THE EVOLVING TREATMENT OF STUDENT LOANS IN BANKRUPTCY

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I. INTRODUCTION

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The United States Bankruptcy Code was first enacted in its modern formulation in 1978.[1] Since its inception, it has provided for a debtor to receive a discharge of debts, which, generally speaking, acts as a permanent injunction against a debtor's creditors from seeking to collect or enforce any debts against the debtor which were in existence on the date the debtor filed for bankruptcy.[2] However, Congress has continually maintained certain "exceptions" to a debtor's discharge of certain types of debts, which, in the judgment of Congress, would be against public policy. The public policies underlying certain exceptions

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2022)).
2. The specific scope of a debtor's discharge in bankruptcy varies depending on the Chapter of the Bankruptcy Code under which the debtor filed. *See, e.g.*, 11 U.S.C. § 727 (Chapter 7 discharge); *Id.* § 1141(d) (Chapter 11 discharge); *Id.* § 1228 (Chapter 12 discharge); *Id.* § 1328 (Chapter 13 discharge). However, regardless of the scope of the debtor's discharge, the discharge of debt is provided for, and enforceable through the discharge injunction. *See id.* § 524.

to discharge are fairly obvious and straightforward and typically involve the debtor's "bad acts." For example, debtors cannot discharge debts for taxes owed to the United States for tax returns which were never filed,[3] for wrongful death or personal injury claims against the debtor arising from the debtor's unlawful operation of a motor vehicle, vessel, or aircraft while the debtor was intoxicated by alcohol or drugs,[4] or debts in the nature of criminal restitution for federal criminal convictions.[5] Other exceptions to discharge reflect Congress's judgment that bankruptcy should not relieve debtors of important familial obligations, such as debts owed to a former spouse or a debtor's children in the nature of alimony or support.[6] Perhaps the most curious exception to discharge is the well-known exception to discharge most student loans,[7] as there does not appear to be anything inherently "bad" about a debtor incurring debts to obtain a higher education.

In fact, when the modern Bankruptcy Code was first enacted, student loans were *presumptively* dischargeable as long as they had gone into repayment more than five years before the debtor filed for bankruptcy.[8] Over time, Congress has consistently amended the Bankruptcy Code to restrict the ability of debtors to discharge student loans.[9] At the same time, it has consistently broadened the category of debts that qualify for the student loan exception to discharge. When the modern Bankruptcy Code was first enacted, this exception was limited to debts which were owed directly to the federal government or to a nonprofit institution of higher education.[10] Today, student loans are presumptively *not* dischargeable in bankruptcy, and can only be discharged if the debtor makes an affirmative showing that excepting the debt from discharge would "impose an undue hardship on the debtor and the debtor's dependents."[11]

One provision of the student loan exception to discharge in bankruptcy that has remained constant since 1978 is the "undue hardship" language in the statute—it is not defined in the Bankruptcy Code.[12] Consequently, bankruptcy courts were left to formulate their own judicial standard for

3. *Id.* § 523(a)(1)(B)(i).
4. *Id.* § 523(a)(9).
5. *Id.* § 523(a)(13).
6. *Id.* § 523(a)(5). *See also id.* § 101(14A) (defining a "domestic support obligation").
7. *Id.* § 523(a)(8).
8. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2591 (1978) (codified as amended at 11 U.S.C. § 523(a)(8)).
9. *See infra*, Part II.
10. *See supra* note 8.
11. 11 U.S.C. § 523(a)(8).
12. *See, e.g.*, Wolph v. United States Dept. of Educ. (*In re Wolph*), 479 B.R. 725, 729 (Bankr. N.D. Ohio 2012) ("As used in § 523(a)(8), the term 'undue hardship' is not defined.").

what constituted an "undue hardship." The seminal case on the issue is *Brunner v. New York State Higher Education Services Corp.*[13] The issue facing many debtors—and bankruptcy courts—today is that when *Brunner* was decided in 1987, the Bankruptcy Code still provided that student loans were *presumptively* dischargeable if they had "first became due before five years of the date of the filing of the petition."[14] Thus, the *Brunner* court faced a rather unsympathetic debtor who sought to avail herself of the "undue hardship" exception to the five-year waiting period rule in order to immediately discharge her student loans.[15] *Brunner* may arguably be construed today as the paradigmatic case where "bad facts make bad law."

The issue facing bankruptcy courts and debtors today is that while the Bankruptcy Code's exception to discharge for student loan debts has remained largely static,[16] a series of governmental programs have made most federally-backed student loans subject to increasingly flexible (but optional) voluntary repayment programs.[17] Many of these programs base the debtor's required monthly payment on the debtor's income and can result in debtors having a required monthly payment of $0.00 on their student loans.[18] Ironically, this situation has arguably disparately impacted the poorest debtors, as those with the lowest incomes are the most likely to have available income-based repayment options that call for no monthly payments.[19] Faced with debtors who have the option to essentially service their federally-backed student loans for no monthly payments, bankruptcy courts around the country have struggled to reconcile *Brunner's* "undue hardship" test with the proliferation of income-based repayment options available to debtors today.[20]

Part II of this Article briefly summarizes the relevant amendments to the Bankruptcy Code's exception to discharge for student loans, through which Congress consistently made student loans more difficult to discharge in bankruptcy and simultaneously broadened the category of debts that qualify for this exception to discharge. Part III of this Article briefly summarizes the evolution of the federally-backed student loan programs and the modern income-based repayment options available under many of

13. Brunner v. N.Y. State Higher Educ. Serv.'s Corp., 831 F.2d 395 (2d Cir. 1987).
14. Bankruptcy Reform Act of 1978, § 101, 92 Stat. at 2591.
15. *See Brunner*, 831 F.2d at 396–97 ("Finally, as noted by the district court, Brunner filed for the discharge within a month of the date the first payment of her loans came due.").
16. While the scope of loans which qualify for the exception to discharge under 11 U.S.C. § 523(a)(8) was last amended in 2005, the test for discharging student loans has remained the same since Congress made student loans presumptively non-dischargeable in 1998. *See generally* discussion *infra* Part II.
17. *See infra* Part III.
18. *Id*.
19. *Id*.
20. *See infra* Part V.

these programs today. Part IV of this Article then examines the *Brunner* case and its "undue hardship" test in the context of its time and suggests that *Brunner* may now represent the prototypical case of bad facts making bad law. Part V then analyzes a number of modern bankruptcy court decisions that have struggled with how to apply the *Brunner* test when faced with debtors who have income-based repayment options available, which might enable them to service their federally-backed student loans with little or no monthly payments, and whether such debtors can demonstrate the undue hardship required under *Brunner* to qualify for a discharge of their loans.

II. Brief History of 11 U.S.C. § 523(a)(8)

Bankruptcy law has always been a uniquely federal issue in the United States—Congress was expressly empowered to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" in the U.S. Constitution.[21] The first significant federal laws governing bankruptcy were enacted in 1898.[22] The Bankruptcy Act of 1898, like the modern Bankruptcy Code,[23] provided for a discharge of debts, although it was not automatic and required the bankrupt to apply for it and prove his entitlement to the same.[24] However, the Bankruptcy Act of 1898 contained only four categories of debts which were excepted from discharge,[25] and student loans were not among them.[26] The Bankruptcy Act of 1898 was significantly overhauled by amendments enacted in 1938,[27] which broadened the debts excepted from discharge to include alimony and support obligations owed

21. U.S. Const. art. I, § 8, cl. 4.
22. Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544 (1898).
23. 11 U.S.C. §§ 101–1532.
24. The bankrupt was required to file an application for a discharge with the bankruptcy court, which would then hold a hearing on the application and would approve the discharge only if the debtor had not committed certain bankruptcy crimes or fraudulently concealed his true financial condition by destroying, concealing, or failing to keep financial records. *See* Bankruptcy Act of 1898, § 14, 30 Stat. at 550.
25. Debts were excepted from discharge if they were (i) for taxes owed to any governmental unit; (ii) arose from judgments against the bankrupt for fraud, obtaining property by false pretenses, or for willful and malicious injuries to the person or property of another; (iii) were not scheduled by the bankrupt in time for the creditor to file a proof of claim (unless the creditor had actual notice of the pendency of the bankruptcy case) or (iv) arose from the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer or fiduciary. *See id.* § 17, 30 Stat. at 550–51.
26. This is likely as a matter of historical circumstance rather than any specific policy judgment by Congress. At the turn of the nineteenth century the student loan industry as we know it today was not in existence.
27. Bankruptcy Act of 1938, Pub. L. No. 75-696, 52 Stat. 840 (1938).

to the debtor's spouse, former spouse, or dependents,[28] but which still did not address student loans.[29]

A. The Bankruptcy Code of 1978.

The modern Bankruptcy Code was enacted in 1978.[30] This was the first time that Congress expressly included student loan debts as a category of debts which could be excepted from discharge.[31] However, unlike the modern Bankruptcy Code, student loan debts were *automatically* dischargeable in bankruptcy under the 1978 Act if "such loan first became due before five years before the date of the filing of the petition[.]"[32] Moreover, the exception to discharge for student loans (then referred to by the undefined term "educational loan")[33] only covered two categories of debts: those which were owed "to a governmental unit, or "a nonprofit institution of higher education."[34] Private loans, even if they were an "educational loan," were dischargeable under the 1978 Act.

If the debtor could not wait for five years to file for bankruptcy after his or her student loans went into repayment, the 1978 Act provided an alternative means of discharging the debtor's educational loans: the loans could be discharged (even if they were less than five years old) if "excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."[35] As a practical matter, however, because of the way the 1978 Act was structured, the only debtors required to rely on the "undue hardship" alternative would be debtors whose student loans had gone into repayment less than five years before seeking bankruptcy relief. Otherwise, the student loans would be automatically discharged and there would be no need for the debtor to invoke the "undue hardship" exception to the exception.[36]

28. Also excepted from discharge under the Bankruptcy Act of 1938 were debts owed for "seduction of an unmarried female" as well as for a "breach of promise of marriage accompanied by seduction" as well as debts arising from "criminal conversation." *Id.* § 17, 52 Stat. at 851.

29. The Bankruptcy Act of 1938 also excepted from discharge of certain debts owed by the debtor to his employees or agents in the nature of unpaid wages or funds owed to the employee but held or retained by the employer. *See id.*

30. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

31. *See id.* § 101, 92 Stat. at 2591.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* discussion *infra* Part IV (showing this was precisely the fact pattern that resulted in the *Brunner* test).

B. Expansion of Student Loans that Qualify for the Exception to Discharge.

Due to constitutional infirmities, the Bankruptcy Reform Act of 1978 was short-lived.[37] It was replaced by the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").[38] BAFJA added an additional exception to discharge for debts arising from injuries caused by the debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated.[39] It also made a minor amendment to the language of 11 U.S.C. § 523(a)(8), which served to broaden the category of debts included in the student loan exception to discharge: instead of debts owed to "a nonprofit institution of higher education" being subject to the exception, now debts were subject to exception if they were owed "to a nonprofit institution."[40] However, BAFJA otherwise left the two-pronged approach to dischargeability of student loans established by the 1978 Act undisturbed. In other words, a debtor filing a case under BAFJA could still automatically discharge his or her student loans if they had gone into repayment more than five years prior to the debtor filing for bankruptcy or, failing that, could seek to prove that excepting the debt from discharge would impose an "undue hardship" on the debtor and his or her dependents.[41]

C. The "Waiting Period" for Presumptive Dischargeability of Student Loans is Extended to Seven Years, and Then Eliminated Entirely.

Perhaps surprisingly, the first major contraction of the Bankruptcy Code's then-generous provisions for discharging student loans was not enacted as part of any bankruptcy act. Instead, as part of the Crime Control Act of 1990,[42] Congress extended the "waiting period" whereby a debtor

37. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The question before the Court in *Marathon* was "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U. S. C. § 1471 (1976 ed., Supp. IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution." *Id.* at 52. The Court, answering this question in the affirmative, stayed its judgment for approximately four months to afford Congress "an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.* at 88.

38. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

39. *Id.* § 371, 98 Stat. at 364 (codified as amended at 11 U.S.C. § 523(a)(9)).

40. *Compare* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(8)), *with* Bankruptcy Amendments and Federal Judgeship Act of 1984 § 454(a)(2), 98 Stat. at 376 (codified as amended at 11 U.S.C. § 523(a)(8)).

41. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. at 376 (codified as amended at 11 U.S.C. § 523(a)(8)).

42. Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

could automatically discharge his or her student loans from five years to seven years.[43] Additionally, the new seven-year waiting period was paused for any period of forbearance or suspension of payments, which could materially lengthen the amount of time a debtor was required to wait before being entitled to automatically discharge his or her student loans in bankruptcy.[44]

Significantly, the Anabolic Steroids Control Act ("Crime Control Act") also dramatically increased the category of debts which qualified for this exception to discharge. Previously, the exception was limited to debts owed "to a governmental unit, or a nonprofit institution of higher education, for an educational loan[.]"[45] The Crime Control Act struck this and replaced it with "for an educational benefit overpayment or loan 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[.]"[46] Thus, after the Crime Control Act, debts owed by a debtor were subject to the student loan exception to discharge even if they were made by a private lender, so long as the debt was insured or guaranteed by any governmental unit. As discussed in Part III, this expansion likely coincided with the significant increase in student loan balances following the implementation of federal student loan programs.[47]

By 1998, Congress had entirely eliminated the "waiting period" and automatic discharge for student loans.[48] Thus, a debtor filing for bankruptcy after 1998 could rely *only* on the "undue hardship" test to qualify for a discharge of his or her student loans. This affected a sea change in the treatment of student loans in bankruptcy, which overnight went from automatically dischargeable (subject to the "waiting period") to presumptively *non*-dischargeable.

D. Anatomy of the Modern Student Loan Exception to Discharge.

The next significant amendment to 11 U.S.C. § 523(a)(8) occurred with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[49] which made private student loans eligible for

43. *Id.* § 3621(2), 104 Stat. at 4965.

44. The complete text of this subparagraph of 11 U.S.C. § 523(a)(8), as amended by the Crime Control Act of 1990, read: "(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition. . . ."

45. Bankruptcy Reform Act of 1978 § 101, 92 Stat. at 2591.

46. Anabolic Steroids Control Act of 1990, § 3621(1), 104 Stat. at 4964–65.

47. *See infra* Part III.

48. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (1998).

49. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

the exception to discharge *regardless* of whether they were insured or guaranteed by any governmental unit, provided that they met the criteria for a "qualified educational loan," discussed below.[50] Congress completely rewrote this section of the Bankruptcy Code in BAPCPA, discarding the previous language of 11 U.S.C. § 523(a)(8) and replacing it with the following:

> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.[51]

This version of the statute is the same version that remains in force today.[52] In addition to reiterating that the "undue hardship" exception remains the only way for a debtor to overcome the presumptive non-dischargeability of student loans, the statute now has three discrete categories of debts which might qualify for this exception to discharge, and requires the reader to cross-reference the Internal Revenue Code to fully understand the scope of the exception.

A "qualified education loan" is a defined term in the Internal Revenue Code.[53] It means "any indebtedness incurred by the taxpayer solely to pay *qualified higher education expenses*"[54] which satisfy three relational requirements.[55] A "qualified higher education expense," in turn, is defined as the "cost of attendance"[56] as set forth in the Higher Education Act of 1965,[57] as

50. *Id*. § 220, 119 Stat. at 59.
51. *Id*.
52. *See* 11 U.S.C. § 523(a)(8); *see also* Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 603 (2d Cir. 2021) ("The statute took its current, three-subsection form in 2005 when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ('BAPCPA').").
53. 26 U.S.C. § 221(d)(1).
54. *Id*. (emphasis added).
55. The expenses must be (i) incurred on behalf of the taxpayer, his spouse, or his children, (ii) paid or incurred within a reasonable period of time before or after the indebtedness was incurred, and (iii) are attributable to education furnished during a time that the recipient was an eligible student. *See id.* § 221(d)(1)(A)–(C).
56. *Id*. § 221(d)(2).
57. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965). Note that while 26 U.S.C. § 221(d)(2) refers to the cost of attendance "as defined in

amended by the Higher Education Act of 1986.[58] The "cost of attendance" (which is a "higher education expense") includes expenses for tuition and fees,[59] an allowance for books, course materials, supplies, and equipment, which may include expenses for the rental or purchase of a personal computer,[60] an allowance for transportation,[61] an allowance for living expenses including room and board,[62] and an allowance for childcare if the student has one or more dependents.[63] Additionally, if the student is enrolled at least half-time, the "cost of attendance" includes "miscellaneous personal expenses,"[64] and can also include study abroad expenses if the student's institution includes such a program.[65] Importantly, the loan is also only a "qualified educational loan" if the costs of attendance were incurred to attend an "eligible educational institution,"[66] which is limited to institutions "eligible to participate in a program under Title IV of" the Higher Education Act of 1965.[67]

Private student loans not insured or guaranteed by a governmental unit must be a "qualified educational loan" to fit within the exception to discharge in 11 U.S.C. § 523(a)(8)(B). This can result in factual disputes because as the various statutes make clear, when parsed together, a private student loan is only a "qualified educational loan" if it was incurred by the debtor "**solely** to pay qualified higher education expenses."[68] In other words, if the debtor can prove that any portion of the loan at issue was used for something *other* than the "costs of attendance" permitted under 20 U.S.C. § 1087*ll*, then the debtor can prove that the private loan is in fact *not* a "qualified educational loan," and therefore does not fall within the scope of

section 472 of the Higher Education Act of 1965," section 472 was not added to statute until passage of the Higher Education Act of 1986.

58. Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986) (codified as amended at 20 U.S.C. § 1087*ll*).

59. 20 U.S.C. § 1087*ll*(a)(1).

60. *Id*. § 1087*ll*(a)(2).

61. *Id*. § 1087*ll*(a)(3).

62. *Id*. § 1087*ll*(a)(5).

63. *Id*. § 1087*ll*(a)(9).

64. *Id*. § 1087*ll*(a)(4).

65. *Id*. § 1087*ll*(a)(8).

66. 26 U.S.C. § 25A(f)(2).

67. *Id*. § 25A(f)(2)(B)*; see also* Youssef v. Sallie Mae, Inc. (*In re Homaidan*), 650 B.R. 372, 415 (Bankr. E.D.N.Y. 2022) (citations omitted) ("Section 523(a)(8)(B) plainly excludes certain private student loans . . . from the scope of a debtor's bankruptcy discharge—but only where specified criteria are met. These criteria include that the student borrower attended or intended to attend a Title IV institution and received a private loan that is within the cost of attendance at that institution as defined by Internal Revenue Code Section 221(d)." (citations omitted)).

68. 26 U.S.C. § 221(d)(1) (emphasis added).

§ 523(a)(8)'s exception to discharge. Moreover, although many private lenders have attempted to shoehorn private student loans into § 523(a)(8)(A)(ii), arguing that they are an "obligation to repay funds received as an educational benefit,"[69] this argument has been uniformly rejected by the Courts.[70]

For example, in *Homaidan v. Sallie Mae, Inc.*,[71] the debtor had taken out private student loans with Navient Solutions, LLC and Navient Credit Finance Corporation, among others.[72] The debtor later filed a petition for bankruptcy relief under Chapter 7 of the Bankruptcy Code and received his discharge, but paid the loans off in full after receiving his discharge as a result of payment demands by the lenders and their collection agent (which purportedly led the debtor to believe that the loans at issue had not been discharged in bankruptcy).[73] He then moved to reopen his bankruptcy case and filed an adversary proceeding against Navient and the other lenders for violation of the discharge injunction.[74] The defendants moved to dismiss the complaint, arguing that the loans had been excepted from discharge by § 523(a)(8), but the bankruptcy court denied their motion and held that the loans were not excepted from discharge.[75] The district court certified the lender's appeal from the bankruptcy court's order for direct appeal, and the U.S. Court of Appeals for the Second Circuit ultimately affirmed the bankruptcy court's holding.[76] Navient, apparently conceding that the loans at issue did not qualify as a "qualified educational loan" under § 523(a)(8)(B), argued that the loans qualified as '"an obligation to repay funds received as an educational benefit, scholarship, or stipend,' under § 523(a)(8)(A)(ii)."[77] Navient asserted that its loans to the debtor were

69. 11 U.S.C. § 523(a)(8)(A)(ii).

70. *See, e.g.*, Crocker v. Navient Sols., LLC (*In re Crocker*), 941 F.3d 206, 224 (5th Cir. 2019) (quoting 11 U.S.C. § 523(a)(8)(A)(ii))

> "We conclude that "educational benefit" is limited to conditional payments with similarities to scholarships and stipends. The loans at issue here, though obtained in order to pay expenses of education, do not qualify as "an obligation to repay funds received as an educational benefit, scholarship, or stipend" because their repayment was unconditional. They therefore are dischargeable."

71. Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021).

72. *Id.* at 598.

73. *Id.* at 598–99.

74. *Id.*

75. *Id.* at 599.

76. *Id.* at 605.

77. "Navient does not argue (in this appeal, at least) that the loan it made to Homaidan falls into either the first [§ 523(a)(8)(A)(i)] or third [§ 523(a)(8)(B)] categories. Nor does Navient argue the loan constitutes a "scholarship" or "stipend." Therefore, the only question remaining is whether Navient's loan is 'an obligation to repay funds received as an educational benefit' under § 523(a)(8)(A)(ii)." *Id.* at 601.

an "educational benefit."[78] In rejecting this argument, the Court observed that Navient's construction of the term "educational benefit" was unsupported by the plain meaning of the statute and violated the canon against surplusage.[79]

E. Procedure for Determining Dischargeability of Student Loans.

With a working understanding of what types of debts qualify for the exception to discharge under § 523(a)(8), it is important to understand the procedural requirements for determining whether a particular student loan is excepted from discharge or not. Two points are critical here. First, the burden is on the party asserting a debt is excepted from discharge to prove: (1) there is a debt owed by the debtor and (2) the debt qualifies for a category of § 523(a) that excepts it from discharge. Second, it is only *after* the lender has proven the loan at issue qualifies under one of the three subsections of § 523(a)(8) that the burden shifts to the debtor to prove that excepting the loan from discharge would impose an "undue hardship" on the debtor and the debtor's dependents.[80] Moreover, because the debtor's discharge provides him with the "fresh start" that is one of the fundamental policies of the Bankruptcy Code, exceptions to discharge are narrowly construed.[81]

Another procedural wrinkle is important—there are three categories of debts which can be excepted from discharge that are effectively "raise it or lose it" arguments.[82] In other words, if the lender does not timely file[83] an adversary proceeding in the debtor's bankruptcy case seeking a determi-

78. *Id.*
79. *Id.* at 602–03.
80. 11 U.S.C. § 523(a)(8).
81. *See, e.g.*, Affordable Bail Bonds, Inc. v. Sandoval (*In re Sandoval*), 541 F.3d 997, 1001 (10th Cir. 2008) ("Exceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor.").
82. The three types of debt subject to this strict temporal limitation are (1) debts for certain types of fraud or misrepresentation under § 523(a)(2); (2) debts for fraud or defalcation while acting as a fiduciary, or for embezzlement or larceny under § 523(a)(4); and (3) debts for willful and malicious injury by the debtor to the person or property of another, § 523(a)(6). 11 U.S.C. § 523(c)(1).
83. There is a strict deadline for filing these types of adversary proceedings. *See* Fed. R. Bankr. P. 4007 (detailing in cases under Chapter 7, 11, 12, or 13, the deadlines is sixty days from the *first* date set for the § 341 meeting of creditors (not the date that the § 341 meeting is ultimately held)). Worse, if this deadline is missed, the Court is powerless to extend it *even if* the lender can show that it missed the deadline due to excusable neglect. *See id.*(permitting court to extend deadline if motion to extend is "filed before the time expires"); Fed. R. Bankr. P. 9006(b)(3)(A) (clarifying that standard of excusable neglect otherwise applicable under Rule 9006(b) does not apply to extensions of time under Rule 4007(c)).

nation that the debt is excepted from discharge under one of these three categories, the lender forever loses the opportunity to make that argument and the debt is automatically discharged.[84] Importantly, the exception to discharge for student loans under § 523(a)(8) is *not* one of the three categories of "raise it or lose it" debts.[85] This is important in the case of student loans because the issue of dischargeability can be raised by either the debtor or the lender. As illustrated in *Homaidan*, many debtors go through bankruptcy without securing a final determination as to whether their student loans are or are not dischargeable because neither the debtor nor the lender files an adversary proceeding seeking such a determination.[86] Many debtors may simply assume because the loan is a student loan, it cannot be discharged, and many lenders may be content to abstain from seeking a definitive determination from the bankruptcy court on the issue.[87] However, as *Homaidan* and others illustrate,[88] this is a risky approach by lenders because the debtor may later seek to reopen the bankruptcy case. If the debtor proves that the debt *was* discharged,[89] the lender may be liable not

84. 11 U.S.C. § 523(c).

85. *Id.*

86. *See* Fed. R. Bankr. P. 7001(f) (providing a proceeding to determine the dischargeability of a debt is an adversary proceeding). *Compare* Fed. R. Bankr. P. 7001 (detailing one of the procedural mechanisms in how disputes in bankruptcy cases are resolved via adversary proceedings, which function as discrete lawsuits that are litigated within the bankruptcy case and subject to numerous Federal Rules of Civil Procedure, requiring a summons and complaint just like a typical federal lawsuit), *with* Fed. R. Bankr. P. 9014 (explaining the other procedural mechanism in resolving disputes in bankruptcy cases through "contested matters," which are typically resolved via motion and response in the underlying bankruptcy case, and includes matters such as objections to claims, objections to a debtor's claim of exemptions, objections to plan confirmation, motions to sell property, and the like).

87. *See, e.g.*, *In re* Haroon, 313 B.R. 686, 689 (Bankr. E.D. Va. 2004) ("The failure to seek a dischargeability determination does not alter the fact that the debt is or is not discharged upon entry of the discharge order. It merely avoids a judicial declaration of that fact at that time.").

88. *See, e.g.*, McDaniel v. Navient Sols., LLC (*In re McDaniel*), 973 F.3d 1083 (10th Cir. 2020); Crocker v. Navient Sols., LLC (*In re Crocker*), 941 F.3d 206 (5th Cir. 2019); Irigoyen v. 1600 W. Invs., LLC (*In re Irigoyen*), 659 B.R. 1 (B.A.P. 9th Cir. 2024); *see also Haroon*, 313 B.R. at 689.

> "There are ramifications from not seeking a dischargeability determination, that is, whether the debt falls within an exception of § 523. One ramification is that *a creditor who attempts to collect the debt proceeds at his own peril and accepts the consequences of his own actions*. If a creditor wants to avoid the adverse consequences of an erroneous analysis, he can come to this court at any time, even after the case has been closed, and seek an adjudication of the dischargeability issue." (emphasis added).

89. It is important to note that the liability of the lender here is limited to situations where the debt was discharged because it never qualified for any of

only to repay amounts it collected on a discharged debt, but also potentially for sanctions and damages for violation of the discharge injunction.[90]

In summary, student loans are excepted from discharge if the lender meets its burden of proving the debt at issue fits into one of the three categories of debts covered by § 523(a)(8). The categories are generically described as (i) federally-backed student loans; (ii) obligations to repay scholarships, stipends, or other educational benefits; or (iii) any other loan (including a private loan) that is a "qualified educational loan."[91] Some private loans may not qualify under § 523(a)(8) because they may have been made in amounts in excess of the cost of attendance, were made for the debtor to attend a non-accredited institution, or may have been paid directly to the debtor so that the lender cannot prove whether the funds were or were not actually used for the cost of attendance. Once the lender has met its burden, the burden shifts to the debtor to prove that excepting the debt from discharge would work an "undue hardship" on the debtor and the debtor's dependents. Only if the debtor can make that showing will the debt be discharged. As the next portions of this Article explain, applying the *Brunner* test to traditional federally-backed student loans can present significant issues for the bankruptcy court when a debtor is in a repayment plan—or has the option—that would require the debtor to make no monthly payments to continue to "service" the debt at issue.[92]

III. The History and Evolution of Federally-Backed Student Loans and Flexible Repayment Options

A. Historical Overview of the Federally-Backed Student Loan Program in the United States.

The history of and the increasing availability of federally backed student loan programs is a direct reflection of the federal government's desire to provide expanded access to higher education opportunities to the citizens

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the three categories of debts described in § 523(a)(8) in the first place, *not* because the debt was in fact covered by § 523(a)(8) and the debtor later proved that excepting the debt from discharge would impose an undue hardship on the debtor. As the *Irigoyen* court aptly observed "in 'undue hardship' cases, debtors do not receive a discharge of a qualified educational loan until they obtain a judgment from the bankruptcy court declaring the debt dischargeable." *Irigoyen* 659 B.R. at 10 (emphasis added). Whereas "where the debt never qualified as the type of nondischargeable debt covered by § 523(a)(8), *it was discharged with all other dischargeable debts at the same time the debtor obtained a general discharge order*." *Id.* at 12 (emphasis added).

90. The discharge injunction is a statutory injunction found at 11 U.S.C. § 524(a). It is the procedural mechanism by which creditors of a debtor are forever barred and enjoined from attempting to collect a discharged debt once the debtor has received her discharge.

91. 11 U.S.C. § 523(a)(8).

92. *See infra* Part IV.

of the United States of America and its territories. Over the last eighty years, the role of the federal government has grown to be the central part of the financing system for higher education.

Prior to World War II, access to higher education was primarily financed through individual wealth, family contributions, and limited private scholarships offered by various colleges/universities, philanthropies, and other charitable institutions.

In the Summer of 1944, President Franklin D. Roosevelt signed into law the Servicemen's Readjustment Act (1944),[93] commonly referred to as the "G.I. Bill," to offer federal aid to veterans returning from service in World War II to adjust to civilian life. The G.I. Bill offered assistance for medical/hospitalization expenses, funds for the purchase of a home or business, and specifically education opportunities[94] and was accessed by millions of returning armed services members.

In 1958, the National Defense Education Act[95] was passed to establish federal funding for low-interest student loans primarily in the fields of science, engineering and foreign languages fueled by completive concerns for technological advancement and preparedness during the Cold War with the Soviet Union.[96]

The Higher Education Act of 1965 ("HEA") expanded the federal government's role in supporting higher education by creating the Federal Family Education Loan Program ("FFELP"), which allowed private lenders to offer student loans guaranteed by the federal government in the event of default.[97] HEA also created a "need-based" grant program intended to further access to higher education for low-income individuals.[98]

By the 1970s, the first of several substantial expansions of federal student loans began with the expansion of Title IV of HEA to provide for increased student loan amounts and to make said loans widely available to students.[99] In 1972, the Supplemental Educational Opportunity Grant Program was created to offer assistance to low-income students in the financing of secondary education.[100]

93. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944).
94. Election of Benefits, 57 Stat. 43 .38 U.S.C., Supp. III, note toll. § 732. Post, p. 291.
95. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).
96. *Id*. § 101.
97. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).
98. *Id*. § 421 at 1236.
99. 34 C.F.R. §§ 676.9–676.10, 668.32(c)(1).
100. Matt Aschenbrener, *Federal Financial Aid Policy: Then, Now, and in the Future*, NASPA (Mar. 10, 2016), https://www.naspa.org/blog/federal-financial-aid-policy-then-now-and-in-the-future.

During the 1970s, the FFELP grew significantly with private lenders becoming the first line of funding sources for student loans.[101] To reduce the risk for such lenders and to increase the likelihood of loans being made, the federal government offered guaranty programs to ensure payment of defaulted loans. The federal government also increased its role in providing opportunities for "need-based" students with the advent of the Federal Work-Study Program and Federal Pell Grants that did not require repayment of funds earned or provided.[102]

During the 1980s, the rising costs of tuition, fluctuating student loan interest rates, and growing student reliance on loans as the primary source of tuition payment sparked the start of federal policymakers becoming concerned with the amount of debt being incurred by America's students. However, no significant policy changes were made until the 1990s.

In 1992, Congress passed the Student Loan Reform Act.[103] This started the process and groundwork for the development of the Direct Loan Program, allowing students to borrow directly from the federal government rather than private lenders who originally spearheaded the program, thus creating a more streamlined and predictable process that would eliminate costs associated with the FFELP.

In the years following the establishment of the Direct Loan Program, federal student loans became more accessible and more common. These factors drove concerns among policymakers and lawmakers regarding the amount of educational debt incurred by American students and the cumbersome repayment terms. These concerns led to the development of more attractive repayment options, such as income-driven repayment ("IDR"), which became law with the College Cost Reduction and Access Act ("CCRAA").[104]

The CCRAA also introduced the Public Service Loan Forgiveness Program ("PSLF"), which offers federal student loan forgiveness to certain borrowers who are employed by a qualifying public service institution and have made 120 payments for ten years or more.[105]

As America entered the 21st Century, the cost of higher education outpaced inflation and income, resulting in a drastic increase in student debt.

101. Higher Education Act of 1965, at Title I, Part E.

102. For purposes of SIP, Title IV need-based assistance includes Federal Supplemental Educational Opportunity Grants, Federal Work Study, and Federal Perkins Loans but not Subsidized Stafford Loans. As later noted, Federal Perkins Loans are no longer being issued to students. Additionally, Subsidized Stafford Loans are now known as Direct Subsidized Loans.

103. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 451, 107 Stat. 312, 341 (1993).

104. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, § 203, 121 Stat. 784, 792 (2007); *see also* 20 U.S.C. § 1098e(b).

105. College Cost Reduction and Access Act § 401 at 800.

The growing burden of student loan debt prompted several attempts at legislative reform.

In 2010, the federal government eliminated the FFELP and shifted entirely to direct loan programs with the enactment of the Health Care Education Reconciliation Act of 2010 ("HCEP").[106] To further consolidate federal control of the student loan market, HCEP introduced measures to eliminate the role of private lenders in federally backed programs.[107] HCEP adopted portions of the Student Aid and Fiscal Responsibility Act ("SAFRA"), which was passed by the U.S. House of Representatives in early 2010 but did not receive a vote from the U.S. Senate.[108] The higher education portion of HCEP is commonly referred to as the SAFRA Act.

Between 2007 and 2021, the federal government introduced multiple initiatives to offer relief for those borrowers experiencing challenges with their student loan balances and ability to repay loans.[109] IDR plans became more common to make student loan repayment affordable. IDR plans specifically consider several factors, such as the borrower's income and family size, in determining loan repayment terms.

In 2021, the American Rescue Plan[110] suspended federal student loan repayment and reset interest rates on certain loans to 0% to provide relief during the COVID-19 pandemic.[111]

As the cost of higher education increases and the burdens of student loans weigh on borrowers now in the workforce, the debate within the nation and with law makers continues as to the most pragmatic means to provide educational opportunities for future members of the American workforce play out in the economy and politics of the county.

B. The Two Coexisting Federal Student Loan Programs.

While the FFELP student loans were effectively eliminated in 2010,[112] it is important to understand the primary differences between the FFELP and the current William D. Ford Federal Direct Loan Program ("Direct Loan Program")[113] as the FFELP loans made before 2010 are still prevalent as many are within the loans' repayment period.

The primary difference between the Direct Loan Program and the FFELP is the source of the funding. The FFELP loans were provided by private lenders,[114] and the loans were guaranteed by the U.S. Department of Edu-

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106. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
107. *Id.*
108. Student Aid and Fiscal Responsibility Act of 2009, H.R. 3221, 111th Cong. (2009).
109. Health Care and Education Reconciliation Act § 2213.
110. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).
111. *Id.* § 2003 at 23.
112. Health Care and Education Reconciliation Act, 124 Stat. 1029.
113. 20 U.S.C. pt. D.
114. *Id.* § 1076.

cation in the event of a default by the original borrower.[115] The Direct Loan Program provided loans to eligible students and parents directly from the U.S. Department of Education for use at participating schools[116] in the form of Federal Direct Subsidized Loans,[117] Federal Direct Unsubsidized Loans,[118] Federal Direct Plus Loans,[119] and Direct Consolidation loans.[120]

Federal Direct Subsidized Loans are only available to undergraduate students with a verifiable financial need for funds up to $5,500.00, depending on the specific school. One of the primary benefits of the Direct Subsidized Loan is the U.S. Department of Education pays the interest on the loan while the borrower is at least a half-time student for the first six months after the borrower leaves school (commonly referred to as "grace period") and during any period of deferment or postponement of the loan payments.[121]

Federal Direct Unsubsidized Loans are available to undergraduate and graduate students with no need-based criteria. Loan amount limits are established by the specific school based on the total cost of attendance and other financial aid the borrower may be receiving.[122]

Direct Plus Program loans are made directly by the U.S. Department of Education and are only available for those students attending a graduate or professional program at a participating school. Borrowers applying for Direct Plus loans cannot have an adverse credit history and the maximum amount of the loan is the total cost of attendance minus any other financial aid received.[123]

Federal Direct Consolidation Loans are for the purposes of consolidating multiple loans made by the U.S. Department of Education after the borrower has graduated, left school, or dropped below half-time status. To qualify for a consolidation loan, the borrower must be in good standing during a current repayment plan or in a grace period.[124]

Repayment Terms

The FFELP offered borrowers three primary options for repayment of student loans. Those options included:

Standard Repayment Plan: Fixed monthly payments for up to ten years with the specific amount of the monthly payment being based up the total loan amount of the loan and the applicable interest rate. For students with

115. *Id*. § 1087b(b).
116. *Id*. § 1087b(a).
117. *Id*. § 1078.
118. *Id*. § 1078-8.
119. *Id*. § 1078-2.
120. *Id*. § 1078-3.
121. *Id*. § 1078.
122. *Id*. § 1078-8.
123. *Id*. § 1078-2.
124. *Id*. § 1078-3.

multiple loans, FFEL offered an option to consolidate those loans and extend the repayment period for a term of up to thirty years.

Graduated Repayment Plan: This repayment plan offers initially lower monthly payments that increase every two years. The borrower could select a repayment term of initially up to ten years. However, the repayment term could be extended up to thirty years for the sole purpose of consolidating multiple FFEL loans. Borrowers with only one student loan could not qualify for this program.

Extended Repayment Plan: This plan offers repayment for terms of up to twenty five years. The Extended Repayment Plan was only available for those qualifying borrowers with more than $30,000 in FFEL student loans. This repayment option could also be combined with a Standard or Graduated repayment plan previously referenced.

In contrast, the Direct Logan Program offers multiple repayment options that, in some instances, were tailored to growing affordability concerns for those borrowers with family obligations and/or are working in career fields with traditionally lower wages/salaries.

The Direct Loan Program offers the three traditional repayment options provided for in FFEL and additional options for borrowers with affordability concerns. Those additional options include:

Income Driven Repayment Plan: Income Driven Repayment Plans (“IDR”) establish the borrower’s monthly student loan payment by considering multiple factors, including the total amount of the borrower’s income, the borrower’s discretionary income, and the borrower’s family size/obligations. Discretionary Income is minimally defined as the difference between annual income and a percentage of the poverty guideline for the borrower’s family size and state of residence. Each of the available repayment plans uses a differing criteria to further define or determine discretionary incomes, as you will see below.

C. The Advent of Flexible Repayment Options for Federally-Backed Student Loans.

Income Contingent Repayment (“ICR”) plans were introduced in the 1992 reauthorization of the Higher Education Act (“HEA”).[125] The primary goal of this portion of HEA was to make student loan repayment less burdensome for those borrowers who acquired higher levels of student loan debt relative to their current income. ICR plans were the direct result of legislative concerns regarding the rising cost of higher education, the relative stagnant nature of income growth during the relative time period, and the burdens said debt levels were placing on borrowers entering the employment market at entry-level wages or those entering fields with traditionally lower wages. ICR was also partially in response to economic down-

125. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 416, 106 Stat. 448, 529.

turns experienced during the early 1990s with hopes that current and future borrowers would maintain some degree of flexibility while still giving the Department of Education some expectation of when these loans would be repaid.

It is important to note that these ICR repayment options were not available to borrowers using the FFELP as ICR did not come into existence until 1992, and Congress did not undertake any successful action to make ICR repayment options a part of the FFELP, even though it continued to operate until 2010.

D. A Brief Overview of the Modern IDR/IBR Options.

In 2015, the Direct Loan Program introduced Revised Pay As You Earn ("REPAYE") as an option for federal student loan repayment.[126] The program's intent was to allow borrowers to manage their payments by capping monthly payments at ten percent of the borrower's discretionary income and the size of their family. In addition to the income-based repayment option, REPAYE also offered loan forgiveness for any remaining loan balance for undergraduate student loans after twenty years of qualifying payment and similar forgiveness for graduate-level loan balances after twenty-five years of qualified payment. Lastly, REPAYE offered interest subsidies for a portion of certain borrowers who incurred interest when the calls for monthly payments were too low to cover the interest incurred, thus preventing ever-increasing loan balances.[127]

The Direct Loan Program currently offers four income-driven repayment plans available to qualifying borrowers provided their current loan(s) are not in payment default. IDR plans also require all participating borrowers to "recertify" their income and family size annually, even if there have been no changes.[128]

<u>Saving on a Valuable Education (SAVE) Plan:</u> This plan was formally known as the REPAYE. While REPAYE was never formally discontinued by the Department of Education, the SAVE plan was introduced in 2023 as the replacement for REPAYE with several key revisions to the plan.[129] Participation in SAVE is limited to new borrowers that do not have existing loan balances on a Direct Loan or a FFEL loan when the borrower received the Direct Loan or FFEL loan on or after October 1, 2007, and the borrower has not received a disbursement from a Direct or FFEL loan on or after

126. Student Assistance General Provisions; Federal Family Education Loan Program and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67 412 (Oct. 30, 2015).
127. 20 U.S.C. § 1087e(d)(1)(E); 34 C.F.R. § 685.209.
128. 20 U.S.C. § 1087e(d)(5).
129. *The Saving on a Valuable Education (SAVE) Plan Offers Lower Monthly Loan Payments*, U.S. Dep't of Educ., https://studentaid.gov/announcements-events/save-plan.

October 1, 2011. SAVE monthly payments cap was reduced to 5% of the borrower's discretionary income as opposed to REPAYE's 10% cap. SAVE also offers a more generous package of interest subsidies to prevent loan balances from increasing during periods of lower payments.[130]

It is important to note that the SAVE Repayment Program has been the subject of a legal challenge in Federal Court by a seven-state coalition.[131] The coalition alleges the U.S. Department of Education and the Secretary of Education lack the statutory authority to provide loan forgiveness and unlawfully attempt to Implement the "Third Mass Cancellation Rule" intending to cancel hundreds of billions of dollars in student loans and have instructed federal contractors to do so as early as September 3, 2024.[132] The Defendants and the SAVE Repayment Program enjoined "from mass canceling student loans, forgiving any principal or interest, not charging borrowers accrued interest, or further implementing any other actions under the Rule or instructing federal contractors to take such actions."[133]

<u>Pay As You Earn (PAYE) Plan:</u> Borrowers qualifying for the PAYE program must participate in an eligible original loan program where the borrower's monthly payments are less than what the borrower's monthly payment would be under the Standard Repayment Plan with a ten year term. A borrower will generally qualify for the PAYE repayment plan if their outstanding loan balance is higher than the borrower's annual discretionary income or constitutes a significant portion of the borrower's annual income. PAYE monthly payments are capped at 10% of discretionary income and the repayment terms are capped at twenty years.[134]

<u>Income Based Repayment (IBR) Plan:</u> Much like PAYE, IBR borrowers qualifying for the program must participate in an eligible original loan program where the borrower's monthly payments are less than what the borrower's monthly payment would be under the Standard Repayment Plan with a ten-year term. A borrower will also generally qualify for the IBR repayment plan if their outstanding loan balance is higher than the borrower's annual discretionary income or constitutes a significant portion of the borrower's annual income. Borrowers who first borrowed after July 1, 2014 will have their monthly payments capped at 10% of discretionary income for up to a term of twenty years. Borrowers who first borrowed before July 1, 2014 will have their monthly payments capped at 15% of discretionary income for up to a term of twenty-five years.[135]

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120. 20 U.S.C. § 1087e(f).
131. These states include Missouri, Arkansas, Florida, Georgia, North Dakota, Ohio, and Oklahoma.
132. Missouri v. United States Dep't of Educ., No. CV 224-103, 2024 WL 4069224, at *1–2 (S.D. Ga. Sept. 5, 2024).
133. *Id*. at *2.
134. 20 U.S.C. § 1087e(d)(1)(D); 34 C.F.R. § 685.219.
135. 20 U.S.C. § 1087e(d); 34 C.F.R. § 685.221.

Income Contingent Repayment (ICR) Plan: Under the ICR Plan, the borrower's payment will be based on the borrower's income and family size.[136] The borrower's monthly payment on an ICR plan will be the lesser of 20% of the borrower's discretionary income or what they would pay on a repayment plan with a fixed payment over the course of twelve years, adjusted to the borrower's income.[137] ICR plans will be capped at a twenty-five year term.[138]

IV. The *Brunner* Test in Context

Under the current version of 11 U.S.C. § 523(a), federal student loans are not discharged in bankruptcy proceedings. However, to the extent that a student loan debtor can prove that excepting the loan debt from discharge potentially imposes an "undue hardship" on the debtor and the debtor's dependents, said debtor may seek to have the debt discharged.[139]

Because the default rule is that student loans are non-dischargeable in bankruptcy, a debtor seeking a potential discharge of student loans must file an adversarial proceeding against the creditor/lender in order to obtain a determination of dischargeability under § 523(a)(8)(B) from the court.[140] The primary drivers of adversarial proceeding filings are: (1) a factual determination if the loan or debt constitutes a "qualified educational expense" and if not, is therefore potentially subject to discharge; or (2) in the instance when the loan clearly falls into the parameters of 11 U.S.C. § 523(a)(8)(A) or 11 U.S.C. § 523(a)(8)(B), the debtor wishes to still seek a discharge of the loan based on factual evidence supporting a finding that excepting the loan from discharge would impose an undue hardship on the debtor.[141]

In 1987, the seminal case of *Brunner v. N.Y. State Higher Education Services Corporation*,[142] resulted in the creation of the *Brunner* test adopted by a majority of courts.[143] The test's purpose was to determine if a student loan

136. 34 C.F.R. § 685.209.
137. *Id.*
138. 20 U.S.C. § 1087e(d).
139. 11 U.S.C. § 523(a)(8).
140. *Id.* § 523(a)(8)(B).
141. *Id.*
142. Brunner v. N.Y. State Higher Educ. Serv's. Corp., 831 F.2d 395 (2d Cir. 1987).
143. *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995); Educ. Credit Mgmt. Corp v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Oyler v. Educ. Credit Mgmt. Corp. *(In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993); United Student Aid Funds v. Pena (*In re* Pena), 155 F.3d 1108, 1114 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys (*In re Polleys*), 356 F.3d 1302,

debt constituted an "undue hardship" for the particular bankrupt debtor justifying a discharge. For the purposes of this analysis, it is important to understand the historical, factual, and legal context of the *Brunner* decision, the applicable bankruptcy law of the time, and why in this particular case bad facts can be said to have made bad law.

The *Brunner* test adopted by the Second Circuit requires a debtor seeking discharge of student loans to satisfy three elements: (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[144]

Prior to filing her bankruptcy petition, Brunner "received a Bachelor of Arts degree in 1979 and a Master's degree in [s]ocial [w]ork in May [of] 1982."[145] Approximately seven months after receiving her Master's degree, Brunner filed a *pro se* petition for personal bankruptcy under Chapter 7, pursuant to which her outstanding debts, excluding approximately $9,000 in student loans, were discharged.[146] Two months later, upon expiration of her nine month grace period suspending her repayment of the student loans incurred obtaining her undergraduate and graduate education, Brunner filed a *pro se* adversary proceeding seeking to discharge her accumulated student loan debt.[147]

The evidence presented to the bankruptcy court, and reviewed by the district court on appeal, also disclosed a number of factors regarding Ms. Brunner's situation that made her a less than sympathetic debtor. The district court record evidenced no additional circumstances indicating a likelihood that Brunner's then-current inability to find any work in her field would extend over a significant portion of the loan repayment period, and Brunner was not disabled, elderly, and had no dependents.[148] No evidence was presented indicating a total foreclosure of potential job prospects in her area of training.[149] At the time of the original hearing, "only ten months had elapsed since Brunner's graduation from her Master's program."[150] Finally, as noted by the district court, "Brunner filed for the discharge within a month of the date the first payment of her loans came due" and

1309 (10th Cir. 2004); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003).
144. *Brunner*, 831 F.2d at 396.
145. *In re* Brunner, 46 B.R. 752, 753(S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).
146. *Id.*
147. *Id.*
148. *Brunner*, 831 F.2d at 396–97.
149. *Id.* at 397.
150. *Id.*

"did so without first requesting a deferment of payment" which was available to those unable to pay because of prolonged unemployment, and "such conduct d[id] not evidence a good faith attempt to repay her student loans.[151]

When viewing the *Brunner* decision in a historic context, it is important to note that the modern Bankruptcy Code, enacted in 1978,[152] automatically permitted student loan debtors to discharge federally-backed student loans if the student loan had entered into repayment more than five years prior to the debtor filing for bankruptcy.[153] A debtor could seek discharge of such loans before that period had run if they could show that excepting the debt from discharge would create an "undue hardship" upon them.[154] For the purposes of seeking a bankruptcy discharge, "undue hardship" was not a defined term,[155] and as noted later by the *Brunner* court, there was very little appellate authority at the time on the definition of "undue hardship" in the context of 11 U.S.C. § 523(a)(8)(B).[156]

It is also important to understand that in 1984, an exception was created to include private student loans that were funded or guaranteed by a governmental unit or a nonprofit institution.[157]

Therefore, when viewing the *Brunner* in the light of these historical and factual circumstances, the court was not deciding if the debtor could *ever* receive a discharge of her student loans—the question before the *Brunner* Court was actually whether the debtor could receive discharge of her loans prior to waiting for the five year repayment period to run, in a case where the debtor had literally never made a payment on her student loans and had just recently finished a graduate program.

V. Too Poor for a Discharge? *Brunner* versus the IDR Plan

A. How Do Courts Reconcile the *Brunner* Test with a $0 Monthly Payment under an IDR Plan?

As discussed above, there are many repayment options available for debtors with federally-backed student loans that may result in a debtor enrolling in a repayment plan that calls for a monthly payment of $0. This is particularly true for debtors with low incomes and large numbers of dependents, since the debtor's monthly payment under most IDR plans is calculated based on a percentage of the federal poverty level for the

151. *Id.*
152. *See supra* Part I.
153. Bankruptcy Reform Act of 1978 § 101, 92 Stat. at 2591.
154. *See id.*
155. *Id.*
156. *Brunner*, 831 F.2d at 396.
157. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 376 (codified as amended at 11 U.S.C. § 523(a)(8)).

debtor's family size.[158] At the same time, the *Brunner* test requires the debtor to show that "the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans."[159] It also requires the debtor to show that she has "made good faith efforts to repay the loans."[160] This presents modern bankruptcy courts with at least two dilemmas.

First, can a court defensibly find that a debtor who can effectively service her student loans with no monthly payment whatsoever cannot maintain a "minimal" standard of living if the loans are excepted from discharge? On one hand, the fact that the debtor is living below the federal poverty-level threshold to qualify for a $0 monthly payment seems to suggest the debtor is in precisely the type of dire financial straits that *Brunner* requires. But on the other hand, if the debtor does not have to come out of pocket to service the loans, can the court adequately support a finding that she cannot maintain a minimal standard of living unless the loans are discharged? Second, if the debtor is enrolled in an IDR plan that calls for no monthly payment, does that qualify as a good faith effort to repay the loans, or should the court require more from the debtor, such as evidence that notwithstanding the debtor's calculated $0 monthly payment, she really cannot pay anything on the loans monthly? Bankruptcy courts around the country have struggled with these issues and how to apply the arguably antiquated *Brunner* test in the face of a new regime of IDR plans that permit debtors to service their federally-backed student loans with no monthly payments.

B. Which Prong of the *Brunner* Test Accounts for a Debtor With an IBR/IDR Plan With a $0 Monthly Payment?

The first significant disagreement among bankruptcy courts is where to analyze the debtor's $0 IDR payment requirement. Is this relevant to the first prong of the *Brunner* test (minimal standard of living) or the third (good faith)?

1. *The first prong—minimal standard of living.*

Some courts analyze the debtor's $0 IDR payment under the first prong of the *Brunner* test, asking whether the debtor can maintain a minimal standard of living for herself and her dependents if forced to repay the loans under the terms of the debtor's IDR plan. For example, in *In re Greene*,[161] the U.S. Bankruptcy Court for the Eastern District of Virginia

158. *See* 34 C.F.R. § 685.209(b) (defining a borrower's "discretionary income," which is used to determine required payments under available IDR plans, as the greater of $0 or the difference between the borrower's income and amounts ranging between 100% and 225% of the applicable federal poverty guideline, depending on the IDR plan).
159. *Brunner*, 831 F.2d at 396.
160. *Id.*
161. *In re* Greene, 484 B.R. 98 (Bankr. E.D. Va. 2012).

effectively announced what is arguably a *per se* rule that a debtor with a $0 monthly payment under an IDR plan can *never* satisfy the undue hardship requirements imposed by *Brunner*.[162]

> By virtue of her participation in the Income Contingent Plan, Ms. Greene's contractual payments on her Student Loan are presently zero. The resulting mathematic reality is that the present required monthly payment of zero on the Student Loan does not impact Ms. Greene's ability to maintain a minimal standard of living.[163]

Although the *Greene* court took pains to acknowledge that the undue hardship analysis is inherently fact-driven,[164] the reality of its holding is that *any* debtor with an IDR plan calling for a $0 monthly payment would categorically fail the first prong of the *Brunner* test. In each case, the "resulting mathematic reality" would be that the required $0 payment does not impact the debtor's ability to maintain a minimal standard of living.

It should be noted that the *Greene* court cited to the U.S. Court of Appeals for the Fourth Circuit's decision in *Education Credit Management Corp. v. Frushour (In re Frushour)*,[165] which is significant because the *Frushour* court analyzed the $0 monthly payment issue under the *third* prong of the *Brunner* test. The court found that the debtor's failure to enroll in the Income Contingent Repayment Loan Program ("ICRP"), which would have resulted in a monthly payment of between $0 and $5 per month, was indicative of the debtor's lack of good faith effort to repay her loans.[166] However, perhaps just as significant, the *Frushour* court declined the creditor's invitation to adopt a *per se* rule that a debtor who paid for internet and cable television subscriptions maintained more than a "minimal" standard of living as a matter of law, opining that such a result was "too harsh," and reiterating that the "undue hardship test necessarily requires a case-by-case approach to determine whether certain expenses are or are not essential for maintaining a minimal standard of living."[167] Of course, using the rule articulated in *Greene*, a case-by-case approach would never be necessary for a debtor with a $0 per month IDR payment because the debtor would fail the first prong of the *Brunner* test as a matter of law.

Another bankruptcy court rejected the creditor's invitation to make such a broad *per se* rule on the impact of a $0 IDR payment on the first prong of the *Brunner* test. In *Booth v. U.S. Department of Education (In re Booth)*,[168] the

162. *Id*. at 120.
163. *Id*.
164. *Id*. at 109 ("Each undue hardship discharge must rest on its own facts. . . .") (quoting Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 869 (Bankr. E.D. Va. 2006)).
165. Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393 (4th Cir. 2005).
166. *Id*. at 402–03.
167. *Id*. at 400.
168. *In re* Booth, 410 B.R. 672 (Bankr. E.D. Wash. 2009).

U.S. Bankruptcy Court for the Eastern District of Washington denied the creditor's motion for summary judgment in the debtor's adversary proceeding where she was seeking to have approximately $160,000 in student loans discharged by satisfying *Brunner's* undue hardship test.[169] The debtor had participated in an ICRP prior to filing for Chapter 7, and the creditor sought a ruling where a debtor participated in an ICRP that called for a monthly payment of $0, the debtor could not satisfy the first prong of the *Brunner* test as a matter of law.[170]

In rejecting this argument, the bankruptcy court relied on two principal findings. First, the court found that unlike a discharge of student loans under § 523(a)(8), "the focus of the ICRP is on deferral, not discharge, of debt," indicating the "antithesis of a fresh start."[171] Moreover, although the debtor may qualify for forgiveness of the unpaid loan balance after twenty-five years of participating in the ICRP,[172] the cancellation or forgiveness of the loans could result in tax liability, while discharging the loans in bankruptcy would not.[173] Second, the court was concerned that by adopting a *per se* rule that a $0 monthly payment for a debtor under an ICRP plan would effectively repeal § 523(a)(8) and replace the judicial discretion afforded to bankruptcy courts with a mechanical administrative calculation:

> "Holding that an administrative decision to temporarily defer monthly repayments precludes application of the statutory undue hardship standards usurps the Bankruptcy Code. It destroys the jurisdiction of the bankruptcy court and would not allow any exercise of discretion by a bankruptcy judge. Granting the defendants' motion would effectively replace a statutory case-by-case analysis potentially relieving a debtor from liability with an administrative formula which potentially defers liability."[174]

Because Congress had not explicitly repealed § 523(a)(8) with the ICRP, it would be inappropriate for the court to make such a blanket holding. Although the *Booth* decision merely denied the creditor's motion for summary judgment, the debtor and creditor ultimately resolved the dispute via a stipulated judgment. The judgment provided that $15,000 of the debtor's student loans would be excepted from discharge while any balance owed above that amount would be discharged.[175]

169. *Id.* at 673–74.
170. *Id.*
171. *Id.* at 676.
172. *See* 34 C.F.R. § 685.209(k) (outlining requirements for loan forgiveness under various federal IDR plans).
173. *Id.*
174. *Booth*, 410 B.R. at 677.
175. Booth v. U.S. Dept. of Educ. (*In re* Booth), No. 08-03493-PCW7, Adv. No. 08-80130-PCW, Judgment of Nondischargeability (ECF No. 62) (Bankr. E.D. Wash. Feb. 11, 2010).

2. *The third prong—good faith.*

The U.S. District Court for the District of Kansas held that a debtor's $0 monthly IDR plan payment is more appropriately considered under *Brunner's* good faith (third prong), recognizing that "[i]f an IDR plan were considered under the first prong, then that plan would prove dispositive whenever the debtor could make the IDR payment (including when the plan's formula called for no payment at all)."[176] In *Education Credit Management Corp v. Goodvin (In re Goodvin)*, the court affirmed the bankruptcy court's finding that the debtor would suffer an undue hardship if his student loans were excepted from discharge.[177] Interestingly, rather than discharging the debtor's student loans *in total*, the bankruptcy court ordered a partial discharge of the debtor's loans, holding that it had the power, under § 105(a) of the Bankruptcy Code, to discharge only the older consolidation loan owed by the debtor, which was accruing interest at a much higher rate than a more recent loan.[178]

Similarly, the U.S. Bankruptcy Court for the Southern District of Ohio analyzed a debtor's participation in an IDR payment plan under *Brunner*'s good faith prong in *Hasting v. United States Department of Education (In re Hastings)*.[179] The court found the debtor's failure to take advantage of the IDR program, among other issues, supported a finding that the debtor had not made a good faith effort to repay the loans.[180] In *Hasting*, the debtor sought to discharge more than $275,000 in student loans.[181] Although he was eligible to enroll in the REPAYE program, the cheapest IDR plan available,[182] which would have required a monthly payment of $419.19 based on his household income of approximately $83,000 annually, he failed to do so.[183] Additionally, the fact that the debtor never contacted the Department of Education about potential enrollment in the REPAYE program, or any other IDR plan, coupled with the fact that he had voluntarily reduced

176. Educ. Credit Mgmt. Corp v. Goodvin (*In re* Goodvin), No. 20-CV-1247-JWL, 2021 WL 1026801, at *15 (D. Kan. Mar. 17, 2021).

177. *Id.* at *9.

178. In fact, the bankruptcy court found that the debtor had already paid $19,527 on this older consolidation loan, which had been in the original principal amount of only $12,077! *Id.* at *8–9.

179. Hastings v. U.S. Dep't of Educ. (*In re* Hastings), 643 B.R. 470, 479 (Bankr. S.D. Ohio 2022).

180. *Id.* at 480.

181. *Id.* at 473.

182. *See* 34 C.F.R. § 685.209(a)(1). The REPAYE plan is also referred to in regulations as the Saving on a Valuable Education (SAVE) plan and permits the borrower to calculate his "discretionary income" to calculate required monthly payments based on the highest multiplier of the federal poverty rate—225%. *See id.* at (b)(i).

183. *Hastings*, 643 B.R. at 474–75.

his annual income by more than $20,000 by changing jobs, the court found that the debtor could not satisfy the third prong of the *Brunner* test as a matter of law.[184]

C. Is There a Correct Approach to the Issue?

As the above cases illustrate, there is no right or wrong answer to how bankruptcy courts should reconcile a debtor's $0 monthly IDR plan payment with *Brunner's* undue hardship test. However, the lack of judicial uniformity highlights the need for Congressional action to legislatively address the issue—either the discharge of student loans under § 523(a)(8) should be expressly addressed in the IDR regulations or § 523(a)(8) should be amended to provide guidance on how courts are to apply the undue hardship analysis in a case where a debtor's IDR payment plan calls for no monthly payments. In the absence of uniform Congressional action, bankruptcy courts applying diverging approaches to the issue leave similarly-situated debtors with materially disparate outcomes depending on the vagaries of their geographic location when they seek bankruptcy relief. The result is demonstrably at odds with the Constitution's mandate that Congress make "uniform" laws on the subject of bankruptcy.[185] Both debtors and lenders deserve more certainty on this issue.

VI. Conclusion

When the *Brunner* test was enacted in 1987 to prevent a new graduate from discharging her student loans without participating in the five-year "waiting period" then available (which would have automatically discharged her loans), it made sense for the courts to apply a test which was rigid, inflexible, and designed to ensure that only truly destitute debtors could discharge their student loans. After all, at that time, the only time the issue would arise would be for a debtor who simply could not wait for the "waiting period" to run to automatically discharge her loans. It is doubtful that the *Brunner* court envisioned its test being applied in the modern era where a proliferation of IDR plans for federally-backed student loans made it possible for the poorest debtors to qualify to service their loans with a $0 monthly payment. Since Congress eliminated the "waiting period" for automatic discharge of student loans but never revisited *Brunner's* articulation of the statutory language in § 523(a)(8), modern bankruptcy courts are left to speculate as to how the test should be applied to debtors with a $0 monthly IDR payment. The issue may be appropriately addressed in the first prong of the *Brunner* test (minimal standard of living) or the third prong (good faith), but it should be uniformly applied by bankruptcy courts nationwide. In the absence of Congressional action to clarify

184. *Id.* at 480.
185. U.S. Const. art. I, § 8, cl. 4.

how § 523(a)(8) should be impacted, if at all, by the availability of IDR plans with $0 monthly payments, creditors and debtors alike will continue to face materially different outcomes depending on what court they litigate the issue before. Bankruptcy courts, creditors, and debtors deserve more. It is time for Congress to take seriously its mandate to "uniform" the laws of bankruptcy throughout the United States.