

THE SUPERIORITY OF PARTIAL DISCHARGE FOR  
STUDENT LOANS UNDER 11 U.S.C. § 523(A)(8):  
ENSURING A MEANINGFUL EXISTENCE FOR THE  
UNDUE HARDSHIP EXCEPTION

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I. INTRODUCTION

[E]xception to discharge [for student loans] is contrary to the two most important principles of the bankruptcy laws: a fresh start for the debtor, and equality of treatment for all debts and creditors.<sup>1</sup>

Student loans are an increasingly big business in the United States today. During fiscal year 2002 alone, approximately 5.8 million students borrowed \$37.8 billion in federally guaranteed loan money, representing a more than threefold increase from the \$11.7 billion borrowed in 1990.<sup>2</sup> This marked increase highly correlates with, and is likely the result of, a temporal increase in the cost of postsecondary education.<sup>3</sup> The mean individual undergraduate student loan debt in 2002 was \$18,900, a 66% increase from \$11,400 in

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\* J.D. Candidate, May 2005, Florida State University College of Law; B.A., University of Florida, 2001. I would like to thank Professor Tim Zinnecker for suggesting this topic and sharing his thorough knowledge of bankruptcy law with me, and Assistant Professor Greg Mitchell for providing constant and invaluable insight, reading numerous drafts, and generally being both an excellent professor and a friend. This Comment is dedicated to my parents, Frank and Ellen Bayuk, and sisters, Pamela and Amanda, for their enduring love and support.

1. H.R. REP. NO. 95-595, at 133-34 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094-95. The idea of treating all debts and creditors *equally*, however, seems to be expressly refuted by the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 507, 523(a) (2000).

2. Press Release, U.S. Department of Education, Student Loan Defaults Remain at Historic Lows (Sept. 12, 2002), *available at* <http://www.ed.gov/news/pressreleases/2002/09/09122002.html> (last visited Feb. 25, 2004).

3. *Id.*

1997.<sup>4</sup> Factoring in the use of loans to finance graduate studies understandably increases these numbers, as well as expectedly increases the number of student borrowers because of the higher relative cost of graduate programs.<sup>5</sup>

In light of this steady increase in student loan borrowing, it is surprising that student loan default rates have gradually declined over the last decade, shrinking from 22.4% in 1990 to 5.4% in 2001.<sup>6</sup> It is important here to note that the number of bankruptcy filings involving attempts to discharge student loans is likely less than the student loan default rate, as not every defaulting borrower files for bankruptcy.<sup>7</sup> Nonetheless, because of the substantial amount of current aggregate loan indebtedness, the possibility of using bankruptcy to discharge loan repayment obligations for even a small percentage of borrowers can create potential problems.<sup>8</sup>

Still, many borrowers faced with a substantial amount of student loan debt might find comfort in the thought that liability for this debt may simply be avoided or negated by availing themselves of protection under the Bankruptcy Code (Code).<sup>9</sup> This comfort, however, would, for the most part, be severely misplaced, as, subject to one exception, § 523(a)(8) expressly excludes from discharge in Chapter 7 or 13 bankruptcies:

educational benefit overpayment[s] or loan[s] made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend.<sup>10</sup>

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4. *College Borrowing Is Up Substantially*, 12 CONSUMER BANKR. NEWS, Mar. 20, 2003. Additionally, the median undergraduate student loan debt rose from \$9500 in 1997 to \$16,500 in 2002, a 74% increase. *Id.*

5. Thus, a student who did not have to resort to loans for his or her undergraduate education may nonetheless be compelled to borrow to afford graduate school.

6. U.S. DEP'T OF EDUC., NATIONAL STUDENT LOAN DEFAULT RATES, at <http://www.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> (last visited Feb. 25, 2004) [hereinafter DEFAULT RATES]. For a scientific study of default rate probabilities, see Laura Greene Knapp & Terry G. Seaks, *An Analysis of the Probability of Default on Federally Guaranteed Student Loans*, 74 REV. ECON. & STAT. 404 (1992).

7. The student loan default rate is based upon the number of borrowers entering repayment in a given year and then defaulting (or stopping payment) for some specified reason; it is not based on the number of student borrower bankruptcy filings. See DEFAULT RATES, *supra* note 6.

8. The primary problem here would likely involve undermining the solvency of student loan programs.

9. 11 U.S.C. §§ 101-1330 (2000).

10. 11 U.S.C. § 523(a)(8) (2000). Although differences exist, educational benefit overpayments, loans, scholarships, and stipends will be treated collectively as "loans" for the purposes and scope of this Comment. In addition, educational loans are excepted from discharge under other chapters of the Code as well. Chapters 7 and 13 are cited because they are the chapters most often utilized by individual debtors seeking bankruptcy protection.

The singular exception applies when requiring repayment of student loans would result in an “undue hardship” to the debtor and his or her dependents.<sup>11</sup>

The application of this undue hardship exception has produced considerable controversy in the federal judiciary’s bankruptcy jurisprudence, especially with regard to the standard required to trigger applicability of the exception.<sup>12</sup> A related issue, which has garnered significant recent attention and which arises generally only when undue hardship is found, concerns the amount of student loan debt that may be discharged.<sup>13</sup> Thus, the first issue in this context relates to the determination of *whether* student loans are dischargeable, which as a consequence brings to light the second issue: *To what extent* are such loans dischargeable?

This Comment devotes its attention to this second issue and centers on the propriety of partial discharge, focusing on the split among the various circuits regarding the partial versus all-or-nothing discharge debate and examining the rationales supporting each position. Part II details the legislative history of § 523(a)(8). The various amendments to the Code and related legislation<sup>14</sup> are tracked and explained in regard to their effect on student loan dischargeability.

Part III takes a brief look at the construction of the undue hardship exception and the evolution of the various tests used to determine its applicability. This Section focuses primarily on the modern standard, the *Brunner* test,<sup>15</sup> and the criteria it entails. An understanding of the undue hardship determination is essential, as this issue is necessarily the prerequisite to the partial discharge question.

Part IV of this Comment delineates the split among, and within, the circuits pertaining to the partial versus all-or-nothing discharge debate. The three leading positions are explained, and the rationales and justifications for each position are presented.

Part V argues in support of the partial discharge approach and calls for uniform judicial recognition and application of this position.

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11. *See id.*

12. For an analysis of this controversy and the progression of standards used to determine undue hardship, see *infra* Part III. *See also* Jennifer L. Frattini, Comment, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537 (2001); B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89 (2002).

13. *See, e.g.,* Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 870-73 (Bankr. D.N.H. 2000) (describing the debate and delineating the three approaches utilized by courts construing § 523(a)(8)).

14. Namely, this “related” legislation refers to the Crime Control Act of 1990 and the Higher Education Amendments of 1998, both discussed *infra* Part II.

15. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). The *Brunner* test has, to a large extent, become the test of choice for determining whether a debtor has shown undue hardship. *See infra* Part III.

This Part provides responses to the strict and hybrid approaches' criticisms of the flexible approach. Part V concludes by explaining why the flexible approach is superior to both the strict and hybrid approaches through a critical analysis of the detriments of these two alternative positions. Finally, Part VI contains brief concluding remarks.

## II. LEGISLATIVE HISTORY OF § 523(a)(8)

Student loans have not always been nondischargeable in bankruptcy. In fact, for most of the twentieth century student loans were treated in the same way as any other unsecured dischargeable debt.<sup>16</sup> However, "[a]s the amount of money invested in higher education grew, concerns developed about the potential for student and institutional abuses of the [student loan] programs."<sup>17</sup> In addition to increased apprehension regarding what was then suddenly characterized as a "loophole" in the Bankruptcy Act (the allowance of full dischargeability for student loans), the media began highlighting extreme cases of system abuse, such as newly graduated doctors and lawyers discharging large student loan debts in bankruptcy on the eve of embarking on lucrative careers.<sup>18</sup>

This increased attention attracted the interest of the 1973 Congressional Commission on Bankruptcy Laws (Commission), a commission appointed to "evaluate and propose reformation of the then-existing bankruptcy laws."<sup>19</sup> In its 1973 report, the Commission noted that examples of abuses in the discharge of student loans had come to its attention, and that such abuses were both reprehensible and threatening to the continuance of educational loan programs.<sup>20</sup> To remedy this "threat," the Commission proposed legislation that would make, in the absence of undue hardship, student loans nondischargeable in bankruptcy, unless the first loan payment became due more than five years before the petition date.<sup>21</sup> Curiously, the Com-

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16. See Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in 11 U.S.C.). The Act excepted from discharge debts: for taxes; from judgments for fraud actions; arising from willful and malicious injuries; for property obtained by false pretenses; not listed on the debtor's schedules; from fraud, embezzlement, misappropriation, or defalcation incurred while the debtor was acting in a fiduciary capacity. *Id.*

17. 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, 739 (1990) (citation omitted).

18. See *id.* at 739-41; see also Huey, *supra* note 12, at 97-99.

19. Collins, *supra* note 17, at 740.

20. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 11, 170, 176-77 (1973) [hereinafter COMMISSION REPORT I].

21. See *id.* at 177. For the text of this proposed legislation, see REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.

mission did not propose this change based on a perceived widespread abuse of the bankruptcy system by student loan debtors, as it noted a lack of statistical evidence suggesting any significant problem.<sup>22</sup> Rather, it justified the proposal on the belief that even a small number of “abuses discredit the system and cause disrespect for the law and those charged with its administration.”<sup>23</sup>

In the years following publication of the Commission’s report, the “loophole” problem gained increasing notoriety, spurred on mainly by continued media sensationalizations of loan discharge abuses.<sup>24</sup> In response, and after much debate, Congress codified the Commission’s proposals in the Education Amendments of 1976.<sup>25</sup> Section 439A provided that student loans were nondischargeable, absent undue hardship, unless the first loan payment became due more than five years before the petition.<sup>26</sup> This represented an almost verbatim adoption of the Commission’s 1973 proposal.<sup>27</sup>

Although the dischargeability issue thus appeared to have been resolved, it arose once again in the context of Congress’s promulgation of the Bankruptcy Reform Act of 1978.<sup>28</sup> In drafting this Act, considerable debate ensued between the House and Senate regarding the inclusion of a student loan nondischargeability provision.<sup>29</sup> The Senate bill proposed to retain the 1976 Education Amendments’ standard, excepting student loans from discharge, absent undue hardship, if the first payment had not become due more than five

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II, at 136 (1973) [hereinafter COMMISSION REPORT II]. In proposing this change, the Commission noted that:

[a] separate clause to provide for a limited nondischargeability of educational loan debts is desirable for two kinds of reasons. First, a loan or other credit extended to finance higher education that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that . . . he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt. Second, such a policy cannot be appropriately carried out under any other nondischargeability provision.

*Id.* at 140.

22. COMMISSION REPORT I, *supra* note 20, at 170.

23. *Id.* (footnote omitted).

24. See Collins, *supra* note 17, at 741-42 (discussing public perceptions of the student loan discharge problem).

25. Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976) (repealed 1978)).

26. *Id.*

27. Compare *id.*, with COMMISSION REPORT II, *supra* note 21, at 136 (containing virtually identical language).

28. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *reprinted in* 1978 U.S.C.A.N. 5787 (codified as amended at 11 U.S.C. §§ 101-1330 (2000)). This Act repealed the Bankruptcy Act of 1898, replacing it with the modern Bankruptcy Code.

29. See Frattini, *supra* note 12, at 545-46 (discussing the different views of the House and Senate).

years before the petition date.<sup>30</sup> The contrary House bill proposed a restoration of the law to pre-1976 Education Amendments standards, treating student loan debts as any other dischargeable debt.<sup>31</sup> After much debate, the House eventually acquiesced to the Senate's position, and Congress thus enacted the Bankruptcy Reform Act, containing the original version of § 523(a)(8).<sup>32</sup>

Since its 1978 enactment, § 523(a)(8) has undergone two significant changes. The first, in 1990, involved an extension of the "payment first became due" provision's time period from five to seven years, thus extending the temporal window for nondischargeability.<sup>33</sup> This amendment also broadened the type of educational loan debts excepted from discharge, setting forth the language found in the current version of § 523(a)(8).<sup>34</sup> The second change, in 1998, eliminated the temporal aspect of § 523(a)(8) altogether, leaving undue hardship as the sole basis for student loan discharge.<sup>35</sup> It thus appears, in light of these changes, that Congress has increasingly narrowed the means by which a debtor may discharge his or her student loans. What remains unanswered is how courts should determine the meaning and applicability of undue hardship, the final statutory avenue for relief.

### III. UNDUE HARDSHIP UNDER § 523(a)(8)

When enacting and amending § 523(a)(8), Congress did not define "undue hardship" or provide explicit guidance to the courts on how

30. See S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865 (discussing the provisions of S. 2266, 95th Cong. (1977)). The Senate proposal also called for a more expansive view of the educational loans excepted from discharge, covering more types of loans than originally provided for in the Educational Amendments of 1976. See *id.*; see also Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141.

31. See H.R. REP. NO. 95-595, at 132 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (discussing H.R. 8200, 95th Cong. (1977)). The House Report noted that the decision to allow discharge of student loans was based primarily on the results of a GAO study conducted to assess loan default and bankruptcy statistics. *Id.* at 6093-94. The GAO study showed that:

[T]he general default rate on educational loans is approximately 18%. Of that 18%, approximately 3-4% of the amounts involved are discharged in bankruptcy cases. Thus, approximately ½ to ¾ of 1% of all matured educational loans are discharged in bankruptcy. This compares favorably with the consumer finance industry. The GAO has also found that in approximately 20% of the bankruptcy cases involving guaranteed student loans, over 80% of the debtor's total indebtedness is attributable to educational loans.

*Id.* at 6094.

32. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2591; 11 U.S.C. § 523(a)(8) (Supp. III 1979).

33. See Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789, 4964-65.

34. *Id.*; see also 11 U.S.C. § 523(a)(8) (2000).

35. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837.

such a definition should be ascertained.<sup>36</sup> Rather, Congress “left it up to the various [b]ankruptcy [c]ourts to utilize their discretion in defining what [undue hardship] means after an analysis of the statute and a review of applicable legislative history.”<sup>37</sup> The courts have responded to this invitation by promulgating numerous tests and criteria for undue hardship, from which three main tests have developed.<sup>38</sup> Although one test has clearly emerged as the modern standard, it nevertheless appears that all variations of undue hardship construction share one common idea: Undue hardship requires more than mere temporary pecuniary misfortune.<sup>39</sup>

### A. *The Johnson Test*

The earliest test for determining the meaning and applicability of undue hardship was articulated by the Bankruptcy Court for the Eastern District of Pennsylvania in *Pennsylvania Higher Education Assistance Agency v. Johnson (In re Johnson)*.<sup>40</sup> Known as the *Johnson* test, the analysis centers around three prongs.<sup>41</sup> The “mechanical” prong asks whether the debtor’s future financial resources would be sufficient to fund loan repayment while, at the same time, supporting the debtor and his or her dependants at a minimal (poverty)

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36. See 11 U.S.C. § 523(a)(8) (2000); *In re Faish*, 72 F.3d 298, 302 (3d Cir. 1995) (citing Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of “Undue Hardship,”* 26 ARIZ. L. REV. 445, 447 (1984) (noting that Congress did not define undue hardship)); see also COMMISSION REPORT II, *supra* note 21, at 140.

37. *Fox v. Pa. Higher Educ. Assistance Agency (In re Fox)*, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993). Perhaps the most pertinent legislative history on the definition of undue hardship can be found in COMMISSION REPORT II, *supra* note 21, at 140-41. The Commission noted that:

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 his dependents, at a minimal standard of living within their management capability, as well as to pay the educational debt.

*Id.*; see also *Bryant v. Pa. Higher Educ. Assistance Agency (In re Bryant)*, 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (citing the Commission’s report with approval).

38. See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *Bryant*, 72 B.R. at 913; *Pa. Higher Educ. Assistance Agency v. Johnson (In re Johnson)*, 5 Bankr. Ct. Dec. (LRP) 532, 544-45 (Bankr. E.D. Pa. 1979).

39. Huey, *supra* note 12, at 102.

40. 5 Bankr. Ct. Dec. (LRP) 532.

41. *Id.* at 544-45 (delineating the three-prong test); see also Richard Fossey, “*The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*,” 26 J.L. & EDUC. 29, 35 (1997) (describing the requirements of each prong); Frattini, *supra* note 12, at 553-56 (discussing the origins of each prong in detail).

standard of living.<sup>42</sup> If the answer is “no,” the court proceeds to prong two; otherwise, loan discharge is denied.<sup>43</sup>

The second prong, “good faith,” asks whether the debtor was irresponsible in limiting expenses, maximizing resources, and securing employment, and, if so, whether more responsible behavior would have changed prong one’s answer.<sup>44</sup> If the answer to the first “good faith” inquiry is “no,” undue hardship is met and the loans are discharged.<sup>45</sup> If both “good faith” inquiries are answered affirmatively, a presumption of nondischargeability is created, which can then be rebutted by a negative answer to prong three’s inquiry.<sup>46</sup>

The third prong’s “policy test” asks whether the “circumstances” (for example, the amount and percentage of student loan indebtedness and the debtor’s employment prospects) indicate either that student loan discharge was the primary purpose in filing for bankruptcy, or that the debtor has benefited financially from his or her loan-financed education.<sup>47</sup> If these are answered in the negative, discharge is appropriate.<sup>48</sup> If either inquiry is answered affirmatively, discharge is denied.<sup>49</sup>

Although the above inquiries appear to be riddled with complexity, the *Johnson* test remained the leading approach in determining undue hardship for almost a decade.<sup>50</sup> Subsequent courts, however, have condemned this test’s complexity as too burdensome, instead preferring a more simplified analysis.<sup>51</sup>

### B. The Bryant Test

The second test for assessing undue hardship emerged out of *Bryant v. Pennsylvania Higher Education Assistance Agency (In re Bryant)*, a case espousing the need for a simplified approach in determining applicability of the exception.<sup>52</sup> The *Bryant* court sought to re-

42. *Johnson*, 5 Bankr. Ct. Dec. (LRP) at 544.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* For a discussion of the strictness with which courts can view satisfaction of the “good faith” test, see Scott Pashman, Note, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(a)(8): Reassessing “Undue Hardship” After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605, 612 (2001) (discussing that “[a] court’s views of what constitutes ‘ordinary prudence’ [for example, non-negligence or responsibility] can be shockingly harsh”).

47. *Johnson*, 5 Bankr. Ct. Dec. (LRP) at 544.

48. *Id.*

49. *Id.*

50. See *Bryant v. Pa. Higher Educ. Assistance Agency (In re Bryant)*, 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987) (noting that *Johnson* was the leading case on the issue of determining undue hardship).

51. See *infra* Part III.B.

52. 72 B.R. at 913, 915 n.2.



place the complexities of the *Johnson* test with a more objective analysis, striving for a result it called “objective simplicity.”<sup>53</sup> The *Bryant* test achieves both its simplicity and objectivity by focusing the analysis on the debtor’s income and resources as they relate to U.S. Census Bureau federal poverty guidelines.<sup>54</sup> If the debtor’s income is substantially higher than the applicable poverty guideline, his or her loans will be nondischargeable unless “the debtor can establish ‘unique’ and ‘extraordinary’ circumstances which should nevertheless render the debt dischargeable.”<sup>55</sup> Conversely, if the debtor’s income is below or close to the guideline, nondischargeability is only appropriate if the creditor can establish the existence of facts rendering the poverty guidelines unrealistic, “such as the debtor’s failure to maximize . . . resources[,] or clear prospects . . . for future income increases.”<sup>56</sup>

The *Bryant* test was beneficial because it simplified the analysis to a single step, comparing the debtor to an objective standard. Later courts, however, have utilized a more expansive undue hardship determination. These courts include additional factors in the analysis to ensure a more accurate assessment of undue hardship, while, at the same time, striving to avoid the complexities present in earlier analyses.

### C. *The Brunner Test*

The third standard for determining undue hardship was first articulated by the District Court for the Southern District of New York in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*.<sup>57</sup> Two years later, the test promulgated by the district court was affirmed on appeal by the Second Circuit.<sup>58</sup> Currently, the *Brunner* test enjoys widespread judicial acceptance and is the test that bankruptcy and appellate courts most frequently use in assessing undue hardship.<sup>59</sup>

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53. *Id.* at 915 n.2 (“[T]he complicated nature of [the *Johnson* test] has encouraged us, here, to strive for the result of objective simplicity.”).

54. *Id.* at 915.

55. *Id.* While the terms “unique” and “extraordinary” are undefined in the opinion, the court notes that these terms refer to “circumstances . . . impos[ing] a financial burden that would render it unlikely that the debtor would ever be able to honor such [loan repayment] obligations.” *Id.* at 917. The court went on to note that discharge may also be appropriate for a debtor whose income is slightly above the poverty line even absent unique or extraordinary circumstances. *Id.*

56. *Id.* at 915.

57. 46 B.R. 752 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d Cir. 1987).

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

59. *See Huey, supra* note 12, at 111-12 (noting that the *Brunner* test has been either formally adopted, approved, or utilized in the Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits as of 2002).

The *Brunner* test is composed of three prongs.<sup>60</sup> The first evaluates whether the debtor and his or her dependents can maintain a minimal standard of living if required to repay the loans.<sup>61</sup> The second prong examines whether additional circumstances exist indicating that the debtor's financial travails are "likely to persist for a significant portion of the [loan] repayment period."<sup>62</sup> The final prong inquires whether the debtor has made good faith efforts to tender repayment.<sup>63</sup>

The test's first prong, assessing whether the debtor can maintain minimal standards of living, is present in the earlier undue hardship tests as well.<sup>64</sup> The court noted that this inquiry is necessary as the required minimum to establish undue hardship.<sup>65</sup> The court found that the additional inquiries required by the second and third prongs were necessary in light of the problems inherent with trying to predict future income.<sup>66</sup> "Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period . . . more reliably guarantees that the hardship presented is [truly] 'undue.'"<sup>67</sup> Thus, the *Brunner* test purports to be the superior way of determining undue hardship, utilizing meaningful criteria while avoiding the pitfalls of its predecessor approaches. No matter which approach is used to determine undue hardship, however, one serious question remains unanswered: What effect does a finding of undue hardship have on the debtor's student loan debt?

#### IV. THE PARTIAL DISCHARGE DEBATE

The language of § 523(a)(8) appears on its face to be absolute, mandating that debts for educational loans are nondischargeable except in cases of undue hardship.<sup>68</sup> The logical correlate to this mandate is that if requiring repayment of such loans creates undue hardship, the debt becomes dischargeable and the obligation of repayment

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

61. *Id.*

62. *Id.*

63. *Id.*

64. See *Bryant v. Pa. Higher Educ. Assistance Agency (In re Bryant)*, 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (using federal poverty guidelines to determine "whether the debtor's income is sufficient to maintain a minimal standard of living *and* to pay the student loans"); *Pa. Higher Educ. Assistance Agency v. Johnson (In re Johnson)*, 5 Bankr. Ct. Dec. (LRP) 532, 544 (Bankr. E.D. Pa. 1979) (including a "subsistence or poverty standard of living" inquiry in the *Johnson* test's first prong).

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

66. *Id.*

67. *Id.*

68. See 11 U.S.C. § 523(a)(8) (2000). For a discussion of the evolution and definition of undue hardship, see *supra* Part III.

ceases.<sup>69</sup> The seeming ease of this concept is deceptive, however, as there is considerable debate on what a finding of undue hardship actually means for both the debtor and the student loan debt.<sup>70</sup> Does a finding of undue hardship mean, as the language of the Code seems to imply, that *all* of the debtor's educational loans become dischargeable—the so called “all or nothing” or “strict” approach?<sup>71</sup> Conversely, are student loans dischargeable *to the extent* they create undue hardship for the debtor—the “partial discharge” or “flexible” approach?<sup>72</sup> Is there a way to reconcile these positions to some extent, refusing to partially discharge individual loans but determining undue hardship and discharge of educational loans on a *loan-by-loan* basis—thus, a “hybrid” approach?<sup>73</sup> These questions and the issue to which they relate form the core of a debate that has ensued among the various circuits, culminating in a circuit split regarding the consequences of an undue hardship adjudication.

### A. *The Strict Approach*

The primary justification for adherence to the strict approach is based on the plain meaning of § 523's language:

- (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt—
- (8) for an educational [loan] . . . unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .<sup>74</sup>

A number of courts have rather cursorily held that this statutory language is clear and unambiguous on its face, essentially beginning and ending the analysis, when confronted with the partial discharge question, with a statement such as Chief Judge Federman's in *Brown v. Union Financial Services, Inc. (In re Brown)*:

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69. In a Chapter 7 liquidation, the loan debt would be discharged along with all other dischargeable debt on the date of the bankruptcy court's discharge order. See 11 U.S.C. § 727 (2000). For a thorough discussion of the treatment of student loan debt and the undue hardship exception in a Chapter 13 “payment plan” bankruptcy, see Farris E. Ain, Comment, *Never Judge a Bankruptcy Plan by Its Cover: The Discharge of Student Loans Through Provisions in a Chapter 13 Plan*, 32 SW. U. L. REV. 703 (2003).

70. Understandably, there are also implications for the creditor regarding treatment of the debt, as it is the creditor whose right to repayment will be altered upon a finding of undue hardship.

71. See 4 COLLIER ON BANKRUPTCY ¶ 523.14[3] (Lawrence P. King et al. eds., 15th ed., rev. 2003).

72. See *id.*

73. See *Grigas v. Sallie Mae Servicing Corp. (In re Grigas)*, 252 B.R. 866, 872-73 (Bankr. D.N.H. 2000) (acknowledging and adhering to this third “hybrid” position). It is noted that this position assumes a debtor to have multiple, nonconsolidated loans evidenced by individual promissory notes. See, e.g., *id.* at 873. The potential ramifications of this assumption on the applicability of the position are discussed *infra* Parts IV.C and V.B.

74. 11 U.S.C. § 523(a), (a)(8) (2000).

I find nothing in the Code that allows me to restructure the student loan obligation or reduce it. I must, therefore, find either that [the debtor] has the ability [to] repay the entire obligation, or that repayment of the entire loan would impose an undue hardship.<sup>75</sup>

The lack of additional rationalization in cases such as *Brown* raises questions as to why courts are content to simply utilize the strict approach while perfunctorily dismissing the merits of a more flexible approach.

Other courts have conducted more thorough plain meaning analyses, making persuasive arguments for the all-or-nothing proposition. For example, in *United Student Aid Funds Inc. v. Taylor* (*In re Taylor*), the Bankruptcy Appellate Panel for the Ninth Circuit construed the meaning of § 523(a)(8) by first examining the statutory language itself.<sup>76</sup> Concluding that the language was “plain,” the court noted that its sole function was to enforce the statute pursuant to its terms.<sup>77</sup> Speaking for the three-member panel, Judge Ryan went on to define the term “debt” as used in § 523(a)(8), turning to the Code’s statutory glossary in § 101.<sup>78</sup> Defining “debt” under § 101(12) as a “liability on a claim,”<sup>79</sup> and further defining “claim” under § 101(5) as a “right to payment,”<sup>80</sup> the court reasoned that “‘liability on a claim’ encompasses the *entire* liability, not merely some portion of the debt or merely selected terms of repayment.”<sup>81</sup> Consequently, because the plain language mandates either full dischargeability or nondischargeability, “§ 523(a)(8) does not authorize a partial discharge of student loans.”<sup>82</sup>

Although some plain language/plain meaning arguments seem to support an anti-partial discharge position, significantly more persuasive arguments can be made by focusing on what is noticeably absent from the statutory language. For this reason, the great majority of courts taking the strict approach do not end their analyses by simply parsing the language of § 523(a)(8) alone. Rather, they continue by

75. 249 B.R. 525, 530 (Bankr. W.D. Mo. 2000) (mem.) (footnote omitted); *see also* *Hemar Ins. Corp. of Am. v. Cox* (*In re Cox*), 338 F.3d 1238, 1242 (11th Cir. 2003) (“The language of § 523(a)(8) clearly and unambiguously provides . . .”).

76. 223 B.R. 747, 752 (B.A.P. 9th Cir. 1998). The reasoning and holding of *Taylor* have been disapproved by a series of subsequent cases in the Ninth Circuit, discussed *infra* Part IV.B; *see also infra* note 118 and accompanying text.

77. *Taylor*, 223 B.R. at 752. (citations omitted).

78. *Id.*

79. 11 U.S.C. § 101(12) (2000).

80. *Id.* § 101(5).

81. *Taylor*, 223 B.R. at 752 (quoting *Skaggs v. Great Lakes Higher Educ. Corp.* (*In re Skaggs*), 196 B.R. 865, 866 (Bankr. W.D. Okla. 1996)) (internal quotation marks omitted) (emphasis added). The *Skaggs* court noted that because the language of § 523(a)(8) is clearly unambiguous, a court is limited to “act[ing] only on the entire student loan obligation.” *Skaggs*, 196 B.R. at 866.

82. *Taylor*, 223 B.R. at 753.

reviewing other provisions both within § 523 and within the Code as a whole, guided by the statutory construction principle that “Congress’ failure to include language is presumed intentional where it has used the language elsewhere in the same statute.”<sup>83</sup> In other words, the fact that certain language persists elsewhere in the Code leads to the conclusion that when Congress wanted to say something, it certainly knew how.<sup>84</sup>

Overwhelmingly, courts find the absence of three words in § 523(a)(8) dispositive of Congress’s disapproval of partial discharge. Courts place so much emphasis on the lack of these words in the statute that their presence would essentially end the entire debate. What are these three precious words? One might be surprised to learn that they comprise the remarkably simple phrase, “to the extent.” “To the extent” is the Code’s term of art to indicate partiality, signifying Congressional approval of remedies (or loan discharge) somewhere between all or nothing.<sup>85</sup> Noting Congress’s proclivity to use this language when it wants a partiality analysis, strict approach courts have not been shy about expressing their perception of the words’ absence in § 523(a)(8). For example, in *Illinois Student Assistance Commission v. Cox*, the court found that other provisions within § 523, such as § 523(a)(2) and § 523(a)(5),<sup>86</sup> contain “to the extent” and thus contemplate a limited or partial remedy.<sup>87</sup> Similarly, the bankruptcy court in *Salinas v. United Student Aid Funds Inc. (In re Salinas)* stated that “[h]ad Congress included [‘to the extent’] in § 523(a)(8), partial discharges . . . would at least have some statutory justification. [Otherwise,] [t]o authorize partial discharges is tantamount to judicial legislation . . . .”<sup>88</sup> Additionally, a panel of the Ninth Circuit in *Taylor* echoed these sentiments by essentially noting that the partial discharge debate could have been avoided through Congress’s inclusion of “to the extent” in the statute.<sup>89</sup>

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83. *Andresen v. Neb. Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 134 (B.A.P. 8th Cir. 1999) (quoting *Hawkins v. Buena Vista Coll. (In re Hawkins)*, 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995) (citation omitted)).

84. *See Ill. Student Assistance Comm’n v. Cox*, 273 B.R. 719, 723 (N.D. Ga. 2002), *aff’d*, 338 F.3d 1238 (11th Cir. 2003).

85. *See Andresen*, 232 B.R. at 130 n.6 (“Such language presumably vests the bankruptcy court with the latitude and duty to find which parts of a debt . . . are discharged and not, as opposed to limiting the outcome of the determination to all-or-nothing.”).

86. 11 U.S.C. § 523(a)(2), (a)(5) (2000). Other subsections within both § 523 and the rest of the Code utilize “to the extent” language as well. *See* 11 U.S.C. §§ 523(a)(7), 522(f)(1), 506(a)-(b) (2000).

87. 273 B.R. at 723. The court further noted that the absence of “to the extent” in § 523(a)(8) “suggests that Congress omitted such language . . . intentionally and, therefore, that courts cannot devise their own equitable remedies in student loan discharge actions.” *Id.*

88. 258 B.R. 913, 919 (Bankr. W.D. Wis. 2001).

89. *See United Student Aid Funds Inc. v. Taylor (In re Taylor)*, 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998). The reasoning and holding of *Taylor* have been disapproved by a se-

In addition to the plain meaning and textual<sup>90</sup> justifications for the all-or-nothing approach, courts and commentators have espoused more theoretical and policy-driven arguments as well. One such argument relates to the legislative history of § 523(a)(8).<sup>91</sup> As one scholar has argued, the progression of amendments to the Code regarding student loan debt shows a legislative intent to make obtaining discharge increasingly difficult; therefore, it is clear that “Congress has shown an intent for all student loans to be collected.”<sup>92</sup> Another argument relates to the overall policy goals of bankruptcy, the debtor’s fresh start and the payment of creditors.<sup>93</sup> While many courts base their support for partial discharge on the belief that it promotes the fresh start rationale,<sup>94</sup> others point out that debts listed in § 523 are nondischargeable in bankruptcy, evidencing an intent to have the payment-of-creditors (in full) rationale trump the debtor’s fresh start.<sup>95</sup>

Finally, all-or-nothing courts delve into the realm of constitutional law, basing their objection to the flexible approach on an implicit separation of powers argument.<sup>96</sup> To this end, strict approach judges routinely denounce grants of partial discharge as judicial usurpations of legislative rule-making authority. These judges note that the addition of a partial discharge remedy to § 523(a)(8) “should be left to Congress, not the courts.”<sup>97</sup>

Based on the foregoing, it appears that the strict approach is supported by a variety of plausible arguments. In fact, the partial discharge debate likely persists because of the strength and logic of these arguments. To gain an appreciation of the reasons for this persistence, it will, of course, be necessary to examine the propriety of and rationales supporting the flexible approach as well.

ries of subsequent cases in the Ninth Circuit, discussed *infra* Part IV.B. See also *infra* note 118 and accompanying text.

90. “Textual” is used here to denote reference to other provisions of the Bankruptcy Code. It is not intended to act in its usual legal capacity, in reference to the text of the U.S. Constitution.

91. For a discussion of the legislative history of § 523(a)(8) and the treatment of student loans in bankruptcy, see *supra* Part II.

92. Craig Gargotta, *The Case Against the Partial Discharge of Student Loans*, FED. LAW., Mar.-Apr. 2002, at 25, 29.

93. See *supra* note 1 and accompanying text.

94. See *Andresen v. Neb. Student Loan Program, Inc.* (*In re Andresen*), 232 B.R. 127, 130-31 (B.A.P. 8th Cir. 1999) (discussing the fresh start policy as supporting the flexible approach).

95. See *In re Bourne*, 262 B.R. 745, 757 (Bankr. E.D. Tenn. 2001); see also Gargotta, *supra* note 92, at 29.

96. See, e.g., *Ill. Student Assistance Comm’n v. Cox*, 273 B.R. 719, 723 (N.D. Ga. 2002); *Mallinckrodt v. Chem. Bank* (*In re Mallinckrodt*), 260 B.R. 892, 904 (Bankr. S.D. Fla. 2001), *rev’d*, *In re Mallinckrodt*, 274 B.R. 560 (S.D. Fla. 2002); *Salinas v. United Student Aid Funds, Inc.* (*In re Salinas*), 258 B.R. 913, 919 (Bankr. W.D. Wis. 2001).

97. *Mallinckrodt*, 260 B.R. at 904.

### B. *The Flexible Approach*

The flexible or partial discharge approach signifies, as the name implies, a court's ability and willingness to discharge a portion, rather than all or nothing, of a debtor's student loan indebtedness. Prior to 1980, bankruptcy courts were loath to entertain the propriety of partial discharge, adhering instead to what appeared to be the Code's mandate of either full dischargeability or nondischargeability.<sup>98</sup> Notwithstanding this historical predilection, in 1980, the possibility of discharging only part of a student loan was explored and ultimately advocated by the court in *Littell v. State Board of Higher Education (In re Littell)*.<sup>99</sup> *Littell* involved a husband and wife who filed jointly under Chapter 7, seeking to discharge \$10,388, including approximately \$7000 in student loans.<sup>100</sup> Noting that discharge would only be available upon a finding of undue hardship, Judge Johnson evaluated the debtors' financial condition, finding that requiring repayment of the entire student loan obligation would create a hardship.<sup>101</sup> After acknowledging the nearly uniform judicial view that student loans were only dischargeable on an all-or-nothing basis, the judge found that such an approach unfairly resulted in adjudications of nondischargeability where hardship clearly existed.<sup>102</sup> The better approach, he reasoned, was to discharge that portion of the debt that created the hardship and require repayment only on the remaining portion.<sup>103</sup> Thus, the flexible approach was born.

The *Littell* court provided virtually no support for the existence and justification of the flexible approach except to say that it was necessary to avoid the strict approach's unfair results.<sup>104</sup> This reasoning perhaps could suffice as a policy argument, but it is no answer to the strict position's numerous supporting rationales. However, subsequent cases provide equally persuasive rationales that have bifur-

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98. See *Andresen*, 232 B.R. at 133 (noting that only since 1980 has judicial recognition of the flexible approach increased).

99. 6 B.R. 85, 88-89 (Bankr. D. Or. 1980).

100. *Id.* at 86-87.

101. *Id.* at 89. Significant to the court's determination of undue hardship were the facts that the debtors had three children, were unable to find employment in their field of study, had a monthly budget that exceeded income by \$35, and had a ten year-old automobile that would soon need to be replaced. *Id.* at 86-87. At the time of filing their petition, the husband earned \$4.40 per hour as a service station attendant, while the wife earned approximately \$450 per month as a school counselor. *Id.* at 87. Interestingly, the debtors' budget deficit did not result from purchasing clothes for the family or from heating the family's home, as the wife made the majority of the clothes and the home was heated mostly by burning wood found on the beach. *Id.* at 87.

102. *Id.* at 89.

103. *Id.* ("The [c]ourt concludes that it would be an undue hardship on the Littells to pay the entire student loans, but that, by a reasonable additional effort, some payment could be made.").

104. *Id.*

cated into two independent justifications for partial discharge: the court's equity powers under § 105(a) of the Code,<sup>105</sup> and the ambiguity of § 523(a)(8).<sup>106</sup>

Section 105(a) is essentially a "catch-all" provision, giving bankruptcy courts a broad delegation of power, rather than specific enumerations, to carry out the mandates and policies of the Code. This equity power is necessary to the proper functioning of the bankruptcy courts, as such courts are, after all, courts of equity.<sup>107</sup> Section 105(a) states:

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11].<sup>108</sup>

Likely the most cited modern case utilizing this "equitable powers" approach is *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, which involved an attempt by joint debtors to discharge approximately \$30,000 in student loans under the undue hardship exception to § 523(a)(8).<sup>109</sup> The bankruptcy court rather summarily entered a finding of undue hardship and discharged the entire loan indebtedness, which was subsequently affirmed by the district court.<sup>110</sup> On appeal, the Sixth Circuit reversed, holding that the finding of undue hardship was erroneous as unsupported by fact, and thus discharge of the entire student loan balance was inappropriate.<sup>111</sup> The Sixth Circuit noted, however, that on remand, the lower court was not constrained to an all-or-nothing determination.<sup>112</sup> Rather, the court found that pursuant to the equitable powers codified in § 105(a), bankruptcy courts were authorized to take action short of total discharge, especially when "an all-or-nothing treatment [would] thwart[] the purpose of the Bankruptcy Act."<sup>113</sup>

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105. 11 U.S.C. § 105(a) (2000). For a thorough analysis of the role § 105(a) plays in student loan bankruptcy cases, see Cara A. Morea, Note, *Student Loan Discharge in Bankruptcy – It Is Time for a Unified Equitable Approach*, 7 AM. BANKR. INST. L. REV. 193 (1999).

106. See *Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 311 (Bankr. S.D.N.Y. 2002) (noting that courts adhering to the flexible approach "have relied on one of two arguments in drawing their conclusion"); *Grigas v. Sallie Mae Servicing Corp. (In re Grigas)*, 252 B.R. 866, 872 (Bankr. D.N.H. 2000) (delineating the two main justifications for the flexible approach, but nonetheless adopting the hybrid approach).

107. See *Gargotta*, *supra* note 92, at 29 ("Bankruptcy courts are courts of equity, and a legislative limitation on that equitable discretion is not easily accepted."); see also *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 455 (1940) (discussing the role of bankruptcy courts as courts of equity).

108. 11 U.S.C. § 105(a) (2000); see also *Nary v. The Complete Source (In re Nary)*, 253 B.R. 752, 767 n.29 (Bankr. N.D. Tex. 2000).

109. 144 F.3d 433, 434-35 (6th Cir. 1998).

110. *Id.*

111. *Id.* at 438-40.

112. *Id.*

113. *Id.* at 439. The court acknowledged that its application of § 105(a) equity powers to student loan dischargeability was influenced by the earlier Sixth Circuit opinion in *Ten-*



*Hornsby* is unique in the flexible approach jurisprudence because of its holding that student loans could be partially discharged using § 105(a) *even absent a showing of undue hardship*.<sup>114</sup> The Sixth Circuit announced that a court's equity powers could be used to provide relief, in the form of a partial discharge, from "oppressive financial circumstances."<sup>115</sup> Although *Hornsby* is widely cited and supported for its proposition that § 105(a) gives courts the authority to partially discharge student loans, a great majority of courts do not go so far as to dispense with the undue hardship requirement. Such courts acknowledge that although § 523(a)(8) does not mandate an all-or-nothing approach, it is nonetheless clear that such an analysis cannot be undertaken without a prerequisite finding of undue hardship.<sup>116</sup>

Typical of the majority view that § 105(a) can be used to partially discharge student loans upon a finding of undue hardship is *Saxman v. Educational Credit Management Corp. (In re Saxman)*.<sup>117</sup> *Saxman* represents the Ninth Circuit's final step in a progression of cases eroding and ultimately disapproving the all-or-nothing precedent set by the Ninth Circuit's Bankruptcy Appellate Panel in *Taylor*.<sup>118</sup> In *Saxman*, the Ninth Circuit held that although § 523(a)(8) was silent with respect to a court's power to order partial discharges, § 105(a)'s broad grant of equity powers operated to authorize such discharges.<sup>119</sup> In so holding, the court noted that "it is now generally recognized that an all-or-nothing approach . . . contravenes Congress' intent in granting bankruptcy courts equitable authority to enforce the provisions of the Bankruptcy Code."<sup>120</sup> The court reiterated its disapproval with the Sixth Circuit's jettisoning of the undue hardship requirement, however, cautioning that § 105(a)'s equity powers

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*nessee Student Assistance Corp. v. Cheesman (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994), wherein the court used its equity powers to stay an order of nondischargeability for eighteen months to see if the debtor could show undue hardship within that time. *Id.*

114. *Hornsby*, 144 F.3d at 439-40.

115. *Id.* at 440. While the court does not define "oppressive financial circumstances," it is presumed, based on the context in which it is used, to encompass a lower standard than undue hardship. Thus, a debtor should, at least intuitively, have an easier time establishing a case for loan dischargeability.

116. See, e.g., *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1174 (9th Cir. 2003) (disapproving the Sixth Circuit's abrogation of the undue hardship exception in favor of a lesser showing).

117. *Id.* at 1175.

118. *United Student Aid Funds, Inc. v. Taylor (In re Taylor)*, 223 B.R. 747 (B.A.P. 9th Cir. 1998). For a discussion of the holding in *Taylor*, see *supra* Part IV.A. For a subsequent case in the Ninth Circuit questioning and disapproving *Taylor*, see *Graves v. Myrvang (In re Myrvang)*, 232 F.3d 1116 (9th Cir. 2000); see also *Great Lakes Higher Educ. Corp. v. Brown (In re Brown)*, 239 B.R. 204 (S.D. Ca. 1999).

119. *Saxman*, 325 F.3d at 1173-74 (citing the § 105(a) argument made in *Hornsby* with approval).

120. *Id.* at 1174 (footnote omitted).

could only be permissibly exercised within the confines of the Code.<sup>121</sup> Therefore, a discharge was only appropriate for those debts meeting the substantive provisions of § 523(a)(8) (undue hardship).<sup>122</sup>

The § 105(a) equitable powers argument provides persuasive support for the flexible approach and is made by many courts promoting the partial discharge position.<sup>123</sup> It is not, however, the only argument that exists in support of this position, as numerous courts have justified partial discharge grants based on a finding of ambiguity in § 523(a)(8)'s language.<sup>124</sup> Such ambiguity, these courts posit, implicitly refutes an all-or-nothing approach; instead, it implicates and favors the flexible approach.

The crux of this ambiguity argument is delineated in *Heckathorn v. United States ex rel. U.S. Department of Education (In re Heckathorn)*, wherein the Bankruptcy Court for the Northern District of Oklahoma found the phrase "undue hardship" to be ambiguous.<sup>125</sup> The court began by noting that "'undue hardship' suggest[s] a matter of degree. Financial hardship is not all-or-nothing, but is more or less."<sup>126</sup> It then examined § 523(a)(8)'s legislative history, finding that such history revealed two desirable but mutually exclusive goals: the continued integrity and funding of student loan programs and the debtor's fresh start.<sup>127</sup> The court reasoned that the concept of undue hardship sought to reconcile these two goals, explaining that

[r]econciliation is not all-or-nothing; it often requires mutual concession and adjustment. The partial dischargeability or other modification of a student loan debt, to the extent its payment is an undue hardship, but no further, accomplishes both Congressional purposes of providing debtors with a "fresh start" while maximizing student loan repayment. Insisting on complete discharge or complete repayment unnecessarily sacrifices one policy to the other.<sup>128</sup>

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121. *Id.* at 1174-75; see also *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993).

122. *Saxman*, 325 F.3d at 1175.

123. See *Tenn. Student Assistance Corp. v. Mort (In re Mort)*, 272 B.R. 181, 184-85 (W.D. Va. 2002); *Kapinos v. Graduate Loan Ctr. (In re Kapinos)*, 243 B.R. 271, 276-77 (W.D. Va. 2000); *Nary v. The Complete Source (In re Nary)*, 253 B.R. 752, 767-70 (Bankr. N.D. Tex. 2000).

124. See *Rivers v. United Student Aid Funds, Inc. (In re Rivers)*, 213 B.R. 616, 618-19 (Bankr. S.D. Ga. 1997); *Wetzel v. N.Y. State Higher Educ. Servs. Corp. (In re Wetzel)*, 213 B.R. 220, 227 (Bankr. N.D.N.Y. 1996); *Raimondo v. N.Y. State Higher Educ. Servs. Corp. (In re Raimondo)*, 183 B.R. 677, 680-81 (Bankr. W.D.N.Y. 1995).

125. 199 B.R. 188, 194-95 (Bankr. N.D. Okla. 1996).

126. *Id.* at 195.

127. *Id.*

128. *Id.*

The court concluded by citing the statutory construction principle that a statute should not be read or applied in a manner that produces an absurd result or is at odds with the legislative scheme.<sup>129</sup> It found that strict adherence to the all-or-nothing approach would produce both of these results and therefore resolved § 523(a)(8)'s ambiguity in favor of permitting partial discharge.<sup>130</sup>

This analysis is typical of that found in cases basing support for the flexible position on a finding of ambiguity in § 523(a)(8).<sup>131</sup> When coupled with the § 105(a) equity powers argument, these two rationales provide a strong justification for the propriety of the partial discharge approach. It is thus easy to see why such an approach has persisted and gained wide judicial recognition over the last two decades. In order to fully comprehend the modern debate, however, it is necessary to acknowledge a newly emerging position that combines various aspects and policies of both the strict and flexible positions. In judicial parlance, it is termed the "hybrid" approach.<sup>132</sup>

### C. *The Hybrid Approach*

The hybrid approach essentially combines the philosophy of the all-or-nothing camp with the equitable results of the partial discharge camp.<sup>133</sup> Courts adhering to this view agree with the argument that § 523(a)(8) clearly and unambiguously requires an all-or-nothing determination, precluding the possibility of partial discharge.<sup>134</sup> These courts go on, however, to admonish both strict and partial approach courts for conducting their respective analyses under the assumption that student loan debt is a lump-sum, aggregated concept.<sup>135</sup> Rather, "there is no reason [a bankruptcy court] cannot treat each [loan] separately for the purpose of dischargeability."<sup>136</sup> In fact, "not separating educational debts into their individual loan components . . . is a misapplication of § 523(a)(8)."<sup>137</sup> Thus, assuming that a debtor has multiple student loans evidenced by individual promissory notes, the hybrid approach permits courts to discharge,

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129. *Id.*

130. *Id.* at 196.

131. *See* cases cited *supra* note 124.

132. *See* *Grigas v. Sallie Mae Servicing Corp.* (*In re Grigas*), 252 B.R. 866, 872-73 (Bankr. D.N.H. 2000) (describing the "hybrid" approach).

133. *See id.* at 873 ("This [approach] allows . . . courts to use the strict camp's reasoning to reach results often found in the flexible camp.").

134. *See* *Pincus v. Graduate Loan Ctr.* (*In re Pincus*), 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002) ("[T]his [c]ourt rejects the partial discharge approach.").

135. *See, e.g., Grigas*, 252 B.R. at 873.

136. *Hinkle v. Wheaton College* (*In re Hinkle*), 200 B.R. 690, 693 (Bankr. W.D. Wash. 1996).

137. *Grigas*, 252 B.R. at 873.

on a loan-by-loan basis, those loans that impose an undue hardship.<sup>138</sup>

The hybrid approach has its origins in *Hinkle v. Wheaton College (In re Hinkle)*, in which the debtor sought to discharge her aggregate student loan debt, consisting of six separate loans, under the undue hardship exception.<sup>139</sup> The court found that while it could not bifurcate a single loan into dischargeable and nondischargeable portions (based on strict approach reasoning), it could nonetheless conduct an undue hardship analysis for each individual loan, discharging only those loans that would create such hardship.<sup>140</sup> The court thus discharged three of the debtor's six loans; however, it did not provide reasoning or guidance as to its determination of *which* three loans should be discharged.<sup>141</sup>

Subsequent cases have provided guidance on this point, indicating that the determination should be chronologically based.<sup>142</sup> For example, in *Grigas v. Sallie Mae Servicing Corp. (In re Grigas)*, the Bankruptcy Court for the District of New Hampshire held that:

[T]he method used for selecting loans to be excepted from discharge under the hybrid approach should be objectively neutral among the various loans and lenders and should further the Congressional intent behind § 523(a)(8) in maximizing the repayment of the [d]ebtor's student loans short of imposing an undue hardship. . . . [Therefore,] the [c]ourt shall analyze each loan in chronological order, with the oldest loan being analyzed first.<sup>143</sup>

In conducting this temporal analysis, a court first determines the maximum monthly payment that can be made and the maximum period of repayment feasible given the debtor's circumstances.<sup>144</sup> The court then determines if this amount, paid over the given number of years, will pay off the oldest loan, and then reduces the payment amount accordingly for each of the subsequent loans.<sup>145</sup> Once the re-

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138. See *id.*; see also *Andresen v. Neb. Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999) (explaining that separate treatment of individual loans is not only allowed but required).

139. 200 B.R. at 692-93.

140. *Id.* at 693-94.

141. *Id.* at 694.

142. See *Lamanna v. EFS Servs., Inc. (In re Lamanna)*, 285 B.R. 347, 354 (Bankr. D.R.I. 2002) (agreeing with other courts' determinations that the hybrid approach should proceed from the first loan forward). The *Lamanna* court observed that it "seems proper" to start with the oldest loan first where all loans belong to the same creditor, but noted that this approach may not be appropriate where multiple creditors are involved. See *id.* at 354 n.4.

143. 252 B.R. at 876.

144. See *id.*

145. See *id.*

maintaining money is such that no more loans can be fully paid, these remaining loans are discharged as creating undue hardship.<sup>146</sup>

Hybrid-approach courts firmly believe that their approach to the partial discharge debate is superior to the approaches promulgated by both the strict and flexible camps.<sup>147</sup> The courts base this belief on their perception that a loan-by-loan analysis achieves the desired equitable result (from the perspective of both debtors and creditors) while at the same time staying true to the language of § 523(a)(8). This perceived ability to achieve the “best of both worlds” is indeed intriguing, and it is likely the reason that the hybrid approach is gaining increasing acceptance in bankruptcy courts across the United States.

## V. THE SUPERIOR APPROACH: PARTIAL DISCHARGE

As described above, both the strict and hybrid approaches enjoy logical underlying rationales and wide judicial recognition. Notwithstanding these facts, however, the flexible approach is the superior method for assessing student loan dischargeability under § 523(a)(8). This is true primarily because of the fairness inherent in the results of the position from the perspective of both debtors and creditors. It is also true because of the intrinsic limitations that plague the strict and hybrid approaches. An exploration of the results achieved by these positions clearly illustrates those limitations, bolstering the heightened fairness benefit of partial discharge. In addition, the flexible approach’s answers to the strict and hybrid positions’ main criticisms, namely based on the text and legislative history of § 523(a)(8), show these criticisms to be unfounded, giving further support to the superiority of the partial discharge position.

### A. *Response to Criticisms of the Flexible Approach*

The strict and hybrid approaches present essentially the same criticisms of the partial discharge position.<sup>148</sup> These criticisms are premised around four themes: the text of § 523(a)(8), the text of other Code provisions, the statute’s legislative history, and the scope of equitable powers available under § 105(a).

One critique of the flexible approach is that it reads the allowance of partial discharge into a statute that clearly and unambiguously precludes such a discharge. Strict and hybrid approach courts posit that § 523(a)(8) expressly limits undue hardship discharge to an all-

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146. *See id.*

147. This “firm belief” in the superiority of the hybrid approach is evidenced by the fact that the approach enjoys a substantial judicial following. *See supra* Part IV.C. for a discussion of cases adhering to the hybrid approach.

148. For a more detailed presentation of these criticisms, *see supra* Parts IV.A, IV.C.

or-nothing proposition. The statute, however, does not unambiguously mandate a limitation to either full dischargeability or nondischargeability; rather, it gives no direction except to say that a student loan debt is nondischargeable unless undue hardship would result from requiring repayment.<sup>149</sup> The clarity and precise direction that strict and hybrid courts claim to find in § 523(a)(8) simply do not exist. Therefore, these courts are wrong to base their refutation of the partial discharge position on the meager proclamation that § 523(a)(8) unambiguously precludes such a position.

Sensing the unpersuasiveness of merely stating the clarity of § 523(a)(8) as their primary argument against the flexible approach, strict and hybrid courts have also espoused the “to the extent” argument. The crux of this argument is that “to the extent” is used in various other provisions of § 523(a) to indicate partiality, yet it is absent in § 523(a)(8). Therefore, the strict- and hybrid-approach courts argue, this absence must indicate Congress’s intent to foreclose any possibility of partial discharge for student loans. This argument is flawed because the use of “to the extent” in sections 523(a)(2), (a)(5), and (a)(7) refers to the *classification/treatment*, or method of *incurrence*, rather than the *amount* of the debt.<sup>150</sup> For example, in § 523(a)(2), debts incurred for money, property, or services are excepted from discharge *to the extent* they are obtained by fraudulent activities or false statements.<sup>151</sup> Thus, only debt that can be classified as “fraudulently obtained” is deemed nondischargeable; the analysis focuses solely on how the debt was incurred. Similarly, in § 523(a)(5), family support debts are not dischargeable except *to the extent* that they are assigned to another entity.<sup>152</sup> Here, dischargeability hinges on how the debt is classified/treated rather than on the *amount* assigned to another entity. Therefore, in light of its varying meanings in other statutory sections, “to the extent” is not necessary in § 523(a)(8) because a partial discharge analysis does not examine the incurrence or classification/treatment of the debt in assessing the proper level of dischargeability. The “to the extent” argument, then, holds very little merit.

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149. See 11 U.S.C. § 523(a)(8) (2000).

150. This argument was also put forth by the District Court for the Southern District of California in *Great Lakes Higher Education Corp. v. Brown (In re Brown)*, 239 B.R. 204, 211 (S.D. Cal. 1999).

151. 11 U.S.C. § 523(a)(2) (2000). For clarity, “classification/treatment” refers to either how the debt is classified (for example, family support debts that are not assigned; fraudulently obtained debts) or how it is treated pre-petition to make it nondischargeable (for example, not assigning a family support debt makes it nondischargeable, whereas assigning it to another party makes it dischargeable).

152. *Id.* § 523(a)(5).

Further critique of the flexible approach is made regarding the legislative history of § 523(a)(8).<sup>153</sup> This critique posits that the progression of amendments to § 523(a)(8), which have increasingly limited the debtor's ability to obtain a discharge, evidences a Congressional intent to ensure full loan repayment.<sup>154</sup> Allowance of partial discharge would thus thwart this intent. The difficulty with this argument is that the legislative history fails to address loan dischargeability under the undue hardship exception. Rather, § 523(a)(8)'s history centers around two main themes: the definitional expansion of what "educational debt" includes, and the gradual lengthening and eventual abolition of the "temporal" discharge provision.

More specifically, the first theme essentially relates to an increase in the classification of debts deemed nondischargeable under this section. For example, although only loans made by governmental/nonprofit lenders were originally excepted from discharge, loans made by private lenders became nondischargeable through subsequent amendments to § 523(a)(8).<sup>155</sup> The second theme relates to the now repealed "temporal" discharge provision. This provision initially allowed discharge of student loans that were more than five years old. Subsequent amendments extended this period to seven years and eventually eliminated it altogether, leaving undue hardship as the sole basis for discharge of loan debt.<sup>156</sup>

In light of this legislative history, it is clear that Congress has neither addressed nor proscribed the availability of a partial discharge remedy. Additionally, because partial discharge only occurs upon a finding of undue hardship, and because undue hardship remains the only legitimate exception to nondischargeability, it follows that the availability of partial discharge has remained unaffected by the Congressional "narrowing" present in § 523(a)(8)'s legislative history.

Finally, it is inconsistent to claim that adherence to the strict approach's philosophy furthers a Congressional intent to ensure full creditor repayment. This is so because any amount of undue hardship may trigger full dischargeability in strict approach jurisdictions, thus causing creditors to lose out in full even when some repayment is possible.<sup>157</sup> This result is clearly at odds with a full repayment intent. Partial discharge, then, is the only way to maximize creditor

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153. See *supra* Part II.

154. Gargotta, *supra* note 92, at 29.

155. See Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789, 4964-65.

156. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837.

157. For elaboration on this argument, see *infra* Part V.B.

repayment while ensuring a meaningful existence for the undue hardship exception.<sup>158</sup>

A final criticism of the flexible approach relates to its use of § 105(a) equity powers as a justification for granting partial discharge of student loans. Strict and hybrid approach courts note that § 105(a) grants general equitable authority to bankruptcy courts, which cannot be used to supercede particular statutory provisions within the Code.<sup>159</sup> “Consequently, while bankruptcy courts may exercise equitable powers under § 105(a), they must do so within the parameters of more specific Code provisions. Section 105(a) cannot be used to circumvent the clear and unambiguous language of § 523(a)(8).”<sup>160</sup> This argument is nothing more than a reiteration of the plain meaning critique described above. Accordingly, it is answered by pointing out that § 523(a)(8) does not address or proscribe partial discharge. Therefore, § 523(a)(8) does not clearly and unambiguously limit undue hardship discharge to an all-or-nothing determination. In light of the absence of this limitation, it is wholly proper for courts to use § 105(a) to partially discharge loans, as such use falls within the confines of the Code because it does not override any specific contrary provision.<sup>161</sup>

Although the strict and hybrid approaches promulgate numerous criticisms of the flexible approach’s philosophy and methodology, the flexible camp’s answers to these criticisms show them to be unfounded. The flexible approach utilizes logical and persuasive reasoning in addressing and refuting such criticisms, bringing into question why they continue to exist. When these responses are coupled with an analysis of the other positions’ inferiority in dealing with student loan discharge, it is clear that partial discharge is the better approach.

### B. Why the Other Approaches Are Inferior

The strict approach is inferior principally for its inflexibility and rigidity in the treatment of student loans under § 523(a)(8). Essentially, the underlying principle of the strict approach that dischargeability is an all-or-nothing proposition is its fatal flaw. Strict obedi-

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158. Obviously, the best way to ensure full repayment would be to make student loans nondischargeable in all cases. This, however, would not enable the undue hardship exception to enjoy a meaningful existence, and would thus be contrary to Congress’s intent in including it in the statute.

159. See *United Student Aid Funds, Inc. v. Taylor* (*In re Taylor*), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998).

160. *Id.* at 754.

161. For a judicial utilization of § 105(a)’s powers as a justification for partially discharging student loans, see *Saxman v. Educ. Credit Mgmt. Corp.* (*In re Saxman*), 325 F.3d 1168, 1173-74 (9th Cir. 2003). See also discussion *supra* Part IV.B.



ence to an all-or-nothing position incorrectly assumes that all student loan debtors can neatly be categorized into one of two groups: debtors who can pay in full (thus, no undue hardship) and debtors who can pay nothing (because of undue hardship). This assumption implicitly ignores both the amount of loan debt and the fact-sensitive circumstances of each debtor (although these are the two most important factors in conducting the undue hardship analysis). Strict approach courts base their entire determination on the presence or absence of undue hardship, which consequently determines the group into which the debtor will be placed.<sup>162</sup> The problem is that there are not only two groups of student loan debtors; rather, there is an infinite continuum, with the two aforementioned groups at opposite extremes and the debtor whose circumstances (constituting undue hardship) allow repayment of exactly one-half of the loan debt at the middle. It is the existence of this “middle” debtor and those others who exist somewhere short of the extremes that make the strict approach both economically and fundamentally unfair.<sup>163</sup>

To illustrate this unfairness at its most extreme point, consider a debtor owing \$10,000 in student loan debt. Imagine that under the *Brunner* test, it would constitute an undue hardship for this debtor to repay \$1000 of the debt.<sup>164</sup> Under these facts, some strict approach courts would discharge the entire \$10,000 because of the existence of undue hardship, notwithstanding the fact that this debtor could repay \$9000 over the loan term. The same result is conceivable if undue hardship would result from requiring repayment of \$500, or even \$100. Theoretically, a debtor capable of a ninety-nine percent repayment could nevertheless be absolved of his entire loan obligation even with a small amount of undue hardship. Admittedly, the more money a debtor is capable of repaying, the less likely a court will be to find the requisite hardship. However, it is no less economically un-

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162. For a discussion of the standards used in determining undue hardship, see *supra* Part III.

163. It will be argued that under the strict approach, two kinds of unfairness are created: economic and fundamental. Creditors suffer economic unfairness when at least some loan repayment is possible, and yet the entire loan is discharged based on undue hardship. This is so because the creditors are being denied money that is otherwise capable of being paid. On the other hand, debtors suffer both economic and fundamental unfairness when undue hardship is present as to some but not all of the loan debt, and yet none of the debt is discharged. The economic unfairness here arises because the debtor is required to pay money he or she cannot pay. More importantly, fundamental unfairness arises because the undue hardship exception, included as a debtor protection, is rendered worthless for a debtor who actually needs its protection. Requiring full repayment when it is simply not possible is unfair on a most fundamental level.

164. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). It is acknowledged that the *Brunner* test does not pinpoint the exact amount of debt creating the undue hardship. Rather, this determination is made by evaluating all of the debtor's current and projected future circumstances and essentially making an educated and analytical estimation of how much debt will create such hardship.

fair to give a debtor capable of repaying \$5000 a full discharge than it is to give one capable of repaying \$9000 the same discharge.<sup>165</sup> In both cases, some repayment is possible, and yet both respective creditors still receive nothing.

Problems on the converse side persist as well. While some strict approach courts discharge too much debt, as above, others may discharge too little. For example, in the above illustration, suppose the debtor could repay \$1000 but not the remaining \$9000. A strict approach court taking an overly narrow view of undue hardship may find that because repayment of the *entire* \$10,000 balance would not create undue hardship, no discharge is appropriate. While this is an extreme case, the same is true for a debtor capable of repaying any amount short of the full balance, as the ability to repay any amount essentially means that undue hardship does not exist as to the full amount. In this situation, the roles are reversed: The debtor is severely disadvantaged by being required to repay an amount that his circumstances make impossible to pay, while the creditor enjoys a windfall in the denial of discharge.<sup>166</sup> This situation thus implicates both economic and, more importantly, fundamental unfairness from the debtor's perspective.<sup>167</sup>

Many strict approach courts do not discuss *how much* of a debtor's aggregate student loan debt creates undue hardship. Rather, they examine the debtor's circumstances, apply the appropriate test, and make an all-or-nothing dischargeability determination. Perhaps there is no acknowledgement that only *part* of a debt could create undue hardship because these courts do not want to open the door to the partial discharge position by analyzing the loan debt in an amount short of its aggregate value. Perhaps an even more plausible explanation is that there is no such acknowledgment because these courts do not want to explicitly announce in every case outside of the two extremes that they are in fact creating a windfall for one party or the other. Either way, the strict approach is fatally flawed because of the inequitable results derived from its adherence to all-or-nothing determinations and the sustained imbalance of benefits flowing to either the creditor or the debtor.

The hybrid approach is equally flawed. It suffers from the same limitations and inequities as the strict approach because it whole-

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165. See discussion *supra* note 158.

166. While technically a creditor is merely receiving what it is owed with full repayment, I argue that a proper and meaningful application of § 523(a)(8) would not mandate full repayment in some situations. In these situations, proper application of § 523(a)(8) would preclude full repayment, yet strict approach courts nonetheless order full repayment. In essence, the creditor is getting some repayment that it would not otherwise receive if the exception was properly applied (and, I argue, proper application is only possible with the flexible approach). Thus, creditors are, in a real sense, receiving a windfall.

167. See discussion *supra* note 158.

heartedly embraces the strict approach's reasoning in rejecting the partial discharge position.<sup>168</sup> Supporters may argue that these inequities are lessened as a result of the hybrid approach's loan examination on an individual rather than aggregate basis, allowing, in essence, a "partial" discharge of the total debt without restructuring a single loan. The same problems found in the strict approach persist here as well, however, because hybrid approach courts are still making all-or-nothing determinations on individual loans. This implicates the same difficulties brought to light through the above illustration. Although admittedly on a smaller scale (because of proceeding loan-by-loan instead of in the aggregate), these courts are nevertheless creating windfalls for one of the parties.<sup>169</sup>

The hybrid approach is inferior for other reasons as well. One reason is that the approach is only available for nonconsolidated loans.<sup>170</sup> If the debtor sought to take advantage of better interest rates or lower administrative costs by consolidating his or her loans into a "single" loan, the hybrid approach would be of no help in bankruptcy because of its aversion to partial discharge. Treatment of each loan individually is not possible since consolidation creates only one individual loan. Therefore, in hybrid approach jurisdictions, student borrowers have a choice: consolidate and foreclose any possibility of hybrid approach-style partial discharge in bankruptcy or do not consolidate and pay higher interest rates (and administrative costs) in order to keep open the possibility of beneficial bankruptcy treatment. In effect, this approach appears to deter the practice of loan consolidation, which ultimately may be in the best interest of both the debtor and creditor.

Another reason for the approach's inferiority is its discrimination of student loan creditors based on the chronology of their lending. In hybrid approach jurisdictions, repayment analyses are made starting with the oldest loans first and continuing forward.<sup>171</sup> This means that

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168. See *Grigas v. Sallie Mae Servicing Corp.* (*In re Grigas*), 252 B.R. 866, 872-73 (Bankr. D.N.H. 2000) (noting the hybrid approach's agreement with the strict approach's view that a loan cannot be restructured or partially discharged).

169. It is acknowledged that the amount of windfall is logically less than in the strict approach because it would only arise in the context of a single loan. For example, if a debtor has six loans and the court discharges loans five and six because of undue hardship, the windfall could have only been created in loans four or five. This is so because the debtor may have had hardship in paying part of loan four, and yet the court required repayment, giving the creditor a windfall. Conversely, the debtor may have had hardship in paying part of loan five, and yet the court discharged the entire loan, giving the debtor a windfall. Thus, the effects of the all-or-nothing approach and its resultant windfall are limited to a single loan under the hybrid approach.

170. See *Lamanna v. EFS Servs., Inc.* (*In re Lamanna*), 285 B.R. 347, 352 n.2 (Bankr. D.R.I. 2002) (acknowledging that the hybrid approach would probably not apply in cases of loan consolidation).

171. See *Coutts v. Mass. Higher Educ. Corp.* (*In re Coutts*), 263 B.R. 394, 401 (Bankr. D. Mass. 2001) ("A reasonable starting point is with the oldest loan forward.").

if the debtor has some ability to repay, the oldest loan is paid in full, and so on, until this ability is exhausted. Thus, the most recent lenders are always detrimentally affected when the court discharges a portion of the debtor's loans, as their loans are indubitably the ones discharged. In light of this discrimination, windfalls here are not only created on a debtor-creditor level but also on a creditor-creditor level, as the earliest lenders will always be paid in full if some repayment is possible.<sup>172</sup>

Based on the foregoing discussion, it is clear that the hybrid and strict approaches are inferior to the partial discharge position for a number of reasons. First, the flexible approach does not create windfalls. Instead, it ensures balanced fairness by discharging a loan to the extent it creates undue hardship and ordering repayment of the part that does not. In this way, neither party benefits at the expense of the other.

Second, the flexible approach does not discriminate for or against creditors. Loans are viewed on an aggregate basis, with the discharged portion shared pro rata by all of the student loan creditors.<sup>173</sup> Thus, all creditors are treated equally, enhancing the fairness of this approach.

Finally, the flexible approach does not limit the availability of partial discharge to nonconsolidated loans, which would otherwise hinge the level of discharge on an unrelated pre-bankruptcy choice. Since such loans are viewed in the aggregate, consolidation plays no role in the analysis, and hence cannot defeat what would otherwise be a proper partial discharge.

## VI. CONCLUSION

In sum, the partial discharge position is clearly superior, and courts should uniformly embrace its philosophy and benefits when proceeding under § 523(a)(8). The approach properly comports with both the statutory language and legislative history of § 523(a)(8). In addition, it ensures omnipresent economic and fundamental fairness in its results from the perspective of both the debtor and creditor. This is true economically for the creditor, as he or she will always be paid if some repayment is possible. It is also true fundamentally for the debtor, as he or she will never be required to pay more than his

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172. See Gargotta, *supra* note 92, at 30 (noting the hybrid approach's discrimination in loan discharges).

173. See *Nary v. The Complete Source (In re Nary)*, 253 B.R. 752, 769 (Bankr. N.D. Tex. 2000). The *Nary* court noted that "§ 523(a)(8) 'permits the discharge, on a pro rata basis, of only that portion of the outstanding education indebtedness which exceeds an amount that the debtor can pay without undue hardship.'" *Id.* (quoting *Raimondo v. N.Y. State Higher Educ. Servs. Corp. (In re Raimondo)*, 183 B.R. 677, 681 (Bankr. W.D.N.Y. 1995)).

or her circumstances dictate, allowing for a meaningful use of the undue hardship exception. Thus, in light of the numerous reasons for the flexible approach's superiority, it is somewhat surprising that the strict and hybrid approaches still continue to enjoy acceptance in our bankruptcy jurisprudence.