The Nondischargeability of Student Loans in Bankruptcy: How the Prevailing "Undue Hardship" Test Creates Hardship of Its Own

By Feather D. Baron*

Introduction

The American Medical Association recently reported that a staggering seventy-two percent of medical school students accumulate a minimum of $100,000 of educational debt prior to graduation.1 Similarly, the Law School Admissions Council determined that the average law school student who borrows both government-insured and private loans graduates with $90,000 in educational debt.2 Not only are these current figures astounding, but the financial burden on students is growing every year. The average level of indebtedness of graduating medical students increased by 8.5% from 2005 to 2006,3 and in the last year alone, the University of San Francisco School of Law increased tuition from $29,057 to $33,790.4 While educational costs are on the rise, salaries in the legal and medical professions are not keeping pace. In 2005, the average third-year medical resident earned an after-tax income of only $33,083.5 In 2007, attorneys employed at

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small law firms were projected to earn as little as $46,000 in their first year.\(^6\)

As students continue to borrow funds to finance education, graduates unable to repay educational loans may be forced to consider bankruptcy as a method of reducing or eliminating debt liabilities. Student loans, however, are classified as nondischargeable debts under the current Bankruptcy Code,\(^7\) which prevents most former students from avoiding repayment of educational loans through bankruptcy.\(^8\)

Recognizing the potentially harsh consequences of this bright-line prohibition, Congress provided one exception to the rule: a debtor may discharge educational debt if he or she demonstrates that repayment would impose "undue hardship" on the debtor or the debtor's dependents.\(^9\) Congress, however, did not specify what constitutes "undue hardship,"\(^10\) and courts consequently developed tests to determine whether a debtor's degree of hardship is sufficiently "undue" to warrant discharge.\(^11\) The Second Circuit articulated the most prominent hardship analysis in Brunner v. New York State Higher Education Services.\(^12\) Under the three-part Brunner test, repayment of student

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8. 11 U.S.C. § 523(a)(8); Kielisch v. Educ. Credit Mgmt. Corp. (In re Kielisch), 258 F.3d 315, 320 (4th Cir. 2001) (quoting IRS v. Cousins, 209 F.3d 38, 40 (1st Cir. 2000)). Debtors ordinarily "remain personally responsible for their non-dischargeable student loan debts, and those debts pass or ride through the bankruptcy unaffected and are a post-bankruptcy liability for the former debtor." Kielisch, 258 F.3d at 320.
10. Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. 2003) (noting that the "Bankruptcy Code does not define the phrase and courts have struggled with its meaning").
11. Id. ("A divergent body of appellate authority has attempted to unwrap the 'undue hardship' enigma.").
12. Brunner v. N.Y. State Higher Educ. Serv. Corp. (In re Brunner), 46 B.R. 752 (Bankr. S.D.N.Y. 1985), aff'd, 831 F.2d 395 (2d Cir. 1987). This Comment focuses on the inadequacies of the Brunner test because Brunner is followed in nine circuits. See infra note 46. However, the minority totality-of-the-circumstances test used in the Eighth Circuit suffers from a similar lack of timing language and is consequently subject to the same timing debate as Brunner. See Bender v. Educ. Credit Mgmt. Corp. (In re Bender), 297 B.R. 126, 132 (Bankr. D. Neb. 2003), aff'd, 368 F.3d 846 (8th Cir. 2004). When faced with the issue of when, during a Chapter 13 case, the totality-of-the-circumstances test applies, the Eighth Circuit concluded that "[a]s a matter of law . . . the question of dischargeability under § 523(a)(8) should not hinge upon the [debtors'] current financial condition, but, rather should be dependent upon their ability to pay off the loans after emerging from bankruptcy protection." Bender, 297 B.R. at 132. The Bender court, however, has since been criticized as adding "a judicial gloss to § 523(a)(8) by defining the issue as whether undue
loans constitutes “undue hardship” if: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans; (2) the state of affairs will likely persist for a significant portion of the repayment period; and (3) the debtor has made a good-faith effort to repay the loan.13

Absent from the Brunner test is an explanation of when a court should apply the Brunner factors. It is unclear whether courts should apply the factors to circumstances as they exist at the time of general discharge or to circumstances at the time a debtor files a dischargeability action, even if the action is filed prior to discharge. In Chapter 7 bankruptcy proceedings, where a debtor’s assets are liquidated to repay creditors, Brunner’s timing ambiguity has little bearing on the hardship analysis because Chapter 7 cases are short in duration14 and result in a quick discharge of unsecured dischargeable debts.15 Chapter 13 cases, however, require a debtor to adhere to a repayment plan that may extend up to five years, and discharge of dischargeable debts occurs only at the completion of a debtor’s repayment plan.16 Due to the length of a Chapter 13 case, a debtor who seeks a dischargeability determination years before the bankruptcy case closes necessarily does so years before discharge is scheduled to occur.17


15. Debtors are permitted to seek dischargeability determinations during the bankruptcy case, or may petition to reopen the bankruptcy case once closed to determine dischargeability issues. Raisor v. Educ. Loan Serv. Ctr. (In re Raisor), 180 B.R. 163, 167 (Bankr. E.D. Tex. 1995); 4 COLLIER ON BANKRUPTCY ¶ 523.04 (Alan N. Resnick & Henry J. Sommer eds., 15th ed., rev. 2007). In either case, the court need not speculate as to the debtor’s financial state at the time of discharge, as discharge is either imminent or has already occurred. 9 COLLIER ON BANKRUPTCY, supra, ¶ 4004.04[1] (“Rule 4004(c) requires that the chapter 7 discharge be entered forthwith as soon as the time for objecting to the discharge and the time for the United States trustee to move to dismiss the case under Rule 1017(e), including any extension granted on motion, has expired. This requirement is designed to bring about an expeditious discharge in chapter 7 cases and a prompt fresh start for the debtor once there is no longer any possibility that a discharge will be denied or that the case will be dismissed, even if the administration of the estate will continue for some time.” (internal citations omitted)).


17. See, e.g., Ekenasi, 325 F.3d at 547 (noting that “[w]here an adversary proceeding seeking discharge of a student loan obligation is brought early in a Chapter 13 case . . .
The difference in timing between Chapter 7 and Chapter 13 discharge is critical in hardship analysis—Chapter 13 requires the successful completion of a plan before a discharge is granted, while Chapter 7 does not. When faced with the question of when to apply Brunner in Chapter 13 cases, some courts dismiss dischargeability actions as premature if filed prior to discharge.\textsuperscript{18} In contrast, other courts apply the Brunner test to a debtor’s circumstances as they exist at the time a dischargeability action is filed, regardless of when in the Chapter 13 repayment plan the action is brought.\textsuperscript{19}

This differing treatment is an unintended consequence of the Brunner test as applied to Chapter 13 debtors, and this result is not surprising given Brunner’s implicit requirement that the factors be applied to a specific, yet unspecified, point in time. In failing to specify when in the bankruptcy case the test applies, however, the Brunner court’s definition of “undue hardship” consequently produces inequitable and inconsistent results in the context of Chapter 13. Some Chapter 13 debtors receive a hardship determination when they file a dischargeability proceeding, while other Chapter 13 debtors must wait until discharge to receive such determination.\textsuperscript{20}

This inequity may be easily eliminated by amending the Brunner test to include a uniform timing standard. The question remains, however, at what time should the test apply? Because the statutory exception lacks timing language, and because Congress intends to encourage filings under Chapter 13 over filings under Chapter 7,\textsuperscript{21} the Brunner test should apply at the time a debtor files a dischargeability action. This solution is permitted under the Bankruptcy Code,\textsuperscript{22} follows congressional intent,\textsuperscript{23} matches the debtor-friendly nature of bankruptcy law, and most importantly, would provide equal treatment to all individual debtors regardless of the chapter filed or jurisdiction chosen.

\textsuperscript{[the court must predict] what the debtor’s situation will be at the conclusion of the Chapter 13 plan which, as here, may extend up to five years”}.


20. See supra notes 18 and 19 and accompanying text.

21. See infra Part II.B.

22. Coleman, 333 B.R. at 849 (noting that there “is no express statutory prohibition on determining this issue before the discharge is granted”).

23. See infra Part II.B.
Although this amendment, standing alone, may produce undesirable consequences, courts can avoid such issues by retaining jurisdiction of the dischargeability action until discharge occurs. If courts resolve all hardship proceedings when filed, it is possible that more debtors will find their student loan obligations discharged based on then-present circumstances than if the test was applied at the time of discharge. For example, a debtor's income may increase over the course of the repayment plan, and the discharge of other unsecured debts at the completion of a repayment plan may assist the debtor in repaying student loans. To avoid this problem and to prevent discharge of debt payable without undue hardship, courts should apply Brunner at the time hardship proceedings are filed and reserve jurisdiction over the dischargeability determination until discharge actually occurs. This would give educational lenders the opportunity to vacate a dischargeability determination if a debtor's financial health improves sufficiently during the course of the Chapter 13 repayment plan. Under this proposed solution, courts would be permitted to consider the merits of all dischargeability actions when filed, while protecting lenders from the discharge of student loans whose repayment does not constitute undue hardship on the debtor or the debtor's dependents.

This Comment argues that to ensure that every debtor receives equitable treatment with respect to the hardship exception, and to better follow congressional intent, the Brunner definition should be amended to include a timing standard that requires courts to uniformly apply Brunner at the time a debtor files a dischargeability action. Furthermore, courts should maintain jurisdiction over hardship determinations until discharge occurs to prevent discharge of debts payable without undue hardship. Part I provides a background of the discharge provisions provided for in bankruptcy, analyzes the hardship exception to student loan nondischargeability, and introduces the Brunner test as the prevailing definition of undue hardship. Part II analyzes Brunner as applied to Chapter 13 debtors. Part III explores the ripeness issue in Chapter 13 cases. Part IV sets forth the reasons why a resolution of the timing issue is necessary to adequately evaluate a Chapter 13 debtor's degree of hardship.

25. Id.
I. Discharge of Debt in Bankruptcy

A. General Discharge and the Nondischargeability of Student Debt

1. Overview of Bankruptcy Discharge

Bankruptcy discharge provisions, which release debtors from liability for many pre-bankruptcy debts, are the main form of debtor relief provided for in bankruptcy law. In the House Report accompanying the Bankruptcy Reform Act of 1978, Congress described discharge as "the heart of the fresh start provisions of the bankruptcy law." The courts have generally agreed that discharge is the "cornerstone" of a debtor's economic recovery; "the discharge provisions of the Bankruptcy Code offer the foremost remedy to effectuate the 'fresh start' which is the goal of bankruptcy relief to the debtor." In 1934, the Supreme Court noted that one of the primary purposes of bankruptcy legislation is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

Although the law is designed to facilitate debtors' economic rehabilitation by providing a fresh financial start, the law's partiality toward providing a clean slate is not designed to shield a debtor from educational loan repayment except in extreme circumstances. In fact, section 523(a)(8) of the Bankruptcy Code provides that a bankruptcy discharge does not release a debtor from any debt for an educational loan insured or guaranteed by the government or a non-profit institution. Accordingly, student loan debt subject to section

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32. 11 U.S.C. § 523(a)(8) states:
(a) A discharge under [Chapters 7 or 13] of this title does not discharge an individual debtor from any debt—

(8) 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
523(a)(8) passes through bankruptcy unchanged, leaving the debtor responsible for loan repayment despite bankruptcy proceedings.33

2. Policy Behind the Nondischargeability of Student Debt

The policy behind section 523(a)(8) is clear. First enacted in 1978 to replace a repealed provision of the Educational Code,34 section 523(a)(8) addresses a growing abuse in the bankruptcy system.35 As explained by the Second Circuit, educational debts are unsecured, and students have few assets upon graduation, so debtors have an incentive to discharge student loans in bankruptcy.36 Upon discharge, debtors would "enjoy the higher earning power the loans have made possible without the financial burden that repayment entails."37 The Second Circuit also noted that the government, when guaranteeing student loans, is unable to act as would an ordinary commercial lender, who may deny loans to individuals with poor credit or adjust the interest rate to reflect likelihood of repayment.38 Instead, the government must offer low fixed-rate loans based on student need, regardless of credit-risk.39 When Congress enacted section 523(a)(8), such abuses were threatening the viability of educational loan programs, endangering future student loans, and harming taxpayers.40 “Congress recognized that this was a case in which a creditor’s interest

by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend . . . .

Id.


35. Renshaw, 222 F.3d at 86–87.

36. Id.

37. Id.


39. Id.

40. Renshaw, 222 F.3d at 87; see also Nash v. Conn. Student Loan Found. (In re Nash), 446 F.3d 188, 191 (1st Cir. 2006) (“Congress has made the judgment that the general purpose of the Bankruptcy Code to give honest debtors a fresh start does not automatically apply to student loan debtors. Rather, the interest in ensuring the continued viability of the student loan program takes precedence.”).
in receiving full payment of the debt outweighed a debtor's interest in a fresh start.”

3. “Undue Hardship” Exception

Based on the express language of section 523(a)(8) and the policy behind its enactment, the statute makes “student loans a very difficult burden to shake without actually paying them off.” In certain exceptional circumstances, however, a debtor may overcome this burden by proving by a preponderance of the evidence that “excepting such debt from discharge...will impose an undue hardship on the debtor and the debtor's dependents.” An undue hardship determination, if granted, fully discharges a debtor's educational loans if and when he or she receives a bankruptcy discharge. Jurisdictions vary in interpreting what constitutes hardship sufficient to grant this generous discharge, but most courts follow the three-part test created by the Second Circuit in Brunner.

41. Renshaw, 222 F.3d at 87.
42. Brunner, 46 B.R. at 752, 756.
45. 11 U.S.C. §§ 523(a)(8), 727(a), 1328(a).
46. 831 F.2d 395 (2nd Cir. 1987). The Brunner test was created in the Second Circuit and is generally followed by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. See id.; see also Pa. Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 300 (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); Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359 (6th Cir. 1994); 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, 356 F.3d 1302, 1309 (10th Cir. 2004); Hemar Ins. Corp. of Am. v. Cox (In re Cox), 338 F.3d 1238, 1241 (11th Cir. 2003). The Sixth Circuit’s Cheesman test parallels the Brunner test. The Cheesman test requires a determination of “(1) whether the debtors are capable of paying the loan while maintaining a minimal standard of living; (2) whether the debtor's financial circumstances are likely to persist for a significant portion of the repayment period; (3) whether the debtor has made a good faith effort to repay the loan.” Strauss v. Student Loan Office-Mercer Univ. (In re Strauss), 216 B.R. 638, 640-41 (Bankr. N.D. Cal. 1998) (citing Cheesman, 25 F.3d at 359). The distinction between Cheesman and Brunner is negligible; less than a year after Strauss was decided, the Ninth Circuit analyzed the Cheesman and Brunner tests side-by-side and concluded that “[i]t does not
B. Brunner v. New York State Higher Education Services: The Brunner Test

1. The Case

Brunner involved a debtor who accumulated $9,000 of educational debt during the course of her undergraduate and graduate school education.47 With the help of her student loans, the debtor received a Bachelor's degree in psychology and a Master's degree in social work.48 However, seven months after graduation, the debtor experienced substantial financial difficulty due to her inability to find employment as a psychologist and petitioned for Chapter 7 bankruptcy.49 Upon completing the Chapter 7 proceedings, the debtor received a general discharge but remained responsible for repayment of her educational loans.50 To eliminate her educational debt, the debtor filed an adversary proceeding seeking to discharge her student loans on the basis of undue hardship.51

At the time Brunner was decided, few appellate courts had interpreted the meaning of undue hardship,52 and the legislature had not defined undue hardship in the Bankruptcy Code.53 Commenting on the lack of congressional direction, the Brunner court noted that "the existence of the adjective 'undue' indicate[d] that Congress viewed garden-variety hardship as an insufficient excuse for a discharge of student loans, but the statute otherwise [gave] no hint of the phrase's intended meaning."54 To assist itself in defining the vague term, the appear that the Sixth Circuit in Cheesman was proclaiming a test distinct from Brunner."
Pena, 155 F.3d at 1112. The Eighth Circuit follows a totality-of-the-circumstances test, which requires consideration of (1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's and her dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 704 (8th Cir. 1981). As both the totality-of-the-circumstances test and Brunner lack a timing standard, both are subject to the same ripeness debate. See supra note 12. The First Circuit has not adopted a particular test. Nash v. Conn. Student Loan Found. (In re Nash), 446 F.3d 188, 190 (1st Cir. 2006) ("[T]here has been much attention given to the particular test which should be applied to determine 'undue hardship.' Congress did not attempt to give specific guidance. We as a circuit have not had occasion to declare our views.").

47. Brunner, 46 B.R. at 753.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id. at 753 n.1 ("The sole authority from the Courts of Appeals appears to be Andrews . . . .")
53. Id.
54. Id.
Brunner court turned to “legislative history and the decisions of other district and bankruptcy courts,” where available.55

2. The Test

To create its three-part hardship test, the Brunner court first reviewed a draft bill proposed by the Commission on Bankruptcy Laws of the United States ("the Commission"), which cited the “rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts” as the reason for the Code provision.56 In its recommendation to Congress, the Commission stated that hardship was “undue” if the “amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could [not] maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans.”57 From the Commission’s statement, the Brunner court created the first element of its three-part test: “before receiving a discharge of student loans the debtor is required to demonstrate that, given his or her current income and expenses, the necessity of making the monthly loan payment will cause his or her standard of living to fall below a ‘minimal’ level.”58 This element has been coined the “minimal standard of living” test.59

The Brunner court then looked to trial courts to determine how they had interpreted undue hardship and found that most courts required the Commission’s “minimal standard of living” test plus an additional showing of hardship.60 In order to demonstrate this additional hardship, a debtor was generally required to show “unique” or “exceptional” circumstances, such as illness, lack of usable job skills, or a large number of dependents.61 Quoting Judge Lifland of the Bankruptcy Court in the Southern District of New York, the Brunner court emphasized that the “dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.”62 Thus, the Brunner

57. Id. at 754.
58. Id.
59. Id.
60. Id. at 754-55.
61. Id. at 755.
62. Id.
court incorporated this concept into the second element of its three-part test: the debtor must demonstrate that the "current inability to pay will extend for a significant portion of the repayment period of the loan."\(^{63}\)

Lastly, the *Brunner* court evaluated case law, the Commission report, and congressional intent to add a requirement of good faith to its hardship analysis.\(^{64}\) Trial courts had required such a showing in the past,\(^{65}\) and the *Brunner* court found authority for this requirement in a recommendation the Commission prepared.\(^{66}\) Specifically, the Commission advised Congress to allow full discharge of student debts without a showing of undue hardship after five years if the debt remained outstanding due to "factors beyond [the debtor's] reasonable control."\(^{67}\) The *Brunner* court interpreted this language as obligating debtors to attempt, in good faith, to make payments on their educational debt in order to receive a discharge.\(^{68}\) The *Brunner* court also read a good-faith requirement into the stated purpose of section 523(a)(8): to keep students with large educational debts from taking advantage of the bankruptcy system.\(^{69}\) Based on these authorities, the *Brunner* court added a third element to its definition of undue hardship: the debtor must have made a good-faith effort to repay the loans prior to seeking discharge.\(^{70}\)

Applying its test to the debtor, the *Brunner* court held that she did not meet her burden of proof on the second and third elements of the test.\(^{71}\) While the court agreed that she was unable to simultaneously meet her minimal expenses and pay off her loans, the court held

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63. *Id.*
64. *Id.* at 755–56.
65. *Id.* at 755.
66. *Id.*
67. *Id.*
   Even where a court finds that repayment of the educational debt would impose "undue hardship" on the student debtor, discharge should not be granted if the debtor has not made a bona fide attempt to repay the loan: "Should the debtor's expected financial condition qualify him for a hardship discharge, such discharge nevertheless ought to be denied during the five-year period if the debtor has not made a good faith effort to obtain income or assets sufficient to repay the educational debt."

70. *Id.* at 756.
71. *Id.* at 757.
that the debtor did not prove that her current inability to find work would extend for a significant period of loan repayment. The debtor’s good health, apparent intellect, and lack of dependents supported the court’s position. In addition, the court held that the debtor did not demonstrate a good faith attempt to repay the loans, as she filed her petition for bankruptcy within a month of receiving her first repayment bill. The district court declared the debtor’s loans nondischargeable, and the Second Circuit Court of Appeals affirmed.

II. Hardship Tests as Applied to Chapter 13 Debtor

A. The Problem in Applying the Brunner Test to Chapter 13 Cases

A majority of courts use Brunner to evaluate debtors’ degree of hardship, and do so in all dischargeability proceedings involving student debt, regardless of the chapter. The broad application of Brunner, however, has proven problematic with respect to Chapter 13 cases. Because the “Brunner elements do not transfer neatly to an adversary proceeding brought to discharge student loan obligations in the midst of the debtor’s attempts to comply with a confirmed Chapter 13 plan,” courts are divided as to whether the Brunner elements must be applied at the time of general bankruptcy discharge, or at any time after a debtor files a bankruptcy petition. The root of the debate lies in the difference between a Chapter 7 and Chapter 13 discharge.

Chapter 7, commonly referred to as a “straight bankruptcy,” provides debtor relief through a court-supervised collection, liquidation, and distribution of a debtor’s nonexempt property for the ben-
efit of creditors. In exchange for surrendering property for liquidation, a Chapter 7 debtor receives a discharge of all pre-bankruptcy debts that are not excepted from discharge, even if the value of the debtor’s assets are insufficient to pay all, or even some, of the debtor’s outstanding indebtedness. In most Chapter 7 cases, the court will grant discharge soon after the debtor petitions for relief, sometimes before creditors receive a single payment from the debtor’s bankruptcy estate and usually before the case is closed. Discharge in Chapter 7 is rapid because it is dependent on the mere filing of a Chapter 7 petition, rather than on completion of a repayment plan.

In contrast, a central purpose of Chapter 13 is to enable a debtor to retain certain assets that would otherwise be liquidated and distributed in Chapter 7. In order to retain his or her property, a Chapter 13 debtor is required to develop and execute an individualized repayment plan to satisfy some or all of his or her creditors’ claims. Although a debtor is permitted great flexibility in developing a Chapter 13 plan, once the plan is confirmed, the debtor must commit all disposable future income to the plan for its duration, which may last up to five years. Only upon full compliance with the Chapter 13 plan will a debtor receive discharge of unpaid debts that are not excepted

82. See generally 1 COLLIER ON BANKRUPTCY, supra note 15.

83. 11 U.S.C. §§ 523, 727(b). In addition to student loans, section 523 lists other types of debts that are non-dischargeable even after the debtor has received a discharge, including debts for alimony and child support. Id. § 523.

84. 1 COLLIER ON BANKRUPTCY, supra note 15, ¶ 1.03[2][d][iv].

85. Id. ("What nonexempt property the debtor has will be converted to proceeds by the trustee and paid to creditors but, if there is no or little property, creditors may receive nothing. . . . [T]he honest debtor is entitled to the discharge so that unpaid creditors may not thereafter bring suit against the debtor to recover any part of the debt from any property the debtor acquires after the filing of the chapter 7 petition.").

86. 6 COLLIER ON BANKRUPTCY, supra note 15, ¶ 727.01[1]. “Section 727 of the Bankruptcy Code provides that the court must grant a discharge to a chapter 7 debtor unless one or more of the specific grounds for denial of a discharge enumerated in paragraphs (1) through (12) of section 727(a) is proven to exist.” Id. (emphasis added). Subject to several exceptions, “the [Chapter 7] discharge is to be granted by the court ‘forthwith’ on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case . . . .” Id. at ¶ 727.01[2]; cf. 11 U.S.C. § 1328(a) (providing that in Chapter 13 cases, “as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed,” subject to enumerated exceptions). Id. (emphasis added).

87. 11 U.S.C. § 1306(b) (“Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.”).

88. Id. §§ 1322, 1325.

89. See generally id. § 1322(b)(11).

90. Id. § 1322(d).
from discharge.\textsuperscript{91} Unlike Chapter 7 discharge, therefore, a Chapter 13 discharge is significantly delayed due to the length and necessity of a Chapter 13 repayment plan.\textsuperscript{92}

In \textit{Brunner}, the debtor petitioned under Chapter 7 of the Bankruptcy Code.\textsuperscript{93} The \textit{Brunner} court appropriately confined its analysis to the case before the court and crafted its test to resolve the hardship question for a Chapter 7 debtor.\textsuperscript{94} In addition, the \textit{Brunner} test was created at a time when student loans were excepted from discharge in Chapter 7 cases only; Congress amended the Bankruptcy Code five years after \textit{Brunner}, expressly extending the nondischargeability of student loan provisions to Chapter 13 debtors.\textsuperscript{95} Noting this fact, the Bankruptcy Court for the Western District of New York stated that “it is unclear, therefore, exactly how the Second Circuit would intend that its \textit{Brunner} test should be applied in a Chapter 13 case."\textsuperscript{96}

Given that the \textit{Brunner} debtor petitioned under Chapter 7 at a time when student loans were not excepted from discharge in Chapter 13 cases, the language of the resulting test understandably fails to specify whether each element applies at the time of discharge or at any time after a debtor files a bankruptcy petition. This uncertainty has created problems for Chapter 13 debtors seeking a dischargeability determination prior to completing repayment plans. Some courts interpret \textit{Brunner} as applying to the time of a debtor’s discharge, that is, at the time a debtor completes a Chapter 13 repayment plan.\textsuperscript{97} Other courts view \textit{Brunner} as applicable at the time a debtor seeks a dischargeability determination, regardless of when the debtor will actually receive his or her discharge.\textsuperscript{98} When presented with this ambiguity, courts have sought direction from the legislative intent behind Chapters 7 and 13.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} \S\S 523, 1328(a); \textit{see also id.} \S 1307(a) (providing that if a Chapter 13 plan is not successfully completed, the case may be converted to Chapter 7 or dismissed).
\item \textsuperscript{92} \textit{See id.} \S 1328 (“As soon as practicable after completion by the debtor of all payments under the plan . . . court shall grant the debtor a discharge of all debts provided for by the plan.”).
\item \textsuperscript{93} “[T]he Brunner factors . . . were developed in the context of an adversary proceeding brought to discharge student loan obligations at the conclusion of a Chapter 7 proceeding.” Ekenasi v. Educ. Res. Inst. (\textit{In re Ekenasi}), 325 F.3d 541, 546 (4th Cir. 2003).
\item \textsuperscript{94} \textit{Id.} (noting that the \textit{Brunner} test does not transfer easily to Chapter 13 cases).
\item \textsuperscript{96} \textit{Id.} at 54.
\item \textsuperscript{97} \textit{See supra} note 18 and accompanying text.
\item \textsuperscript{98} \textit{See supra} note 19 and accompanying text.
\item \textsuperscript{99} See \textit{infra} Part II.B.
\end{itemize}
B. Congressional Intent

In drafting current Chapter 13 legislation, Congress sought to encourage overextended income-earning debtors to choose Chapter 13 over Chapter 7. Acknowledging that prior "wage earner plan" legislation had deterred debtors from choosing repayment plans over liquidation proceedings, Congress made several legislative changes designed to benefit debtors who file under Chapter 13. For example, Congress simplified and eliminated several rules regarding repayment plans, allowed for substantial flexibility in the plans, placed statutory limits on the length of time of repayment plans, and made Chapter 13 discharge more generous than Chapter 7 discharge. In addition, Congress gave student debtors an extremely powerful incentive to choose Chapter 13 over Chapter 7 when it first enacted Chapter 13: prior to 1990, the discharge exception of section 523(a)(8) did not apply to Chapter 13 debtors—this statutory scheme guaranteed the discharge of unpaid student debt upon completion of a confirmed Chapter 13 plan even if the debtor was capable of repaying the debt. Since student loans were only exempted from discharge in Chapter 7, the legislation "had the effect of providing debtors with an incentive to file Chapter 13 plans and discharge their student loan

101. "[T]he use of bankruptcy law should be a last resort . . . if it is used, debtors should attempt repayment under chapter 13." H.R. Rep. No. 95-595, at 117 (1977).
102. "[A]n overly stringent and formalized Chapter XIII (wage earner plans) has discouraged overextended debtors from attempting to arrange a repayment plan under which all creditors are repaid most, if not all, of their claims over an extended period." Id. at 117-18.
103. The legislative intent of [C]hapter 13 is . . . no mystery. In the words of the Committee on the Judiciary of the House of Representatives:[t]his bill attempts to cure [the inadequacies of Chapter XIII of the former Bankruptcy Act] and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out.
8 COLLIER ON BANKRUPTCY, supra note 15, ¶ 1300.02 (quoting H.R. Rep. No. 95-595, at 117 (1977)).
105. 2 COLLIER BANKRUPTCY MANUAL, supra note 30, ¶ 523.13[2].

Originally, the nondischargeability of student loans applied only to Chapter 7 bankruptcies, which had the effect of providing debtors with an incentive to file Chapter 13 plans and discharge their student loan debts at the conclusion of the plan payments without a showing of undue hardship. Congress eliminated this incentive when it amended the statute in 1990 to extend the non-dischargeability of student loans to Chapter 13 filings.

debts at the conclusion of the plan payments without a showing of undue hardship."\textsuperscript{106}

Congress eliminated the student loan discharge incentive in the 1990 amendments by excepting student loans from discharge in Chapter 13 cases.\textsuperscript{107} Yet the 1990 amendments did not wholly eliminate a student debtor's incentive to file under Chapter 13. For example, Chapter 13 discharge continues to release the debtor from liability for more types of debt than the discharge available in Chapter 7,\textsuperscript{108} and Chapter 13 debtors are still permitted to retain present assets while financing payment plans with future income.\textsuperscript{109} More importantly, Congress has enacted little legislation beyond the 1990 amendments to discourage debtors from choosing Chapter 13.\textsuperscript{110} Most notably, Congress did not restrict when a Chapter 13 debtor may seek an undue hardship discharge determination under section 523(a)(8).\textsuperscript{111} Since a time restriction regarding the filing of a dischargeability action is "notably absent from the Bankruptcy Code,

106. \textit{Ekenasi}, 325 F.3d at 546 n.2 (citing Kielisch v. Educ. Credit Mgmt. Corp. \textit{(In re Kielisch)}, 258 F.3d 315, 320 (4th Cir. 2001)).

107. Id.

108. "Certain debts discharged in Chapter 13 are nondischargeable in Chapter 7; [d]ebts dischargeable in a Chapter 13 case include debts for some willful and malicious torts, fines and penalties [ ], marital property settlement debts, and debts as to which a discharge was denied in an earlier bankruptcy case." 8 \textit{COLLIER ON BANKRUPTCY}, \textit{supra} note 15, \textsection 1328.02[2][a]. As the Bankruptcy Code states:

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5), (8) , or (9) of this title; or

(3) for restitution of a criminal fine . . . .


109. \textit{See id.} § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

110. Although Congress has discouraged Chapter 13 filings by narrowing the scope of the Chapter 13 discharge in the 1990, 1994, and 2005 amendments, Chapter 13 discharge remains more generous to debtors than Chapter 7 discharge. \textit{See 8 COLLIER ON BANKRUPTCY}, \textit{supra} note 15, \textsection 1328.02[2][a].

111. 11 U.S.C. § 523(a)(8) (2000). As one court stated:

\[\text{[W]e decline to adopt a hard and fast rule which would preclude bankruptcy courts from even entertaining a proceeding to discharge student loan obligations until at or near the time the debtor has completed payments under a confirmed Chapter 13 plan. The text of pertinent statutes does not prohibit such an advance determination.}\]

Bankruptcy Rules or other statutes,"112 Congress did not likely intend the hardship exception, or any other legislation, to deter debtors from filing under Chapter 13.

III. Evaluation of the Ripeness Issue Raised by Brunner in Chapter 13 Cases

Although Congress enacted legislation to encourage debtors to choose Chapter 13 over Chapter 7, the Brunner test’s lack of timing language appears to hinder this congressional goal by introducing the issue of ripeness into Chapter 13 hardship analyses. Each element of the Brunner test may be interpreted as allowing for a hardship determination at any time, or, alternatively, limiting a hardship analysis until a debtor’s repayment plan is complete.113 Because there is no statutory language resolving this question, it seems that Congress neither anticipated ripeness as a consideration in the hardship analysis114 nor predicted that a debtor pleading the hardship exception would be prevented from doing so based on choosing Chapter 13.115 If the Brunner test remains unchanged, the ripeness issue may motivate debtors to petition for Chapter 7 rather than Chapter 13, thus defeating an important congressional goal of encouraging Chapter 13 over Chapter 7.116

A. The Ripeness Doctrine

Ripeness is an independent requirement for judicial review,117 which dictates whether the reviewing court can, and should, entertain disputes.118 “The ripeness doctrine is invoked to determine whether a dispute has developed to a point that warrants decision,”119 and is typically regarded as an equitable doctrine120 that prevents judicial review

112. Strahm, 327 B.R. at 320.
113. See infra Part III.B.
114. See supra Part II.B.
115. See supra Part II.B; see, e.g., Raisor v. Educ. Loan Serv. Ctr. (In re Raisor), 180 B.R. 163, 167 (Bankr. E.D. Tex. 1995) (“[I]t is premature for the Court to determine whether or not the PLUS Loans will cause undue hardship if the loans are not discharged. Under Chapter 13, the appropriate time for this determination is near or at the time the plan is scheduled for completion.”).
116. See supra Part II.B.
of hypothetical or speculative disagreements. As expressed by the United States Supreme Court, "[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."

Before adjudicating a complaint, a court must conclude that the case is ripe for review, triggering an analysis of both constitutional and prudential ripeness. Because ripeness is a two-part inquiry, a debtor seeking a discharge determination must prevail on both parts in order for the court to consider the complaint ripe. While courts generally agree that constitutional ripeness is satisfied upon filing either a Chapter 7 or Chapter 13 action, Chapter 13 debtors often find prudential ripeness very hard to satisfy.

1. Constitutional Ripeness

To satisfy the first element of ripeness, a debtor must demonstrate "sufficient injury to meet Article III's requirement of a case or controversy." Under Article III of the United States Constitution, the jurisdiction of federal courts is limited to actual cases or controversies. This jurisdictional limitation, known as a justiciability requirement, generally prevents courts from entertaining hypothetical or abstract issues; however, "[j]usticiability is itself a concept of uncer-

123. As the Eleventh Circuit states, "[t]he ripeness doctrine involves both jurisdictional limitations imposed by Article III's . . . case [or] controversy [clause] and prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present." Johnson v. Sikes, 730 F.2d 644, 648 (11th Cir.1984); see also MidAmerican Energy Co., 234 F.3d at 1038.
124. Ripeness "is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs., 387 U.S. at 149.
126. See infra Part III.A.2.
127. Cheffer v. Reno, 55 F.3d 1517, 1524 (11th Cir. 1995); see also U.S. CONST. art. III, § 2.
128. See U.S. CONST. art. III, § 2; see also S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch., 24 F.3d 427, 431 (2d Cir. 1994).
tained meaning and scope.” 129 Justiciability is not “a legal concept with a fixed content or susceptible of scientific verification,”130 and consequently the Court has defined it by what is not justiciable.131 Among non-justiciable controversies are political questions, requests for advisory opinions, issues that have been mooted by subsequent events, and issues presented by parties without standing.132 Similarly, an issue brought before a party is harmed fails to present the requisite case or controversy and must be dismissed for lack of ripeness.133

Constitutional ripeness is rarely raised in opposition to a dischargeability action, and no court has cited it as adequate grounds for dismissal.134 In fact, only three courts have addressed ripeness from a constitutional standpoint in the bankruptcy context.135 In Bender v. Educational Credit Management Corp.,136 the court acknowledged the constitutional requirement of ripeness, but dismissed the debtor’s complaint without addressing the issue due to the debtor’s failure to satisfy prudential ripeness.137 In Coleman v. Educational Credit Management Corp.,138 the bankruptcy court addressed ripeness from a constitutional position and held that the debtor’s dischargeability action satisfied Article III ripeness.139 In its analysis, the Coleman court agreed with the court in Craine v. United States (In re Craine),140 which found that “the issue of the dischargeability of a student loan presents a ‘case and controversy’ from a constitutional standpoint as soon as the Chapter 13 case is filed.”141 The court in Strahm v. Great Lakes Higher Educ. Corp. (In re Strahm)142 also noted that parties did “not employ the term ‘ripe’ in a jurisdictional sense, but, rather, in a ‘timing’ [or pruden-

131. Flast, 392 U.S. at 95.
132. Id.
133. Poe, 367 U.S. at 508.
136. 368 F.3d 846 (8th Cir. 2004).
137. Coleman, 333 B.R. at 846 (citing Bender, 368 F.3d at 847-48).
138. Id.
139. Id. at 847. In denying the lender’s motion to dismiss the debtor’s dischargeability action for lack of subject matter jurisdiction, the Coleman court concluded “that it ha[d] subject matter jurisdiction to determine whether a student loan debt should be discharged as an undue hardship prior to the completion of a chapter 13 debtor’s plan payments.” Id.
140. 206 B.R. 598.
142. 327 B.R. 319.
Based on the absence of additional case law addressing Article III ripeness, courts appear to agree that the requisite case or controversy exists at the filing of hardship actions.

2. Prudential Ripeness

The second inquiry in the ripeness analysis involves policy considerations. A debtor must show, and the court must conclude, that "the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court." This element is often considered sub-constitutional or prudential, and "concerns the wisdom of having the court adjudicate the matter in question." Ripeness in the prudential sense often calls for an analysis of "policy factors such as political concerns, separation of powers, and over-encroachment on the rights of the states."

In contrast to the constitutional inquiry, the prudential aspect of ripeness has been the basis of many dismissals of Chapter 13 dischargeability actions, and the issue continues to divide courts. In the prudential analysis, courts are divided over when to apply the Brunner test: at the time of the dischargeability action, or at the time of general bankruptcy discharge. Courts have analyzed the Brunner elements in both ways; some find the Brunner language mandates that courts apply the test at the time of the dischargeability action, regardless of when the action is filed. Others apply the test only at the time of discharge, and consequently dismiss dischargeability actions brought before discharge for lack of ripeness. Thus, courts analyzing the specific language of Brunner have arrived at different conclusions on the issue of prudential ripeness.

143. Id. at 321.
146. Id.; see also Adult Video Ass’n v. U.S. Dep’t of Justice, 71 F.3d 563, 567 (6th Cir. 1995).
147. 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 101.01 (3d ed. 1999).
148. See infra Part III.B.
149. See infra Part III.B.
150. See supra note 19 and accompanying text.
151. See supra note 18 and accompanying text.
B. Applying the Brunner Test in Chapter 13 Cases Creates Inequitable and Inconsistent Results

1. Element 1: The Debtor Cannot Maintain a Minimal Standard of Living

To satisfy the first element of the Brunner test, a debtor must demonstrate that he or she cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans. In Chapter 7 cases, this element is simple in application as "current" income typically coincides with income at or near the time of discharge. Yet in Chapter 13 cases, courts have defined "current" income as either income at the time of discharge or income at the time of the dischargeability action.

Many courts interpret the phrase "current income" to mean the debtor's income at the time of discharge. In Pair v. United States Department of Education and Raisor v. Education Loan Servicing Center, the courts assumed that the "minimal standard of living" test applied to the debtor at the time of discharge and dismissed the debtors' dischargeability actions, reasoning that "it is impossible to determine whether a Chapter 13 debtor will be able to maintain a minimal standard of living after receiving discharge." The Raisor court further concluded that "it is speculative at this time what the [d]ebtor's income and expenses will be at the time the [p]lan is scheduled for completion. It is possible that the [d]ebtor's income may increase during the life of the [p]lan and negate the need for the discharge of the [student] [l]oans." To avoid speculation as to a debtor's "current income" at the time of discharge, courts adopting this view dismiss complaints as premature unless filed near or at the time of discharge. However, dismissing dischargeability actions as premature penalizes debtors who choose Chapter 13 over Chapter 7, disad-

153. See supra notes 14–15 and accompanying text.
154. See infra Part III.C.
158. Pair, 269 B.R. at 720 (citing Raisor, 180 B.R. at 166).
159. Raisor, 180 B.R. at 166.
vantages those Chapter 13 debtors who file bankruptcy petitions in jurisdictions that view "current income" as that at the time of discharge, and deprives courts of the ability to determine dischargeability actions on their merits, thus removing the judicial discretion inherent in section 523(a)(8).

In assessing the meaning of "current income," other courts conclude that the phrase refers to the debtor’s income at the time of the dischargeability action, not at the time of discharge.\textsuperscript{161} The court in Coleman noted that courts interpreting the “issue as whether undue hardship exists at the time of discharge” are merely adding “judicial gloss to [section] 523(a)(8).”\textsuperscript{162} “The issue defined by the statute does not include the [words ‘at the time of discharge’]. There is no express statutory prohibition on determining this issue before the discharge is granted.”\textsuperscript{163} Courts adopting this view allow a “debtor to choose the ‘snapshot’ date for determining undue hardship on the grounds that the ‘text of the pertinent statute does not prohibit such an advance determination.’”\textsuperscript{164} By reading “current income” literally, these courts effectively eliminate any speculation or uncertainty regarding a debtor’s income; a court may determine, with absolute certainty, the debtor’s income at the time of the dischargeability hearing without speculating as to the debtor’s projected income at discharge. In Goranson v. Pennsylvania Higher Education Assistance Agency,\textsuperscript{165} the court recognized that applying the Brunner test to the debtor’s chosen “snap
shot” date would be challenging, but “[t]o do otherwise would be to penalize a debtor for electing Chapter 13 over Chapter 7.”166

Although the latter view appears more equitable and seems to further congressional goals, not all debtors enjoy this treatment. In fact, courts’ disagreement over the timing of “current income” illustrates Brunner’s inability to consistently and equitably define undue hardship in Chapter 13 cases. In Chapter 7 cases, the first Brunner element is applied evenly, regardless of how the court views “current income,” because the timing of discharge and the timing of a dischargeability action typically coincide. These events, however, do not occur simultaneously in Chapter 13 cases, causing courts to apply Brunner’s first element unevenly and inconsistently.

While some courts adopt a view that more closely follows congressional intent to encourage Chapter 13 filings over Chapter 7 filings, the inconsistency in interpretation should be eliminated by adding timing language to the Brunner test: courts should entertain hardship determinations at the time of filing, and reserve jurisdiction to vacate such determination if circumstances demonstrate that a Chapter 13 debtor, upon completing the repayment plan, can repay the loans without undue hardship.

2. Element 2: The State of Affairs is Likely to Persist for Much of the Repayment Period

Courts have also debated the second Brunner element in Chapter 13 cases. Once a debtor proves that he or she cannot maintain a minimal standard of living if required to repay student loans, a debtor must then prove that the state of affairs is likely to persist for a significant portion of the student loan repayment period.167

Some courts find a Chapter 13 debtor’s dischargeability action premature if filed prior to discharge because a debtor’s ability to repay student loans may improve after he or she is relieved of dischargeable debts.168 In support of this view, the court in Pair stated that Brunner’s second element must be considered at the time of a debtor’s discharge, so a dischargeability action filed prior to discharge would impermissibly force the court to speculate as to the debtor’s financial health at the time of discharge.169 The Raisor court agreed, finding

166. Id. at 56.
169. Id.
that "because other unsecured debts will be discharged after completion of the [p]lan, the elimination of these debts could facilitate the [d]ebtors' abilities to repay the [student] [l]oans."¹⁷⁰

Other courts, however, have presented persuasive arguments opposing this view. These courts have recognized that "[u]nless the repayment period is close to completion at the time a Chapter 13 discharge is due, the second prong of the Brunner test always requires the court to speculate as to the debtor's future financial prospects."¹⁷¹ Since student loan repayment plans typically span many years (sometimes over twenty-five), it is unlikely that a Chapter 13 discharge will occur after a substantial portion of the student loan repayment period has passed because repayment plans generally span three to five years.¹⁷² With this in mind, some courts conclude that they are in no better position speculating as to the debtor's circumstances throughout the repayment period at the commencement of the Chapter 13 plan than at its conclusion.¹⁷³ Addressing this specific issue, the Coleman court noted that although "the Court may be required to speculate to a greater degree if it makes the determination a few years prior to the debtor's discharge . . . this difference of degree [is not] of constitutional significance."¹⁷⁴ Likewise, in Strahm, the court noted this element "always requires the court to consider a future time period where certainty is never available, whether evidence in regard to this factor is presented in the early stages, or the later stages, of a Chapter 13 case."¹⁷⁵

Differing interpretations of when Brunner's second element applies in Chapter 13 cases indicates Brunner's inability to consistently define undue hardship in Chapter 13 cases. Brunner's second element uses impliedly time-sensitive language but fails to specify when, in the course of the debtor's Chapter 13 plan, the element applies. This ambiguity creates a situation in which some courts dismiss debtors' dischargeability actions for lack of ripeness if filed prior to discharge, while other courts entertain the merits of such actions when filed.

¹⁷³. Id.; see also Ekenasi v. Educ. Res. Inst. (In re Ekenasi), 325 F. 3d 541, 547 (4th Cir. 2003) (noting that the court "can envision exceptional circumstances where the Brunner factors could be predicted with sufficient certainty in advance of the conclusion of a Chapter 13 proceeding.").
¹⁷⁵. Strahm, 327 B.R. at 322.
Such inconsistency is problematic because it may encourage debtors to file under Chapter 7, which contradicts the policy behind Chapter 13 and the hardship exception.

This inconsistency should be resolved by including an express timing standard in Brunner that directs courts to resolve hardship proceedings when debtors seek such determinations. To prevent bankruptcy abuse and protect creditors from the discharge of payable debts, courts should reserve jurisdiction to vacate hardship determinations if circumstances demonstrate that a Chapter 13 debtor, upon completing the repayment plan, can repay the loans without undue hardship.

3. Element 3: The Debtor Made a Good Faith Effort to Repay the Loans

The Brunner test’s final element is likewise subject to opposing interpretations. To satisfy the third Brunner element, a debtor must demonstrate that he or she has made a good-faith effort to repay the loans prior to seeking discharge. 176 Many courts hold that a debtor seeking discharge of student loans prior to completion of a repayment plan fails to demonstrate a good-faith effort to repay the obligation. 177 Simply stated, “filing an undue hardship complaint at the beginning of a case demonstrates a lack of good-faith under Brunner.” 178

Other courts, however, adopt a far more flexible approach to Brunner’s third element. In analyzing the good faith of a Chapter 13 debtor, the Goranson court acknowledged that the debtor’s “decision to wait before filing the complaint might be consistent with ‘good faith’” but did not rely solely on that factor to conclude that the debtor had satisfied the good-faith requirement. 179 The court noted that the debtor’s good-faith effort was demonstrated by:

[T]he amount of time elapsed since the loans first became due until the filing for Chapter 13 relief; the [d]ebtor’s pursuit of deferments; the length of time the [d]ebtor labored in Chapter 13

177. See, e.g., Pair v. U.S. Dep’t of Educ. (In re Pair), 269 B.R. 719, 721 (Bankr. N.D. Ala. 2001) (adopting the Raisor analysis and holding that good faith requires a debtor to at least attempt to pay some part of the loan); Raisor v. Educ. Loan Servicing Ctr. (In re Raisor), 180 B.R. 163, 166-67 (Bankr. E.D. Tex. 1995) (finding that “by attempting to discharge the PLUS Loans prior to the completion of the Plan, the Debtors are not demonstrating a good faith effort to repay the obligation”).
178. Pair, 269 B.R. at 720.
before seeking discharge of these debts; the fact that the failure to make more than minimal payments on the student loans prior to bankruptcy was a consequence of an inability to afford payments, rather than of irresponsible choices, high living, or a manifest effort to take the easy way out; the [d]ebtor's diligent effort to obtain part-time employment (which she obtained); a good-faith reason currently to limit her employment to part-time employment; the fact that the [d]ebtors' Plan is a maximum duration plan (60 months); and the fact that this Chapter 13 Plan is, by any measure, these [d]ebtors' best effort.180

By allowing for an analysis of good faith based on a debtor's specific circumstances and behavior rather than relying solely on the timing of the dischargeability action, courts adopting this view seem more capable of making fair and equitable assessments of debtors' good faith based on the many factors that may demonstrate such efforts.

The debate surrounding Brunner's third element again shows that Brunner does not adequately define hardship for Chapter 13 debtors. Although the term "good faith" does not appear time-sensitive, courts' differing interpretations of the phrase show that the timing of dischargeability actions plays a determinative role in Chapter 13 debtors' hardship determinations. Because of this inequity and inconsistency, debtors may be reluctant to file Chapter 13 in a jurisdiction that dismisses hardship actions as premature if filed prior to discharge. This is problematic because it controverts congressional intent, both by discouraging Chapter 13 in relation to Chapter 7 filings, and by impairing Chapter 13 debtors' access to the undue hardship exception. In Chapter 7, a debtor would receive an evaluation of the merits of his or her action, while in Chapter 13, a debtor would find his or her identical action dismissed on purely procedural grounds. As the hardship exception expressly extends to both Chapter 13 and Chapter 7 debtors, the differing treatment that arises under the Brunner analysis raises problems of inequity and inconsistency.

By adding timing language to the Brunner test, this inequity would be eliminated. Furthermore, to remain consistent with congressional intent, courts should entertain hardship determinations at the time of filing and reserve jurisdiction to vacate such determination if circumstances demonstrate that a Chapter 13 debtor, upon completing the repayment plan, can repay the loans without undue hardship.

180. Id.
C. Neither the Statute nor the Bankruptcy Rule Resolve the Issue of Ripeness

Based on the differing interpretations of Brunner's appropriate time of application, the Brunner test presents an incomplete definition of undue hardship. When presented with the timing question, courts have consequently looked beyond Brunner for direction, turning to available legislative rules and findings. However, little legislation exists dictating the timing of a dischargeability action, and the available legislation provides little clarity on the issue.

Under Rule 4007(b) of the Bankruptcy Code, a dischargeability action may be filed "at any time," which suggests that a debtor may indeed obtain a dischargeability determination any time after petitioning for bankruptcy. Most courts, however, find that Rule 4007(b) allows a debtor to file a dischargeability action at any time, but does not grant courts jurisdiction to make a dischargeability determination at any time. Rule 4007(b), has been viewed as a procedural tool permitting debtors to file certain proceedings "when the matter is ripe." Courts adopting this view conclude that since a Chapter 13 debtor does not receive a discharge until the repayment plan is complete, the issue of student debt dischargeability is not ripe for review until the end of the plan. In courts favoring this approach, complaints are typically dismissed as premature, and debtors are instructed to re-file their claim at, or near, the completion of their Chapter 13 plan.

181. See, e.g., United Student Loans, Inc. v. Taylor (In re Taylor), 223 B.R. 747, 751 (B.A.P. 9th Cir. 1998) (noting that the "filing of a complaint at anytime to discharge a student loan based on undue hardship does not conflict with any statutory right or procedure or with public policy").


183. See infra notes 185 and 189 and accompanying text for a discussion of how courts have been unable to reach a consensus on how to interpret the statute.


However, courts that dismiss dischargeability actions in Chapter 13 on procedural grounds fail to consider a debtor’s financial picture at the time of filing, leading to the possible dismissal of meritorious actions. Aside from this inequity, these courts may also unintentionally encourage student debtors to choose Chapter 7 over Chapter 13. The end result is contrary to the congressional intent behind Chapter 13 legislation and the hardship exception itself.

Aligning more closely with congressional goals, other courts have found that the plain language of Rule 4007(b) allows courts to entertain a dischargeability action when filed. Because a debtor may file a dischargeability action at any time, these courts generally conclude that they may make a hardship determination at any time. In support of this interpretation, the Bankruptcy Appellate Panel for the Ninth Circuit noted that “the filing of a complaint at any time to discharge a student loan based on undue hardship does not conflict with any statutory right or procedure or with public policy.” Indeed, it seems unlikely that Congress intended to allow debtors to file a complaint at any time, while simultaneously prohibiting courts from entertaining such actions.

While the latter interpretation of Rule 4007(b) follows the express language of the rule and seems to parallel congressional intent, not all courts share in this view. Some courts continue to dismiss dischargeability actions as premature if filed prior to plan completion, which may unintentionally encourage student debtors to choose Chapter 7 over Chapter 13. Such a result seems contrary to the congressional policy behind Chapter 13 legislation, and appears to frustrate the purpose of the hardship exception. In addition, courts’ differing interpretations of Rule 4007(b) have led to inconsistent treatment of debtors, and thus the Rule has failed to adequately re-

189. Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 705 n.5 (8th Cir. 1981) (“We recognize that the bankruptcy court’s determination of undue hardship will necessarily involve a certain amount of speculation about the debtor’s financial circumstances. We further recognize that the debtor’s financial circumstances may change in the future. For this reason we recommend that if the bankruptcy court determines that the debtor should not be granted a discharge on the grounds of undue hardship, the bankruptcy court deny such relief without prejudice to the debtor’s again seeking relief under Rules Bankr. Proc. . . . .”).


191. Id. at 751; see also Goranson v. Pa. Higher Educ. Assistance Agency (In re Goranson), 183 B.R. 52, 53 n.1 (Bankr. W.D.N.Y. 1995) (stating that under some circumstances undue hardship may be addressed prior to completion of the Chapter 13 plan).

192. See supra note 18 and accompanying text.
solve the timing debate. To ensure that all debtors, regardless of chapter or jurisdiction, have equal access to the hardship exception, an express timing standard should be added to Brunner: courts should uniformly consider dischargeability actions when filed, and reserve jurisdiction to vacate the determination if the debtor is able to repay the loans without undue hardship at the time of discharge.

IV. The Solution: Amend Brunner to Include a Timing Standard and Maintain Jurisdiction Until Discharge Occurs

A. Courts Should Evaluate Dischargeability Actions on Their Merits When Filed

To promote fairness and equity among student debtors, regardless of chapter or jurisdiction, courts must prevent the issue of ripeness from foreclosing dischargeability determinations prior to the occurrence of Chapter 13 discharge. In light of the delayed discharge in Chapter 13 cases, Brunner's lack of timing language has led most courts to put off hardship analyses until a debtor completes his or her repayment plan.193 Under a Brunner analysis, if the bankruptcy court finds against the debtor on any of its three elements, the inquiry ends and the student loan is deemed not dischargeable.194 Since timing is an issue at each stage of Brunner, the likelihood of a debtor prevailing on all Brunner elements prior to plan completion is slim in many jurisdictions. To the detriment of Chapter 13 debtors, therefore, many courts may not consider potentially meritorious dischargeability ac-

193. Coleman v. Educ. Credit Mgmt. Corp. (In re Coleman), 333 B.R. 841, 846 (Bankr. N.D. Cal. 2005) (“The majority of circuit courts that have addressed this issue have . . . concluded that the express language of § 1328(a) requires the determination to be made at the time of discharge. One lower court observed that, while FRBP 4007(b) permits the dischargeability action to be filed at any time, it does not provide that the issue of dischargeability may be determined at any time.”) (internal citations omitted).

To establish that excepting a student loan debt from the discharge would impose undue hardship, a debtor must prove three things: '(1) that she 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 indicated 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.' Coleman, 333 B.R. at 849 (emphasis added) (quoting Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman), 325 F.3d 1168, 1172 (9th Cir. 2003)).
tions simply because a debtor seeks a determination prior to plan completion.

This problem may be easily eliminated by adding a uniform timing standard to Brunner. If the timing issue is resolved in the test itself, courts applying Brunner would not be faced with the question of when Brunner applies in Chapter 13 cases. Likewise, debtors would not be subject to differing treatment regarding the hardship exception based on the Chapter filed and jurisdiction chosen.

If a timing standard is added to Brunner, what time should control: that of discharge or the dischargeability action? Clearly, compelling arguments have been made supporting both views. Some courts reason that deciding dischargeability actions at or near discharge avoids speculation as to the debtor’s circumstances at the time of discharge, and promotes Congress’s aim of restricting the discharge of student debt.\textsuperscript{195} Other courts note, however, that deciding dischargeability actions when filed promotes Congress’s clear goal of encouraging Chapter 13 over Chapter 7,\textsuperscript{196} and is supported by the plain language of Rule 4007(b).\textsuperscript{197}

While both views are well-supported, the debate clearly tips in favor of deciding dischargeability issues when filed. In addition to the rationales provided by courts in support of this view, its soundness rests on the fundamental purpose of bankruptcy law: to provide debtors with a fresh financial start through discharge,\textsuperscript{198} and to prevent creditors from using aggressive and abusive collection practices.\textsuperscript{199} As bankruptcy law is largely focused on the protection of debtors,\textsuperscript{200} the timing standard added to Brunner should reflect this debtor-friendly principle. Debtors—not creditors—file hardship proceedings, and they do so to determine the scope of their eventual discharge. The

\begin{itemize}
\item \textsuperscript{195} See supra Part I.A.2.
\item \textsuperscript{196} See Goranson, 183 B.R. at 55–56 (allowing a debtor to choose a snap-shot date for the application of the hardship exception; “[t]o do otherwise would be to penalize a debtor for choosing Chapter 13 over Chapter 7”); see generally supra Part II.B.
\item \textsuperscript{197} Fed. R. Bankr. P. 4007(b) (providing that a dischargeability action may be filed “at any time”).
\item \textsuperscript{198} See supra Part I.A.1.
\item \textsuperscript{199} State "grab law" permitted and encouraged aggressive creditor remedies, such as repossession and arrests. 8 COLLIER ON BANKRUPTCY, supra note 15, ¶ 1300.LH[1].
\item \textsuperscript{200} Id. ("The fundamental aim of ... all true bankruptcy laws is the displacement of grab law, through the establishment of a uniform system for ratable asset distribution among creditors. A more recent objective of ... bankruptcy law is to return the debtor to a useful economic role in society by means of the 'fresh start,' through the discharge in bankruptcy.")
\end{itemize}
Brunner test, therefore, should give deference to the debtor's filing decision and evaluate circumstances as they exist at the time of filing.

B. Benefits and Practical Consequences of the Solution

The benefits of deciding dischargeability actions on their merits when filed are two-fold. First, the uniform practice may preserve debtors' incentive to file under Chapter 13 rather than Chapter 7, thus promoting the congressional intent underlying Chapter 13 legislation.\textsuperscript{201} Second, this approach may result in dischargeability determinations early in the bankruptcy case, ultimately facilitating the debtor's ability to obtain a fresh start. Faced with a long repayment period, the Chapter 13 debtor would presumably like to know if remaining student debt would be discharged upon successful completion of a plan before committing to years of plan-payments.\textsuperscript{202} Along these lines, the Strahm court noted that "if the [d]ebtor prevails . . . a number of options may be available to the [d]ebtor, which may impact future collective proceedings in the chapter 13 case."\textsuperscript{203} These options include "modification of the chapter 13 plan, increased funding of the chapter 13 plan, accelerated distribution of funds in the chapter 13 plan, conversion [to Chapter 7], dismissal or other options."\textsuperscript{204} If, however, the debtor does not prevail, early resolution of the issue may allow a debtor to modify his or her plan to prevent, for example, the accrual of additional interest and penalties on the student loan.\textsuperscript{205}

Despite these clear benefits, it must be reiterated that undue hardship, as defined by Brunner, remains a difficult standard to meet.\textsuperscript{206} Even if courts entertained dischargeability actions when filed, debtors would remain responsible for proving, by a preponderance of

\textsuperscript{201} See supra Part II.B.


\textsuperscript{203} Strahm v. Great Lakes Higher Educ. Corp. (In re Strahm), 327 B.R. 319, 325 (Bankr. S.D. Ohio 2005) (noting that "as with any judicial determination impacting the total, or partial, amount a debtor is required to pay in connection with a specific claim in the Chapter 13 case, options become available which may have not been otherwise available").

\textsuperscript{204} Id.


\textsuperscript{206} Brunner v. N.Y. State Higher Educ. Serv. Corp. (In re Brunner), 46 B.R. 752, 753 (Bankr. S.D.N.Y. 1985), aff'd 831 F.2d 395 (2d Cir. 1987) (noting that "[t]he existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as [an] insufficient excuse for a discharge of student loans").
the evidence,\textsuperscript{207} that repayment of a student loan would indeed cause "undue hardship."\textsuperscript{208} The high hardship standard\textsuperscript{209} benefits educational lenders, who may fear that Chapter 13 debtors, if given the opportunity, will file dischargeability actions early and often, and will consequently be released from debt that may be manageable when plan payments cease. However, resolving dischargeability actions when filed will not likely result in the discharge of more student debt because the debtor's burden under the hardship standard is so substantial.\textsuperscript{210}

Furthermore, it is unlikely that more loans will be discharged if courts adopt this solution because practical financial considerations will likely force debtors to think twice before seeking a dischargeability determination. The sheer cost of hiring an attorney for the purpose of bringing a dischargeability action will presumably deter debtors from repeated filings, which will therefore limit a debtor's realistic ability to file multiple dischargeability actions and reserve resources for those circumstances that truly warrant a hardship discharge.

C. Reservation of Jurisdiction Would Prevent Unwarranted Discharge

Considering the debtor's burden of proof and the practical cost considerations of bringing an undue hardship action, it is unlikely that more student loans will be discharged if the \textit{Brunner} analysis applied uniformly at any time during the debtor's bankruptcy proceeding. However, because Congress clearly intended student loans to be nondischargeable except in extreme circumstances, any increase in the discharge of educational debt may cause concern. A simple solution exists that would prevent this unlikely event: courts may reserve jurisdiction over the action and give lenders the opportunity to vacate the dischargeability determination if the debtor's circumstances change so significantly that repayment of the educational loans would not constitute an undue burden. Changed circumstances may include

\textsuperscript{207} See supra note 43 and accompanying text.
\textsuperscript{208} Long v. Educ. Credit Mgmt. Corp. (\textit{In re Long}), 271 B.R. 322, 328 (B.A.P. 8th Cir. 2002), rev'd on other grounds, 322 F.3d 549 (8th Cir. 2003).
\textsuperscript{209} See Ekenasi v. Educ. Res. Inst. (\textit{In re Ekenasi}), 325 F.3d 541, 547 (4th Cir. 2003) ("[I]t will be most difficult for a debtor, who has advanced his education at the expense of government-guaranteed loans, to prove with the requisite certainty that the repayment of his student loan obligations will be an 'undue burden' on him . . . when the debtor chooses to make that claim far in advance of the expected completion date of his plan.").
\textsuperscript{210} Id.; see also Brunner, 46 B.R. at 756.
a substantial salary increase, the receipt of an unexpected inheritance, or lottery winnings.

This proposed solution would have a two-fold effect. First, allowing lenders to contest discharge upon changed circumstances may discourage debtors from filing dischargeability actions early in their Chapter 13 plan. Knowing that an early determination may be vacated, a debtor seeking an undue hardship determination may choose to wait until general discharge to prevent a later court action. Second, debtors whose circumstances substantially improve after a dischargeability determination would not be free from repayment of educational loans; only those debtors who would, in fact, suffer undue hardship if required to repay the debt would be relieved of their student debt. Educational lenders would therefore be assured that those debtors released from liability for repayment of student loans truly demonstrate circumstances that justify the failure to repay student loans.

Although maintaining jurisdiction over dischargeability actions may increase the demand for limited judicial resources, policy considerations in this context outweigh concerns for judicial efficiency. The hardship exception calls for a careful analysis of competing considerations: a debtor’s chance at a fresh financial start contrasted with a creditor’s goal of avoiding uncollectible debts. These opposing interests should be viewed in light of Congress’s goal of extending the hardship exception to all student debtors while simultaneously preventing abuses of the bankruptcy system. As circumstances may change during the course of a debtor’s repayment plan, this balance may shift after dischargeability determinations have been made. Because each interest furthers fundamental congressional policies underlying current bankruptcy law, a court’s resources are well spent making sure that the balance is thoroughly analyzed for the fairest possible result.

V. Conclusion

As the cost of education continues to rise, outpacing increases in salaries, educational debt will become increasingly burdensome on a growing number of students. This country prides itself on innovation and higher learning, and our nation would suffer enormously if promising students choose to forgo higher education for fear of unanticipated post-graduate insolvency. This prospect, although hypothetical, is likely to become more realistic as student debts grow increasingly difficult to discharge in bankruptcy.
Presently, courts are in a position to reinterpret bankruptcy law in this area and adopt a timing standard that addresses the practical effect of the *Brunner* test in Chapter 13 cases. By allowing courts to consider the merits of debtors' dischargeability actions when filed, debtors could take full advantage of the undue hardship exception, regardless of Chapter or jurisdiction. Congress expressly extended the exception to Chapter 13 debtors, yet the *Brunner* test has made it nearly impossible for Chapter 13 debtors to obtain relief under the section prior to the occurrence of discharge. This problem, in light of Congress's encouragement of Chapter 13 over Chapter 7 filings and the Bankruptcy Code's silence on the timing issue, could be easily eliminated by entertaining hardship determinations when filed. Since timing is an issue unaddressed by *Brunner*, it may, and should, be resolved by adding a uniform timing standard to the *Brunner* analysis. To offset any possibility that such standard would discharge more student debt, courts should additionally reserve jurisdiction over the dischargeability determination until discharge, in fact, occurs.