Long*, 322 F.3d at 554–55.

98. Huey, *supra* note 1, at 107–08.

99. *Id. See also* Pardo & Lacey, *supra* note 2, 488–89, nn.348–49.

100. *Long*, 322 F.3d at 554–55.

101. *Polleys*, 356 F.3d at 1309.

102. *Id.*

highly subjective standard could lead to further inconsistencies because there is no firm, set standard.

C. *The Totality of the Circumstances Test and the Brunner Test are Significantly Different.*

Both tests look at two things: the debtor's current inability to repay their education debts[103] and whether the debtor's future financial situation will allow them to repay their debts.[104] Many courts and scholars call the practical differences between the two tests minimal.[105] However, the differences between the tests are significant.[106]

The biggest difference between the two tests is the presence of the good faith requirement of the *Brunner* test.[107] No statutory language exists to support the presence of this element.[108] By adding an unsupported element, the *Brunner* test arguably creates a higher bar to discharge than what is in the statute.[109] However, others argue that the good faith standard in the *Brunner* test is a superior "catchall" to that of the third factor of the Totality of the Circumstances test because the Totality of the Circumstances test's "any other relevant information" factor is over-inclusive.[110] The argument continues that because of the Totality of the Circumstances test's over subjective nature, the *Brunner* test's more restrictive "good faith" requirement limits the factors to be considered, which ensures greater consistency.[111]

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103. *Id.*

104. *Brunner*, 831 F.2d at 396; *Long*, 322 F.3d at 554–55. While on the surface both tests have a forward-looking element, some courts interpret the second *Brunner* element to require the existence of some extraordinary circumstances rather than just a future inability to pay. This interpretation creates further divergence between the two standards because neither the Totality of the Circumstances test, nor § 523(a)(8) itself require the debtor to prove any extraordinary circumstances or a "certainty of hopelessness." *Bronsdon*, 435 B.R. at 799.

105. *Bronsdon*, 435 B.R. at 798. *See* Pardo & Lacey, *supra* note 2, at 487.

106. *Polleys*, 356 F.3d at 1308 (noting that often courts read the Brunner requirements very stringently); Pardo & Lacey, *supra* note 2, at 489–90.

107. Pardo & Lacey, *supra* note 2, at 489.

108. Bedinger, *supra* note 42, at 1829.

109. *Id.*

110. *See* contrary assertion that both of these factors or elements operate the same way, asking if there is the presence of some "disqualifying action." *Bronsdon*, 435 B.R. at 800. However, as the court further notes in its opinion, the Totality of the Circumstances test requires the opposing party to present evidence of a disqualifying action while the *Brunner* test requires that the debtor prove the absence of any disqualifying action by showing "good faith."

111. In his study of published opinions concerning § 523(a)(8), Pardo and Lacey determined that because of the wide variety of judicial interpretations of the more restrictive "good faith" standard, consistency was limited. As a result, the only thing that

The other critical difference between the two tests is that the *Brunner* test takes an elemental approach to § 523(a)(8).[112] This all or nothing approach to discharge is often seen as harsh because it fails to take into account that a debtor might have a weaker argument on one factor might and have an extraordinarily compelling argument on another. However, the Totality of the Circumstances test has been criticized for going too far in the other direction; that is, some argue that it is too subjective and creates inconsistent results.[113] While some argue the results are often the same regardless of the test applied, the two standards are significantly different.[114]

D. *Partial Discharge Causes Further Inconsistencies Between Circuits.*[115]

Although there are two primary tests, jurisdictions disagree over the topic of partial discharge.[116] Partial discharge is the idea that although a debtor may not have shown an "undue hardship" significant enough to discharge the entirety of their student loan debts, a discharge of some portion of the debt is appropriate.[117] Although the justification for partial discharge is more complicated, the basic premise is that because § 523(a)(8) is silent on the issue, the equity powers in § 105(a) allow courts to grant a partial discharge. Courts have adopted three primary interpretations.[118] Courts applying an "all-or-nothing" approach only allow discharge upon a satisfactory showing of "undue hardship."[119] Courts taking a "liberal" approach to partial discharge allow a debtor to discharge the portion of their education debt that would cause an "undue hardship."[120] A third approach is the "hybrid" approach, which lets debtors discharge

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was consistent was the articulation of the form of the test. Pardo & Lacey, *supra* note 2, at 433.

112. *Id.* at 488.

113. Edu. Credit Mgmt. v. Polleys, 356 F.3d at 1312–13 (10th Cir. 2004) (Lucero, J., concurring).

114. Pardo & Lacey, *supra* note 2, at 433.

115. Although this article will not examine the merits of partial discharge, it is worth briefly covering the significant divergence of jurisdictions on this issue.

116. Foster, *supra* note 7, at 1072–73.

117. *Id.*

118. *Id.* at 1072–73.

119. Foster, *supra* note 7, at 1073–76 (although the primarily cited case for this approach has been overruled, In re *Taylor*, this approach is still applied). *See In re* Taylor, 223 B.R. 747 (B.A.P. 9th Cir. 1998) *overruled by In re* Saxman, 325 F.3d 1168 (9th Cir. 2003); *In re* Roach, 288 B.R. 437 (Bankr. E.D. La. 2003); *In re* Young, 225 B.R. 312 (Bankr. E.D. Pa. 1998).

120. Foster, *supra* note 7, at 1076–80. See *In re* Miller, 377 F.3d 616 (6th Cir. 2004); *In re* Saxman, 325 F.3d 1168 (9th Cir. 2003).

individual student loan debts upon a satisfactory showing of "undue hardship."[121] These three approaches, applied differently in jurisdictions regardless of the test applied, are resulting in further inconsistent application of the "undue hardship" standard of § 523(a)(8).

V. A MODIFIED TOTALITY OF THE CIRCUMSTANCES TEST SHOULD BE ADOPTED TO RESOLVE THE OUT-OF-DATE REQUIREMENTS AND INCONSISTENCIES BETWEEN THE *BRUNNER* TEST AND THE TOTALITY OF THE CIRCUMSTANCES TEST.

The issues with § 523(a)(8) can be addressed through both judicial and legislative means. However, these issues should be resolved in the judicial system. The judiciary currently has the tools available to resolve the ambiguities and inconsistencies in the application of § 523(a)(8).[122] Reading § 523(a)(8) with the rest of the Code, neither the *Brunner* test nor the Totality of the Circumstances test makes sense; rather, a modified Totality of the Circumstances test should be adopted. A modified Totality of the Circumstances test would be substantially similar to its current form, only the backwards-looking inquiry in the first factor should be removed. Although the modification is minimal, the removal of the backwards-looking inquiry in the first factor of the test allows it to better comply with the Code and congressional intent.

A. *The Central Factor of any Test Is the Debtor's Future Ability To Pay.*

Interpreting § 523(a)(8) to have the primary consideration be the debtor's future ability to repay their debt not only complies with the "Whole Act Rule,"[123] but takes into account the legislative history of the section.[124] In the Commission report, the Commission indicated the undue hardship standard should be interpreted to focus on the debtor's future inability to pay.[125] If the debtor is unable to pay but is forced to continue payments on their education debt, they will almost certainly experience

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121. Foster, *supra* note 7, at 1080–83. *See In re* Andersen, 232 B.R. 127 (B.A.P. 8th Cir. 1999); *In re* Grigas, 252 B.R. 866 (Bankr. D.N.H. 2000).

122. Pardo & Lacey, *supra* note 2, at 511–16.

123. The Whole Act Rule mandates that terms be read and interpreted consistently throughout the Code.

124. *Id.*

125. *In re* Andrews, 661 F.2d 702 (8th Cir. 1981) (citing *In re* Wegfehrt, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981)).

hardship. Since the 2005 BAPCPA amendment was passed, Congress shed additional light on their intended meaning of "undue hardship."[126]

Section 524(m) was enacted in the 2005 BAPCPA amendment and is the only other Code section with an "undue hardship" standard.[127] With the addition of a similar "undue hardship" standard in § 524(m), no further legislative action is required. In § 524(m), a presumption of "undue hardship" arises when the debtor's future disposable income is insufficient to make payments as outlined in a reaffirmation agreement.[128] The debtor demonstrating a future ability to pay rebuts the presumption of "undue hardship."[129] The § 524(m) standard is extremely similar to the proposed standard in the Commission report to Congress, which advised that the "undue hardship" standard should be based on the debtor's future ability to make payments.[130] Both undue hardship standards inquire into the debtor's current disposable income and extrapolate a reasonable prediction based on the debtor's future ability to repay their education loans.[131] Utilizing the "Whole Act Rule," both of these standards should be given the same or substantially similar meanings.[132] A modified Totality of the Circumstances test takes the test in § 524(m) into account in a way that neither the *Brunner* test nor the Totality of the Circumstances test does. While the *Brunner* test's second element requires the court to look at the debtor's future ability to pay in a similar fashion to that of the Totality of the Circumstances test, this element is often interpreted to mean that the debtor must show some extreme circumstances that are likely to persist indefinitely.[133] By placing the bar so high, not only do these established judicial doctrines not conform to the standard in § 524(m) but they sharply contrasts with the Commission's report.[134]

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126. *Id.*

127. Pardo & Lacey, *supra* note 2, at 511.

128. 11 U.S.C. § 524(m)(1) (West 2012). *See* Pardo & Lacey, *supra* note 2, at 512.

129. 11 U.S.C. § 524(m)(1) (West 2012).

130. Pardo & Lacey, *supra* note 2, at 511–13.

131. *Id. See also* 11 U.S.C. § 1325 (West 2012) (requiring the payment of the debtor's disposable income for the duration of the proposed plan for confirmation).

132. *See* Pardo & Lacey, *supra* note 2, at 511 (citing United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction . . . is a holistic endeavor.")).

133. Often the second element of the *Brunner* test is read to require the debtor to show some "extraordinary circumstances" that are likely to persist for the foreseeable future. Huey, *supra* note 1, at 109–110.

134. Pardo & Lacey, *supra* note 2, at 420, 511–12.

B. *The Backwards–Looking Inquiry in the Totality of the Circumstances Test's First Factor and the Brunner Test's First Element Should Be Eliminated.*

The Totality of the Circumstance test's first factor, similar to the first element in the *Brunner* test, contains a backwards-looking inquiry that should be eliminated. The primary reasons for the elimination of a backwards-looking inquiry are that such an inquiry is not supported by the Code and it is duplicative.[135] The plain language of § 523(a)(8) only requires the debtor to prove future payments "*would* impose an undue hardship."[136] A backwards-looking inquiry into the debtor's conduct that brought the debtor to bankruptcy is an unwarranted causal inquiry.[137] "No other discharge provision of the Bankruptcy Code invites the court to delve into the causes that precipitate the debtor's financial situation."[138] Essentially, looking at past information in the discharge of debt largely operates as an additional and unwarranted requirement or hurdle to discharge.

The backwards-looking inquiry is also duplicative. If the idea is to prevent abuse of the bankruptcy system, then the other good faith Code sections are sufficient to prevent abusive debtors. The purpose of checking to make sure the debtor has a current inability to pay is to make sure that the debtor is not abusing this section.[139] Essentially, this prong operates in the same way that the good faith element operates in the *Brunner* test because both examine the debtor's past conduct.[140] Congress is very apt at adding good faith requirements when it thinks such a showing is warranted, but § 523(a)(8) does not contain a good faith element.[141] If Congress wanted to force debtors to prove good faith in conjunction as part of the "undue hardship" standard, it would have said so.[142]

There are many other safeguards to make sure that the debtor is not trying to cheat the system. Forcing debtor to have to prove they are currently unable to pay their education debt just expends judicial resources and puts additional strain on already fragile debtors. Similarly to the "undue hardship" standard in § 524(m), calculating the current disposable income and

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135. *Id.* at 512.
136. 11 U.S.C. § 523(a)(8) (West 2012) (emphasis added).
137. Pardo & Lacey, *supra* note 2, at 511.
138. *Id.* at 517.
139. *Id.* at 513.
140. *Id.*
141. *Id.* at 515.
142. *Id.*

determining from that the debtor's future ability to pay is more efficient.[143] It is easier for debtors to prove a current inability to pay and that the condition is likely to persist, rather than a purely proving a future inability to pay.[144] The elimination of the backwards-looking inquiry in the Totality of the Circumstances test allows the determination of "undue hardship" in § 523(a)(8) to create a uniform standard with § 524(m) and with the rest of the Code.

C. *The Brunner Test's Good Faith Element Should Be Rejected, and the Totality of the Circumstances' Third Catchall Factor Should Be Adopted.*

Both the *Brunner* test[145] and the Totality of the Circumstances test[146] were created at a different stage in the evolution of § 523(a)(8).[147] However, the Totality of the Circumstances' third factor, the catchall factor, allows courts to address any other significant information.[148] By allowing courts to address any other relevant information, they are able to take into account the significant changes that § 523(a)(8) underwent in the 36 years the Code section has been around.[149]

Conversely, the *Brunner* test's good faith requirement is an insufficient catchall provision that acts more like a bar to discharge than equitable provision. The *Brunner* test's good faith element is also not supported by § 523(a)(8) or its legislative history.[150] For these reasons, the *Brunner* test's good faith element should be flatly rejected.

Both the *Brunner* test and the Totality of the Circumstances test go farther than the text of the Code allows with backwards-looking inquiries.[151] However, the Totality of the Circumstances test is less off the mark than the *Brunner* test. The removal of the backwards-looking inquiry leaves a realistic standard: the debtor's future ability to pay based on current disposable income and any additional information relevant to the debtor's hardship situation.

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143. Pardo & Lacey, *supra* note 2, at 516.

144. *Id.* at 512.

145. Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 395 (2nd Cir. 1987).

146. Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 554-55 (8th Cir. 2003).

147. *See* Section IV, *infra.*

148. *Long*, 322 F.3d at 554–55.

149. *Id.*

150. 11 U.S.C.A. § 523 (West 2012).

151. Pardo & Lacey, *supra* note 2, at 512–13.

D. *Adoption of a Modified Totality of the Circumstances Test Will Help Mitigate Inconsistencies Created By Partial Discharge.*

A modified Totality of the Circumstances test is admittedly a lower bar to discharge than that contained in the other two tests. But, with such a significant bar to discharge like that in the *Brunner* test, it is not surprising. The Modified Totality of the Circumstances test is likely closer to congressional intent.[152] By placing the burden of proof on the debtor, it is still a substantial obstacle to prove a future inability to pay.[153]

Because of the lower bar to discharge and a more equitable catchall provision, the modified approach may resolve further inconsistencies created by the three different approaches to partial discharge. The concept of partial discharge was created in order to mitigate the extremely harsh effects of the *Brunner* test and the Totality of the Circumstances test.[154] While a lower bar to discharge is not an endorsement of partial discharge, the lower bar will circumvent much of the equitable driving force behind the need for such a doctrine.

The Totality of the Circumstances test better encompasses the equity powers of bankruptcy courts. The third factor of the Totality of the Circumstances test is one that allows courts to take into account all those factors causing a debtor "undue hardship," while also allowing courts to determine whether or not the debtor is abusing the bankruptcy system.[155] While the *Brunner* test also has a catchall good faith element, there is no basis for it, and it is more restricting on courts because it only allows the consideration of good faith rather than relevant extenuating circumstances.[156] The catchall standard contained in the Totality of the Circumstances test complies with the amorphous idea of "undue hardship" and takes into account not only the other instance of "undue hardship," but the legislative history of § 523(a)(8) as well.

VI. CONCLUSION.

Because of the inconsistent applications of both the *Brunner* test and the Totality of the Circumstances test and the

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152. *In re* Andrews, 661 F.2d 702 (8th Cir. 1981) (citing *In re* Wegfehrt, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981)).

153. Pardo & Lacey, *supra* note 2, at 512–13.

154. Foster, *supra* note 7 at 1055.

155. Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 554-55 (8th Cir. 2003).

156. Pardo & Lacey, *supra* note 2 at 511.

enactment of a similar "undue hardship" standard in § 524(m), the judiciary should resolve the inconsistent application of § 523(a)(8) by adopting a modified Totality of the Circumstances test. The outdated *Brunner* test, with its backwards-looking element and good faith requirement is unrepresentative of § 523(a)(8). The Totality of the Circumstances test was similarly created in the 1980's, but the elimination of the backwards-looking requirement allows the test to adapt to the significant changes in the Code. The adoption of the modified Totality of the Circumstances test allows a universal standard that takes into account the significant changes in education finance and the Bankruptcy Code.

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