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THE STUDENT LOAN BANKRUPTCY GAP

JASON IULIANO[†]

ABSTRACT

Each year, a quarter of a million student loan debtors file for bankruptcy. Of those, fewer than three hundred discharge their educational debt. That is a success rate of just 0.1 percent. This chasm between success and failure is the titular “Student Loan Bankruptcy Gap,” and it is a phenomenon that is unprecedented in the law.

Drawing upon an original dataset of nearly five hundred adversary proceedings, this Article examines three key facets of the Student Loan Bankruptcy Gap. First, it establishes the true breadth of the gap. Second, it explores why the gap has persisted for more than two decades and, in doing so, uncovers a creditor case-selection strategy designed to deter debtors from bringing legitimate claims. And third, it identifies solutions that have the potential to close the Student Loan Bankruptcy Gap and bring debt relief to millions of individuals.

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[†] Assistant Professor of Law, Villanova University. Ph.D. in Politics, Princeton University; J.D., Harvard Law School. Thanks to Laura Napoli Coordes, Seth Frotman, Jonah Gelbach, Melissa Jacoby, Ted Janger, John Pottow, Austin Smith, Madeleine Wanslee, Jay Westbrook, and the participants of the International Insolvency Institute’s Global Bankruptcy Workshop at Brooklyn Law School for valuable comments and discussions relating to this Article. And thanks to Greg Bailey, Alice Douglas, Andy Lee, Amy Phelps, and Callie Terris for exceptional research assistance.

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INTRODUCTION

This year, almost a quarter of a million student loan debtors will file for bankruptcy.¹ Of those, about three hundred will discharge their educational debt.² These statistics portend good news . . . for 0.1 percent of the student loan filers. For the other 99.9 percent, however, the outcome is bleak. They will exit bankruptcy with their student loans in tow, denied the fresh start that the system promises to every “honest but unfortunate debtor.”³

Take a moment to consider what those statistics mean. For every one thousand student loan debtors in bankruptcy, only one will clear the legal hurdles erected by Congress and obtain a discharge. This chasm between success and failure is the titular “Student Loan Bankruptcy Gap.”⁴ And it is an unprecedented situation in the law. Nowhere else have so many people sought legal relief while so few have obtained it.

The most troubling aspect, though, is that the gap does not result from existing law. Contrary to the prevailing wisdom, the student loan

1. See Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 528 (2012) [hereinafter Iuliano, *Empirical Assessment*] (calculating the number of student loan debtors who file bankruptcy).

2. See *infra* Part II.

3. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor’” (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991))).

4. Because referring to the situation as an access-to-justice problem is insufficient to capture the scope of the crisis, this Article coins the term “Student Loan Bankruptcy Gap.”

discharge laws do not present an insurmountable hurdle. About half of all bankrupt student loan debtors would obtain relief if they took the appropriate legal steps.⁵ Unfortunately, because nearly everyone has bought into the myth that student loans are not dischargeable, most debtors do not take those steps.

This failure has made the Student Loan Bankruptcy Gap the most pressing issue in educational debt today. Given that student loan debt now exceeds \$1.7 trillion,⁶ this is no small claim. But it is supported by the evidence. The Student Loan Bankruptcy Gap has harmed millions of members of Generation X, is harming millions of millennials, and will harm millions in Generation Z—unless something changes.⁷

Although scholars have been discussing failures in the student loan discharge process for more than a decade,⁸ they have neither recognized the true extent of the Student Loan Bankruptcy Gap nor understood the reason for its continued existence. This Article fills both holes in the literature. First, by presenting original nationwide data, this Article puts concrete numbers to the problem. And second, by conducting an in-depth analysis of student loan bankruptcy proceedings, it identifies the primary source of the Student Loan Bankruptcy Gap: creditor manipulation.

Specifically, the data show that creditors have adopted a case-selection strategy that distorts precedent and masks the true likelihood of obtaining a student loan discharge. In particular, creditors are engaging in strategic settlement—a process that involves settling unfavorable cases to avoid adverse precedent and aggressively litigating favorable cases to tilt the law in their favor. Ultimately, through repeated interactions with the courts, creditors have developed a body of precedent that supports their position,

5. See *infra* Part II.B.

6. See *Student Loan Debt Clock*, FINAID, http://www.finaid.org/loans/studentloandebt_clock.phtml [<https://perma.cc/X7R8-UCMM>].

7. See *infra* Parts II.B, III.A, III.B.

8. See, e.g., Katherine Porter, *College Lessons: The Financial Risks of Dropping Out, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 85, 98 (Katherine Porter ed., 2012) (advocating for bankruptcy courts to take into account the type of degree and whether the degree was completed when assessing whether a debtor should have their student loan discharged); Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 615 (2006) (arguing that “federal law [makes] it extremely difficult for individuals to default on student loans”); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 265–76 (2006) (concluding that most policy justifications do not support the “overly broad U.S. approach” to student loan nondischargeability).

notwithstanding the fact that debtors win the vast majority of cases. By employing this strategy, creditors have successfully cultivated a myth of nondischargeability—a myth that scholars,⁹ bankruptcy attorneys,¹⁰ and media commentators¹¹ all subscribe to.¹² This Article’s findings dispel that myth and offer hope to the millions of borrowers burdened by student loans they can never afford to pay back.

Although identifying the myth is a crucial first step, any comprehensive solution must go further and encourage individuals to assert their legal rights. This approach could take a variety of forms, from providing bankrupt debtors with information about the discharge process, to improving how attorneys evaluate student loan cases to encouraging journalists to present a more data-driven—and less sensationalistic—view of student loan bankruptcy. Despite their modest nature, these debtor-focused reforms have two key virtues over the sweeping legislative and judicial changes that scholars¹³ and

9. See, e.g., Charles J. Tabb, *Bankruptcy and Entrepreneurs: In Search of an Optimal Failure Resolution System*, 93 AM. BANKR. L.J. 315, 334 (2019) (“[A] debtor is burdened by her student loans forever unless she can prove an undue hardship, which is a very difficult standard to satisfy under current interpretations.”); William Voegeli, *The Higher Education Hustle: Political Correctness and the Credentials-Industrial Complex*, 13 CLAREMONT REV. BOOKS 12, 14 (2013) (“Debts incurred by those . . . who will never finish school, are no more dischargeable than degree recipients’ liabilities.”).

10. See, e.g., *Do I Need an Attorney for Student Loan Discharges if There Is Evidence that They Engaged in Predatory Student Loan Lending?*, AVVO, <https://www.avvo.com/legal-answers/do-i-need-an-attorney-for-student-loan-discharges-2252306.html> [<https://perma.cc/2A27-9HEE>] (responding to the question, bankruptcy attorneys uniformly gave discouraging answers, describing the process as “very difficult,” if not impossible, with one attorney commenting that he has “filed more than 6,000 cases and [is] yet to see student loans discharged”).

11. See, e.g., Jessica Dickler, *Trump Administration May Make It Easier To Wipe Out Student Debt in Bankruptcy*, CNBC (Feb. 21, 2018, 1:37 PM), <https://www.cnbc.com/2018/02/21/trump-administration-may-make-it-easier-to-wipe-out-student-debt-in-bankruptcy.html> [<https://perma.cc/3F8G-79QA>] (quoting Mark Kantrowitz as noting that “[a]s of now, ‘it’s almost impossible to discharge student loans in bankruptcy”).

12. See Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions To Discharge Student Loans*, 27 STAN. L. & POL’Y REV. 295, 297 (2016) (“Conventional wisdom dictates that it is all-but-impossible to discharge student loans in bankruptcy.”).

13. See, e.g., Robert C. Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 467, 497 (2014) (arguing that “the ‘undue hardship’ provision in the Bankruptcy Code should be repealed”); Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2177–78 (2014) (advocating for a system in which judges “play a more robust monitoring role in undue hardship adversary proceedings and thus . . . serve as a check against any attempts by creditors to run roughshod over student-loan debtor’s procedural rights”).

politicians¹⁴ have long advocated—namely, effectiveness and ease of implementation.

This Article proceeds in three parts. Part I frames the student loan bankruptcy debate. In doing so, it highlights the unique laws that govern the student loan discharge process and explores the criticisms that scholars and attorneys levy against those laws. Next, Part II presents original data that challenge the veracity of these critiques. Specifically, the data reveal two key findings: (1) that student loan creditors have engaged in a case-selection strategy designed to deter debtors from bringing legitimate claims, and (2) that, every year, tens of thousands of bankrupt debtors miss out on obtaining a student loan discharge simply because they fail to request one. Finally, Part III explores the path forward. It begins by discussing the social and economic consequences of inaction and concludes by offering solutions that have the potential to close the Student Loan Bankruptcy Gap.

I. THE STUDENT LOAN BANKRUPTCY FRAMEWORK

A. *The Discharge Process*

Understanding the student loan discharge process requires a brief dive into the Bankruptcy Code. The current iteration of the law governing student loan discharges was enacted as part of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act.¹⁵ The relevant statutory language reads as follows:

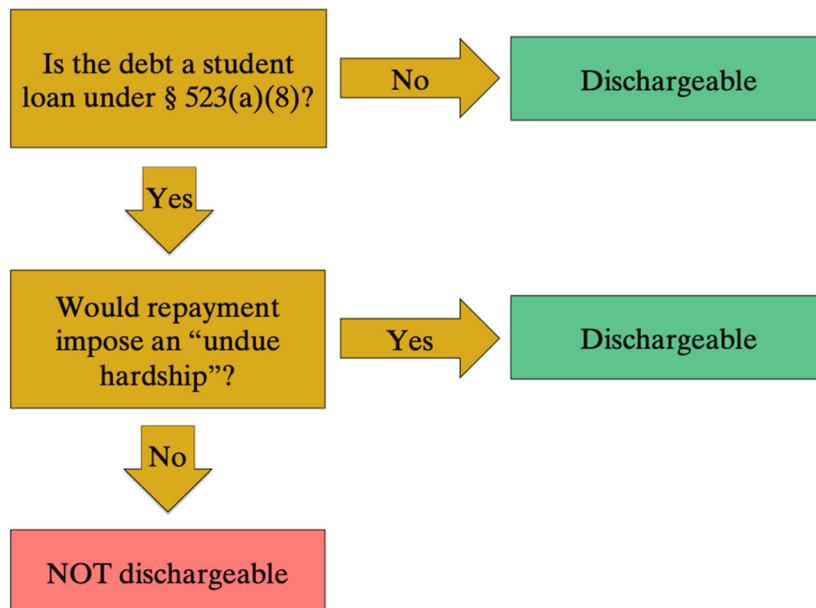
- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt
- (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

14. See, e.g., Zack Friedman, *Bernie Sanders: I Will Cancel All \$1.6 Trillion of Your Student Loan Debt*, FORBES (June 24, 2019, 7:18 AM), <https://www.forbes.com/sites/zackfriedman/2019/06/24/student-loans-bernie-sanders/#9623f33fc295> [https://perma.cc/E6X8-VALB] (comparing Bernie Sanders's plan to eliminate all student loan debt with Elizabeth Warren's plan to cancel \$50,000 in student loan debt for individuals earning less than \$100,000).

15. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

- (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.¹⁶

FIGURE 1: THE STUDENT LOAN BANKRUPTCY PROCESS



Although there is a lot to parse in this statutory excerpt, Figure 1 aims to provide a clear explanation of the text. As the flow chart illustrates, judges must engage in a two-step analysis to determine whether a student loan is dischargeable. At step one, the judge must resolve whether the loan at issue is a qualifying educational debt under

16. 11 U.S.C. § 523(a)(8) (2018).

§ 523(a)(8) of the Bankruptcy Code. The precise contours of this statutory provision will be important later.¹⁷ For present purposes, however, it is sufficient to know that the student loan discharge exemption only applies to three categories of educational debt: (1) government and nonprofit-backed loans and educational benefit overpayments,¹⁸ (2) obligations to repay funds received as an educational benefit, scholarship, or stipend,¹⁹ and (3) qualified education loans.²⁰ If a student loan does not fall within at least one of these categories,²¹ the inquiry ends, and the debt is discharged through the normal bankruptcy process. If, however, the student loan satisfies the criteria for at least one of these categories, then it is a qualifying educational debt under § 523(a)(8), and step two of the analysis is triggered.

At this second stage of the inquiry, the judge must determine whether repayment of the debt would “impose an undue hardship on the debtor and the debtor’s dependents.”²² Because Congress has never defined “undue hardship,” the judiciary has been forced to flesh out the meaning of the phrase. To that end, most courts have coalesced around a test first set forth in *Brunner v. New York State Higher Education Services Corp.*²³ To prove undue hardship under the

17. See *infra* Part II.A. See generally Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277 (2019) [hereinafter Iuliano, *Student Loan Bankruptcy*] (arguing that courts have misinterpreted the statutory criteria for discharging student loans in bankruptcy).

18. 11 U.S.C. § 523(a)(8)(A)(i).

19. *Id.* § 523(a)(8)(A)(ii).

20. *Id.* § 523(a)(8)(B).

21. For a discussion of the scope of these categories, see *infra* Part II.A.

22. See § 523(a)(8); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (citing § 523(a)(8)).

23. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). The Eighth Circuit and most bankruptcy courts in the First Circuit have adopted an alternative test known as the “totality-of-the-circumstances test.” See, e.g., *In re Long*, 322 F.3d 549, 553–54 (8th Cir. 2003) (holding that the totality-of-the-circumstances test requires courts to consider: “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case”); *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 797–98 (B.A.P. 1st Cir. 2010) (noting that “[m]ost of the bankruptcy courts within the First Circuit have adopted the totality of the circumstances test over the *Brunner* test”). Although bearing a distinct name and purporting to undertake a more holistic analysis of the debtor’s situation, the totality-of-the-circumstances test yields outcomes that mirror those in *Brunner* Circuits. See Iuliano, *Empirical Assessment*, *supra* note 1, at 497 (“Identical debtors filing in a *Brunner* circuit and a totality of the circumstances circuit should expect similar outcomes.”).

Brunner standard, a debtor must establish the following three elements:

- (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.²⁴

This Article explores the meaning of these three elements in a later Part.²⁵ For now, it is sufficient to know that proving undue hardship requires the debtor to show (1) a current inability to repay the loans, (2) a future inability to repay the loans, and (3) a good faith effort to repay the loans.²⁶ If the debtor satisfies these three elements, then the student loan is discharged. Otherwise, the debt is nondischargeable and survives bankruptcy.

As this discussion highlights, there are two paths to discharge. The debtor can either show that the student loan is not a qualifying debt under § 523(a)(8) or prove that repayment would impose an undue hardship. If the debtor clears either of these hurdles, then the student loan is discharged.

B. The Myth of Nondischargeability

Despite the existence of these two discharge pathways, a myth of nondischargeability pervades the discourse on student loan debt.²⁷ At the extreme, many commentators fail to acknowledge either of these pathways and, instead, assert that the law places a blanket prohibition on the elimination of educational debt. As one journalist declares without qualification, “[S]tudent loans are not dischargeable in

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

25. See *infra* Part II.B.

26. I borrow this terminology from Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 496 (2005).

27. See, e.g., Mary Pilon, *The Student Loan Effect*, WALL ST. J. (Feb. 18, 2010, 9:00 AM), <https://blogs.wsj.com/juggle/2010/02/18/the-student-loan-effect> [https://perma.cc/6UDE-RPKY] (“[S]tudent loan] debt is associated with a unique sense of hopelessness.”).

bankruptcy.”²⁸ And as another writes, “Since student loans are not dischargeable in a bankruptcy, even the most financially distressed former students cannot get out from under their debt.”²⁹ The media is, unfortunately, not alone in advancing such claims. Even some scholars make categorical statements about the impossibility of discharging student loan debt.³⁰ Although these extreme positions anchor the myth, more nuanced views are part of the discourse as well.

Unfortunately, the more measured claims are just as discouraging to debtors.³¹ They describe a system in which discharging student loans is a theoretical possibility but a practical impossibility.³² The following quote from a consumer bankruptcy attorney is illustrative:

Student loans are not dischargeable in bankruptcy under almost any circumstances. There is such a thing as a hardship discharge of student loan debt, but to get one of those you need to be over the age of eighty, have no hearing, and have a serious mental illness that prevents you from ever being able to earn a dime or receive a social security payment, and not have any family that can assist you.³³

28. Robert Jonathan, *Student Loans: Paying Them Off Without Getting Schooled*, INQUISITR (July 8, 2012), <https://www.inquisitr.com/271834/student-loans-paying-them-off-without-getting-schooled> [https://perma.cc/78CW-4G8D].

29. Rachel E. Dwyer, *Student Loans and Graduation from American Universities*, THIRD WAY (June 18, 2015), <https://www.thirdway.org/report/student-loans-and-graduation-from-american-universities> [https://perma.cc/4B98-JWRD]. Two authors went so far as to describe the system as follows:

[Banks] wrote the student loan law, in which the fine-print says they aren't "dischargeable [sic]." So even if you file for bankruptcy, the payments continue due "You will be hounded for life They will garnish your wages. They will intercept your tax refunds. You become ineligible for federal employment."

Andrew Hacker & Claudia Dreifus, *The Debt Crisis at American Colleges*, ATLANTIC (Aug. 17, 2011), <https://www.theatlantic.com/business/archive/2011/08/the-debt-crisis-at-american-colleges/243777> [https://perma.cc/NVG6-FY5Z].

30. See, e.g., Voegeli, *supra* note 9, at 14 (“[S]tudent loans are not dischargeable in bankruptcy.”).

31. See, e.g., Kevin Carey, *Lend with a Smile, Collect with a Fist*, N.Y. TIMES (Nov. 27, 2015), <https://nyti.ms/1NyckmI> [https://perma.cc/YG7V-XEJE] (“[F]ederal law all but precludes [bankruptcy as a] method of discharging student loans.”).

32. See, e.g., Mike Brown, *Study: For Those Filing for Bankruptcy, Student Loan Debt Still Lingers On*, LENDEDU (June 11, 2019), <https://lendedu.com/blog/student-loans-bankruptcy> [https://perma.cc/F54S-Y7SB] (“[S]tudent loan debt is one form of debt that is almost always impossible to discharge in bankruptcy.”).

33. David R. Black, *Successfully Guiding a Client Through the Chapter 13 Filing Process*, ASPATORE, Jan. 2014, at *13, 2014 WL 10512.

Although seemingly hyperbolic, this view represents how most lawyers and scholars perceive the undue hardship standard.³⁴ Almost to a one, they make bold statements regarding the herculean effort required to prove undue hardship.³⁵

This myth is so pervasive and so frequently echoed that one could fill multiple pages with quotes declaring that student loans “are almost impossible to discharge in bankruptcy.”³⁶ To spare the reader that undertaking, consider just one framing of the problem that conjures a particularly striking image: “A student loan resembles a labyrinth; it’s easy for you to enter, but once you get into trouble, it is difficult, maybe impossible, to exit.”³⁷ This metaphor is apt, though not for the reasons the scholars who drew the comparison believe. As the remainder of

34. See, e.g., Cloud & Fossey, *supra* note 13, at 479 (“[F]ederal courts have interpreted the ‘undue hardship’ requirement in such a way that makes it very difficult for student-loan debtors to obtain bankruptcy relief.”); Jonathan M. Layman, *Forgiven but Not Forgotten: Taxation of Forgiven Student Loans Under the Income-Based-Repayment Plan*, 39 CAP. U. L. REV. 131, 136 (2011) (“[F]ederally backed student loans cannot be discharged in bankruptcy except in some rare cases of extreme financial hardship.”); *The Student Borrower Bankruptcy Relief Act of 2019*, 38 AM. BANKR. INST. J. 8, 70 (2019) (describing the undue hardship standard as “nearly impossible to demonstrate”); *Student Loans Difficult—But Not Impossible—To Discharge in Bankruptcy*, MINILLO & JENKINS CO., LPA, <https://www.mjbankruptcy.com/articles/student-loans-difficult-but-not-impossible-to-discharge-in-bankruptcy> [<https://perma.cc/S6QA-Y2RE>] (“Discharging student loan debt in bankruptcy is exceedingly difficult and it occurs very rarely.”).

35. See, e.g., Victoria J. Haneman, *A Timely Proposal To Eliminate the Student Loan Interest Deduction*, 14 NEV. L.J. 156, 179 n.142 (2013) (“Student loans are nondischargeable absent a showing of undue hardship, which is a standard that is seldom met.”). A small number of attorneys have tried to chip away at the narrative of hopelessness. See, e.g., Austin Smith, *Not All Student Loans Are Non-Dischargeable in Bankruptcy and Creditors Know This*, STUDENT BORROWER PROT. CTR. (Mar. 18, 2019), <https://protectborrowers.org/not-all-student-loans-are-non-dischargeable-in-bankruptcy-and-creditors-know-this> [<https://perma.cc/NB3W-XQ2C>] (“There is a great deal of misinformation surrounding student loans in bankruptcy. Most people believe that anything called a ‘student loan,’ or any debt made to a student, cannot be discharged in bankruptcy. This notion is fundamentally untrue.”); *Services I Provide*, STUDENT LOAN LAW., <https://thestudentloanlawyer.com/services> [<https://perma.cc/F9YR-VG5N>] (offering legal help and resources for managing student loan debt).

36. See Ryan Cooper, Opinion, *The Case for Erasing Every Last Penny of Student Debt*, WEEK (Feb. 8, 2018), <https://theweek.com/articles/753769/case-erasing-every-last-penny-student-debt> [<https://perma.cc/VAY9-NV2E>]. A salient example involves the National Bankruptcy Review Commission, which stated in its final report that “[a]lthough the drafters of the nondischargeability provision may have intended that those who truly cannot pay should be relieved of the debt under the undue hardship provision, in practice, nondischargeability has become the broad rule with only a narrowly construed undue hardship discharge.” NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 211 (1997). The commission went on to observe that “[i]t hardly is surprising that some courts see few requests for hardship discharges of educational loans given the pitfalls of the undue hardship standard.” *Id.* at 212.

37. Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 215, 218 (2014).

this Article will argue, the situation is dire, but the bankruptcy laws are not to blame. Instead, it is the bleak perception of those laws that has allowed the Student Loan Bankruptcy Gap to persist.

II. THE TWO-STEP ANALYSIS

This Part analyzes the two discharge pathways in order. Each analysis begins with a discussion of the key legal arguments that define the inquiry. Next, original data are presented showing that both steps of the analysis offer debtors a viable path to discharging their student loans. One notable pattern in the data is revealing—namely, limited precedent favoring creditors coupled with an overwhelming number of settlements favoring debtors. Drawing on litigation theory, this Part argues that the data pattern is best explained by strategic settlement. In short, creditors are settling unfavorable cases to avoid adverse precedent and litigating good cases to cultivate favorable precedent. Ultimately, this litigation strategy has distorted the law and cultivated the myth of nondischargeability.

A. *Is It an Educational Debt?*

In student loan bankruptcy cases, the first issue that a judge must decide is whether the debt in question is a qualifying educational debt under § 523(a)(8) of the Bankruptcy Code. As discussed above, if the loan falls into any of three statutory categories, it is nondischargeable absent a showing of undue hardship.³⁸ This section provides a brief overview of two of the categories and then takes a deeper look at the final statutory provision.

The first category is set forth in § 523(a)(8)(A)(i) and encompasses any “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.”³⁹ Courts have read this language to apply to “all situations of student loans funded by the government or nonprofit institutions.”⁴⁰ This category exists to protect American taxpayers and nonprofit organizations from bearing the burden of student loan defaults.⁴¹

38. See *supra* notes 18–20 and accompanying text.

39. 11 U.S.C. § 523(a)(8)(A)(i) (2018).

40. *E.g., In re Rezendes*, 324 B.R. 689, 692 (Bankr. N.D. Ind. 2004).

41. For a more detailed discussion of this provision, see Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 283.

The second category falls under § 523(a)(8)(B) and includes any “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.”⁴² As anyone who has opened the Tax Code would guess, digging into this provision means wading through more than a dozen technical terms. Completing that investigation, though, would reveal that this category includes any debts that are incurred for the purpose of paying approved costs of attendance at an accredited educational institution.⁴³

The third category—and the one with which this Section is primarily concerned—is found in § 523(a)(8)(A)(ii). This provision excepts from discharge any “obligation to repay funds received as an educational benefit, scholarship, or stipend.”⁴⁴ Most courts have interpreted this clause as a broad catchall, reading it to include any educational debts not covered by the other two provisions.⁴⁵

This sweeping analysis turns on the phrase “educational benefit.”⁴⁶ Specifically, judges have endorsed a colloquial reading of the phrase, in which “benefit” means “an advantage or profit gained from something.”⁴⁷ Understood this way, an “educational benefit” is anything that facilitates or advances an individual’s education. In short, if the debt is incurred to fund any educational expenses, then it is an educational benefit. Given the breadth of this interpretation, I have previously labeled it the “Broad Reading.”⁴⁸

In a prior article⁴⁹ and a number of amicus briefs,⁵⁰ I have proposed an alternative interpretation of “educational benefit”—an

42. § 523(a)(8)(B).

43. For a more detailed discussion of this provision, see Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 286–88.

44. § 523(a)(8)(A)(ii).

45. See, e.g., *In re Corbin*, 506 B.R. 287, 296 (Bankr. W.D. Wash. 2014) (observing that “a majority of courts have held that a loan qualifies as an ‘educational benefit’ if the stated purpose for the loan is to fund educational expenses.” (citing *Maas v. Northstar Educ. Fin., Inc.* (*In re Maas*), 497 B.R. 863, 869–70 (Bankr. W.D. Mich. 2013))).

46. See, e.g., *In re Beesley*, No. 12-24194-CMB, 2013 WL 5134404, at *4 (Bankr. W.D. Pa. Sept. 13, 2013) (“[C]ourts . . . have interpreted ‘funds received as an educational benefit’ to include loans.”); *In re Rumer*, 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012) (writing that “loans received as an educational benefit, scholarship, or stipend” are excepted from discharge).

47. *Benefit*, OXFORD ENG. DICTIONARY, <https://en.oxforddictionaries.com/definition/benefit> [<https://perma.cc/M4JB-K8YP>].

48. See Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 291.

49. See *id.* at 288–313.

50. See generally Brief of Bankruptcy Scholars as Amici Curiae in Support of Appellees and Affirmance, *McDaniel v. Navient Sols., LLC* (*In re McDaniel*), No. 18-1445 (10th Cir. Apr. 18,

interpretation that I refer to as the “Narrow Reading.” The Narrow Reading argues that “benefit” should be given the same meaning it has when used in phrases such as “unemployment benefit,” “insurance benefit,” and “retirement benefit.”⁵¹ The defining feature of these types of benefits is not that they promote an individual’s well-being but rather that they provide monetary assistance that the beneficiary is legally entitled to receive.⁵² The payment can come from a variety of sources—for example, the state, an employer, or an insurance company—but in each instance, the payer is distributing guaranteed benefits.⁵³

To draw out the distinction between the two readings of “benefit,” consider the phrase “retirement benefit.” When asked what retirement benefits are, people think of programs that provide defined payments to retirees, such as pensions and social security. But consider another example. Suppose someone offered a retiree one hundred dollars. Is that a retirement benefit as well? In a strained sense, it may be. The money does benefit the individual during her retirement. That said, the money is clearly not a retirement benefit in any conventional sense of the phrase. And notwithstanding the fact that the money benefits the retiree, it would be very odd to say that the monetary gift provides a retirement benefit.

Nonetheless, that situation is precisely analogous to what the courts have done in the context of educational benefit. They have defined each of the words by looking at them in isolation and have then concluded that any monetary transfer benefiting an individual’s education is an “educational benefit.” In doing so, courts have failed to account for the way in which “educational” and “benefit” combine to form a specialized term. If the courts were to read “benefit” in the same

2019) [hereinafter *In re McDaniel* Brief] (“The plain meaning of the statute, the legislative intent behind the statutory exemption, and the Bankruptcy Code’s, fresh-start policy all support a narrow reading of the student loan discharge exemption.”); Brief of Bankruptcy Scholars as Amici Curiae in Support of Appellees, *In re Crocker*, 941 F.3d 206 (5th Cir. 2019) (No. 18-20254) [hereinafter *In re Crocker* Brief] (same).

51. *Benefit*, DICTIONARY.COM, <http://www.dictionary.com/browse/benefit?s=t> [<https://perma.cc/4ZK3-CPZ2>] (defining “benefit” as “a payment or gift . . . given by an employer, an insurance company, or a public agency”).

52. See *Benefit*, OXFORD ENG. DICTIONARY, *supra* note 47 (defining “benefit” as “[a] payment made by the state or an insurance scheme to someone entitled to receive it”).

53. See *Benefit*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/benefit> [<https://perma.cc/3ANF-DMS7>] (defining “benefit” as “financial help in time of sickness, old age, or unemployment . . . a payment or service provided for under an annuity, pension plan, or insurance policy . . . a service (such as health insurance) or right (as to take vacation time) provided by an employer in addition to wages”).

way they read the word in analogous contexts—such as “retirement benefit” or “employment benefit”—“educational benefit” would refer to a type of debt known as a conditional educational grant. These debts, in short, include any educational funds that a student receives in exchange for a promise to perform future services.

The Reserve Officer Training Corps is a notable example of an educational benefit program. The fund pays college tuition for students who meet certain qualifications and who agree to serve in the military for a given number of years following graduation.⁵⁴ Another example of an educational benefit is the federally funded National Health Service Corps scholarship. Similar to its military counterpart, this program pays the tuition of medical school students who agree to spend several years working in underserved areas after graduation.⁵⁵ Importantly, these programs do not loan money but rather offer conditional educational grants. The student must repay the money only if she does not meet her obligations. This type of agreement is what the statute means when it refers to an educational benefit.

A few key points illustrate the superiority of the Narrow Reading.⁵⁶ First, if “educational benefit” is read broadly, then § 523(a)(8)(A)(i) and § 523(a)(8)(B) are rendered irrelevant. Recall that these provisions cover loans backed by the federal government or nonprofits and qualifying education loans. Both of these categories of debts are undeniably educational benefits under the Broad Reading. This interpretation, however, presents a significant problem. Giving “educational benefit” a meaning that completely subsumes two other statutory provisions violates the canon against surplusage.⁵⁷ Importantly, no such concern arises under the Narrow Reading. All three subsections of § 523(a)(8) retain distinct, yet complementary, meanings.

54. Angela Frisk, *Get Money for College Through ROTC Programs*, U.S. NEWS & WORLD REP. (July 25, 2013, 10:00 AM), <https://www.usnews.com/education/blogs/the-scholarship-coach/2013/07/25/get-money-for-college-through-rotc-programs> [<https://perma.cc/5FR8-L67M>].

55. *Scholarship Program Overview*, NAT'L HEALTH SERV. CORPS, <https://nhsc.hrsa.gov/scholarships/overview/index.html> [<https://perma.cc/C43E-2K33>].

56. For a comprehensive discussion of the arguments in favor of the Narrow Reading, see *McDaniel* Brief, *supra* note 50; *In re Crocker* Brief, *supra* note 50; Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 288–313.

57. See, e.g., *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (writing that courts must “give effect, if possible, to every clause and word of a statute” (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000))); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

Second, the phrase “educational benefit” appears in another part of the statute, and there, courts have interpreted the term in line with the Narrow Reading.⁵⁸ The specific occurrence is in § 523(a)(8)(A)(i), and the operant phrase is “educational benefit overpayment.”⁵⁹ An opinion by a bankruptcy court in New Mexico provides a clear explanation of how courts have interpreted the phrase in this context: “Educational benefit overpayment occurs in programs like the GI Bill, where students receive periodic payments upon their certification that they are attending school. When a student receives funds but is not in school, this is a[n] educational benefit overpayment.”⁶⁰ Interpreting “educational benefit” in completely different ways in related sections of a statute would make no sense. As the Supreme Court has affirmed repeatedly, when identical words are used multiple times throughout a statute, they must be given the same meaning each time, absent a compelling reason otherwise.⁶¹

And third, the only mention of “educational benefit” in the legislative record strongly supports the Narrow Reading. As part of a 1990 congressional hearing, the chair of the Subcommittee on Economic and Commercial Law asked the U.S. Attorney for the Eastern District of Texas to explain “[t]he specific problem [the provision] is designed to address.”⁶²

The U.S. Attorney responded as follows:

This section adds to the list of non-dischargeable debts, obligations to repay educational funds received in the form of benefits (such as VA benefits), scholarships (such as medical service corps

58. See, e.g., *In re Moore*, 407 B.R. 855, 859 (Bankr. E.D. Va. 2009) (describing “educational benefit overpayment” as “an overpayment from a program like the GI Bill, where students receive payments even though they are not attending school”).

59. 11 U.S.C. § 523(a)(8)(A)(i) (2018).

60. *In re Coole*, 202 B.R. 518, 519 (Bankr. D. N.M. 1996). One court explained educational benefit overpayments in further detail:

Clearly, Plaintiff’s failure to pay his student housing obligations cannot be deemed debt for ‘an educational benefit overpayment.’ Defendant paid nothing to Plaintiff. NYU merely allowed Plaintiff to live at school facilities in consideration for certain charges which were not paid. No linguistic gyration can twist a no payment or underpayment by Plaintiff to an overpayment by Defendant.

In re Alibatya, 178 B.R. 335, 338 (Bankr. E.D.N.Y. 1995).

61. See, e.g., *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (“[I]dential words used in different parts of the same statute’ carry ‘the same meaning.” (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005))).

62. *Federal Debt Collection Procedures of 1990: Hearing Before the Subcomm. on Econ. & Com. L. of the H. Comm. on the Judiciary*, 101st Cong. 42 (1990) (question for the record submitted by Rep. Brooks, Chairman, H. Subcomm. on Econ. & Com. L.).

scholarships) and stipends. These obligations are often very sizable and should receive the same treatment as a “student loan” with regard to restrictions on dischargeability in bankruptcy.⁶³

This answer directly restates the Narrow Reading. The U.S. Attorney clarified that educational benefits are not loans but rather “educational funds received in the form of benefits.”⁶⁴ They are, in other words, conditional educational grants.

Notably, within the last year, two courts of appeals have considered this issue and both have endorsed the Narrow Reading.⁶⁵ Accordingly, this Article does not pursue these points further. Instead, it focuses on an objection to the argument—namely, if the Narrow Reading is so obviously correct, why did the Broad Reading prevail for more than a decade in the overwhelming majority of bankruptcy cases?⁶⁶

As I will show, the answer to that question lies in how student loan creditors have litigated educational benefit cases. Specifically, they have worked to ensure that courts only hear arguments in favor of the Broad Reading. When debtors advance a narrow interpretation of the statute, creditors entice them to drop the case by proposing confidential settlement agreements. By contrast, when debtors concede the accuracy of the Broad Reading, creditors pursue litigation techniques designed to manufacture precedent supportive of their preferred interpretation. This process is called strategic settlement.⁶⁷ And it is concerning because it exploits an access-to-justice gap in the bankruptcy system.

Because student loan debtors often lack the ability to pay for adequate counsel, most never learn they have strong legal claims in this area and, therefore, acquiesce to their creditors’ demands. Moreover, given that student loan debtors have no incentive to establish sound

63. *Id.* at 74–75 (response of Mr. Wortham, United States Attorney for the Eastern District of Texas).

64. *Id.* at 74.

65. See *McDaniel v. Navient Sols., LLC (In re McDaniel)*, No. 18-1445, 2020 WL 5104560, at *7–10 (10th Cir. Aug. 31, 2020) (endorsing the Narrow Reading); *Crocker v. Navient Sols., LLC (In re Crocker)*, 941 F.3d 206, 217–24 (5th Cir. 2019) (finding that the Broad Reading “is not only unsupported by the text, it is unsupported by some of [the appellant’s] authorities” and holding “that ‘educational benefit’ is limited to conditional payments with similarities to scholarships and stipends”).

66. For a discussion of the case law endorsing the Broad Reading, see Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 284–86.

67. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1492–94 (2003) [hereinafter Cross, *Decisionmaking*] (discussing strategic settlement).

precedent for future cases, those few individuals who do bring challenges are eager to accept settlement offers. Because of this incentive structure, creditors have been able to manufacture favorable precedent, even in the absence of legally defensible arguments. This strategy has been highly successful and has created a perception of nondischargeability that has deterred many potential litigants.⁶⁸

The following two Subsections focus on the structural issues that underlie much of the student loan bankruptcy litigation. The first Section presents data showing the existence of a significant access-to-justice gap. And the second discusses the litigation incentives that have enabled this problem to persist.

1. *Data.* A majority of courts that ruled on the meaning of educational benefit adopted the Broad Reading. That much is clear from the case law. But what is not clear is why judges have endorsed that interpretation. Is it because they believe the arguments in the Broad Reading's favor are more compelling, or is it simply because they do not hear arguments against it? This Subsection presents data that bear on this question and finds that the evidence points toward the latter explanation. Judges have not had the opportunity to weigh the Narrow Reading against the Broad Reading. And more troublingly, student loan creditors have worked to prevent courts from having such an opportunity. Uncovering this litigation strategy requires looking beyond the judicial opinions to the parties' briefs. This Subsection accomplishes that by presenting data on those cases that addressed the

68. This perception of nondischargeability is widespread among consumer bankruptcy attorneys. See, e.g., Rich Feinsilver, *Education Department Reviewing Discharge of Student Loans in Bankruptcy? – Not So Fast*, FEINLAWYER.COM (Feb. 22, 2018), <https://feinlawyer.com/education-department-reviewing-discharge-student-loans-bankruptcy-not-fast> [<https://perma.cc/5H44-RGAW>] (“As of now, it is almost impossible to discharge student loans in bankruptcy.”); *Refinancing Student Loans To Avoid Bankruptcy*, SIMON, RESNICK, HAYES LLP, <https://www.simonresnik.com/chapter-13/refinancing-student-loans-avoid-bankruptcy> [<https://perma.cc/2WHH-DKEK>] (“[P]rivate student loan debt [is] . . . almost completely (except for extreme cases) nondischargeable in bankruptcy.”); John Rose, *Are Student Loans Dischargeable in Bankruptcy?*, ROSE L. OFF., <https://www.johnwrose.com/Articles/Are-student-loans-dischargeable-in-bankruptcy.shtml> [<https://perma.cc/DM3W-9ZV9>] (“When the current bankruptcy law went into effect in 2005, it became nearly impossible to discharge student loans in bankruptcy.”); Eric M. Wilson, *Tuscaloosa Student Loan and Tax Debt Relief Lawyer*, ERIC WILSON L., LLC, <http://www.ericwilsonlaw.com/Bankruptcy/Student-Loans-Tax-Debt.html> [<https://perma.cc/8BQL-HJ4J>] (“It is almost impossible to discharge student loans through bankruptcy.”).

meaning of educational benefit between October 2005 and December 2019.⁶⁹

To identify the relevant set of cases, I used the “Bankruptcy Dockets Search” function on Bloomberg Law to run a “Dockets & Documents” query for any docket materials that used the phrase “educational benefit” at least three times and also referenced either educational debt or student loans.⁷⁰ Because the term “educational benefit” appears twice in § 523(a)(8), I required at least three mentions to ensure that documents that quoted the statute but lacked any additional discussion of the term were excluded from the search results. To filter out irrelevant results, I read through the docket for each of these cases. Many focused on the issue of undue hardship, not the scope of the educational benefit exemption. And a number of others involved issues unrelated to the dischargeability of student loan debt.⁷¹

Through this filtering process, I narrowed the set of cases to those that addressed the meaning of educational benefit. I counted a case as addressing the issue if either party advanced an argument regarding the scope of the educational benefit exemption in any court filing or if the court discussed the meaning of the phrase in its opinion. To serve as a partial check on Bloomberg Law, I also ran the same search query on Westlaw. Between these two protocols, thirty-nine cases met the criteria for inclusion in the dataset.⁷²

It bears noting that this search methodology is not comprehensive. Because Westlaw only searches judicial opinions and because Bloomberg Law does not run a full-text search on every document filed in the bankruptcy courts, some relevant cases likely failed to turn up in either set of results.⁷³ That said, the low number of cases is consistent

69. The start date was chosen to coincide with the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

70. The precise query is as follows: (“student loan!” OR “educational debt!” OR “educational loan!”) AND atleast3(“educational benefit”).

71. Many of these cases focused on the scope of 11 U.S.C. §§ 523(a)(8)(A)(i) or § 523(a)(8)(B) (2018), but did not discuss the meaning of § 523(a)(A)(ii). I excluded those cases in which both debtors were individuals. There were very few of these cases, but generally, these disputes involved two family members in a debtor–creditor relationship. *See, e.g., In re Nypaver*, 581 B.R. 431, 431–32 (Bankr. W.D. Pa. 2018).

72. Several other cases are ongoing, but because they have not reached a resolution, they are not included in the dataset.

73. Unfortunately, the only way to conduct a comprehensive search would be to manually examine the PACER filings for every adversary proceeding. And given the large number of adversary proceedings, that method would have increased the workload almost a hundredfold.

both with prior research on student loan undue hardship proceedings⁷⁴ and with the data on student loan adversary proceedings presented later in this Article.⁷⁵

Of these thirty-nine disputes, thirty-two were resolved by a judicial ruling on the merits; one ended with a default judgment in favor of the debtor; and another six concluded with settlement agreements. In the cases where judges ruled on the merits, creditors were highly successful, winning more than 80 percent of the time. In light of the case law discussed in previous research, that win rate is unsurprising.⁷⁶ But the question motivating this data collection is not “Who wins?” but rather “Why do they win?” Digging deeper into the cases reveals that the answer is not because creditors have the better arguments but rather because most courts fail to hear debtors’ best arguments.

Table 1 shows the strength of the link between the arguments debtors raise and the discharge outcomes they receive. As the table reveals, debtors won—or agreed to confidential settlements—in every case in which they offered arguments in support of the Narrow Reading. Conversely, they lost every case—except one—in which they failed to propose the Narrow Reading. In the single outlier, the debtor prevailed because the judge endorsed the Narrow Reading after conducting his own examination of the issue.⁷⁷

74. See Iuliano, *Empirical Assessment*, *supra* note 1, at 505 (finding that only 0.1 percent of student loan debtors in bankruptcy seek to discharge their educational debts).

75. See *infra* Part II.B. Between 2011 and 2019, there were an average of 573 student loan adversary proceedings per year. See *infra* tbl.2. Educational benefit cases are, however, only a small part of this total. More precisely, given the composition of all student loan debt, one would expect approximately 2 percent of these adversary proceedings to address the meaning of educational benefit—this approximation is derived from dividing the approximately \$1.7 trillion in total student loan debt by the roughly \$50 billion that is subject to the educational benefit discussion. See Teddy Nykiel, *2020 Student Loan Debt Statistics*, NERDWALLET (Sept. 23, 2020), <https://www.nerdwallet.com/blog/loans/student-loans/student-loan-debt> [<https://perma.cc/PL58-H3YB>] (noting that \$1.67 trillion is owed in federal and private student loan debt as of June 2020); Alexander Gladstone, *Appeals Court Weakens Bankruptcy Protections for Private Student Loans*, WALL ST. J. (Sept. 1, 2020, 4:57 PM), <https://www.wsj.com/articles/appeals-court-weakens-bankruptcy-protections-for-private-student-loans-11598993841> [<https://perma.cc/222G-RXCY>] (noting that “[r]oughly \$50 billion of outstanding private student debt” is subject to the “educational benefit” dispute).

76. See Iuliano, *Student Loan Bankruptcy*, *supra* note 17, at 289–301.

77. See *Nunez v. Key Educ. Res./GLESI (In re Nunez)*, 527 B.R. 410, 413–15 (Bankr. D. Or. 2015) (discussing the merits of the Narrow Reading). Given the judge’s extensive treatment of the issue in his opinion, it seems likely that the Narrow Reading was addressed during oral argument.

TABLE 1: DEBTORS' ARGUMENTS AND DISCHARGE OUTCOMES

Discharge	Did debtor propose Narrow Reading?	
	Yes	No
Yes	12*	1
No	0	26

* This figure includes five rulings on the merits, six stipulated discharges, and one default judgment.

In contrast to the debtors, creditors won only those cases in which debtors conceded the accuracy of the Broad Reading. For these cases, the debtors' strategies involved challenging the application of the Broad Reading to the specific loans in dispute.⁷⁸ Most frequently, their arguments focused on whether educational benefit referred to the loan's stated purpose or the loan's actual use.⁷⁹ Many borrowers argued for the latter interpretation, claiming that their educational loans were dischargeable because they used them for noneducational purposes.

This argument is nothing short of bizarre. By its logic, if a debtor took out an educational loan to pay for tuition but proceeded to use the funds to purchase a car, the debt would be dischargeable. But if that same debtor took out an educational loan to pay for tuition and actually used it to pay for tuition, the debt would be nondischargeable. For obvious reasons, courts have found this line of argument unpersuasive.⁸⁰

Nonetheless, debtors keep raising claims like this, and that has proven beneficial to student loan creditors. Each time they win,

78. See, e.g., Reply Brief for Appellant at 6–9, *Desormes v. Charlotte Sch. of L.* (*In re Desormes*), 497 B.R. 390 (Bankr. D. Conn. 2012) (No. 10-50079) (conceding the Broad Reading and focusing on the question of whether the funds were received).

79. See, e.g., *Maas v. Northstar Educ. Fin., Inc.* (*In re Maas*), 497 B.R. 863, 869 (Bankr. W.D. Mich. 2013) (“Although the breadth of this term has been the subject of some debate, a majority of courts determine whether a loan qualifies as an ‘educational benefit’ by focusing on *the stated purpose for the loan when it was obtained*, rather than on how the loan proceeds were actually used.”).

80. See *Navient Sols., LLC v. Crocker* (*In re Crocker*), 585 B.R. 830, 836 (Bankr. S.D. Tex. 2018), *aff'd in part, rev'd in part*, 941 F.3d 206 (5th Cir. 2019). In *Crocker*, the court concluded that “educational benefit” is to be read narrowly:

[The scope of educational benefit does] not include all loans that were in some way used by a debtor for education. If such were the case, would not a loan for a car used by a commuter student to travel to and from school every day be nondischargeable under § 523(a)(8)(A)(ii)? The answer is obvious.

Id.

creditors have another case they can point to in support of the Broad Reading. As the list of supportive precedent expands, the perception that the issue is settled grows stronger, and the argument itself becomes more compelling. Creditors are aware of this fact and have worked to ensure that the precedent weighs in their favor. They have done so not only by litigating cases that are likely to bolster favorable precedent but by settling cases that are likely to result in adverse precedent. Indeed, in every single case that settled, the debtors advanced arguments supporting the Narrow Reading.⁸¹ As the data illustrate, proposing the Narrow Reading is a virtual prerequisite for obtaining a favorable outcome.

One point worth emphasizing is that the debtors who argued for the Narrow Reading and those who failed to do so had similar student loan obligations. In only 8 percent of the cases, borrowers had debts that would be exempt from discharge under the Narrow Reading.⁸² Despite this, borrowers lost 67 percent of the cases—more than eight times the rate one would expect if the issues had been adequately briefed. Although that disparity highlights a notable access-to-justice gap, it is not the most significant problem. The far greater issue is the small number of cases that are filed.

To put the extent of this shortfall into perspective, consider the following: each year, several thousand debtors with student loans that are not qualifying debts under § 523(a)(8) file for bankruptcy.⁸³ But each year, fewer than five of those debtors bring forward cases to request a discharge.⁸⁴ In percentage terms, fewer than 1 percent of the educational benefit cases that should be filed are actually filed. Regardless of the exact number, the key point is that few individuals with dischargeable student loans recognize that those debts are, in fact, dischargeable.

81. See, e.g., Plaintiff's Notice of Hearing and Motion for Partial Summary Judgment at 7–10, *Ferguson v. Navient Sols., LLC* (*In re Ferguson*), No. 17-04051 (Bankr. D. Minn. July 25, 2017) (advocating a narrow construction of § 523(a)(8)).

82. See *Chi. Patrolmen's Fed. Credit Union v. Daymon* (*In re Daymon*), 490 B.R. 331, 335–37 (Bankr. N.D. Ill. 2013) (finding that an employer-sponsored tuition assistance program—in which the debtor received tuition reimbursement in exchange for agreeing to work for the employer for a fixed period of time—conferred a nondischargeable educational benefit); *Omaha Joint Elec. Apprenticeship & Training Comm. v. Stephens* (*In re Stephens*), No. 10-8056, 2011 WL 672000, at *3–4 (Bankr. D. Neb. Feb. 17, 2011) (same); *Sensient Techs. Corp. v. Baiocchi* (*In re Baiocchi*), 389 B.R. 828, 830–32 (Bankr. E.D. Wis. 2008) (same).

83. This number is an estimate derived from the fact that approximately 2 percent of outstanding student loan debt falls into this category. See *supra* note 75.

84. See *supra* notes 69–72 and accompanying text.

2. *Theory.* The existence of an access-to-justice gap in the student loan bankruptcy system is unfortunate, but given the litigation incentives, it is not surprising. This situation is a paradigmatic example of the case-selection strategy that Marc Galanter identifies in his landmark law and society article, “Why the ‘Haves’ Come out Ahead.”⁸⁵ In that piece, Galanter divides litigants into two groups: repeat players and one-shotters.⁸⁶ Repeat players are those who engage in many similar cases over time.⁸⁷ One-shotters are those who have isolated interactions with the judicial system.⁸⁸ Because one-shotters do not expect to find themselves in court again, they are concerned only with the outcome in the present case.⁸⁹ Repeat players, by contrast, take a long-term view, which enables them to trade off immediate gains to obtain greater gains in subsequent cases.⁹⁰ These incentives make it such that repeat players care greatly about the establishment of favorable precedent, and one-shotters do not care at all. By capitalizing on these divergent interests, repeat players are able to engage in a case-selection strategy designed to cultivate favorable precedent, even in the absence of strong legal arguments.⁹¹

As experience has proven, the repeat-player/one-shotter model is more than an abstract theory. Its insights explain litigation strategy in a large number of domains.⁹² From plea negotiations between

85. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (explaining how litigants who expect to be involved in many cases on a single issue have different incentives than litigants who expect to be involved in only one case).

86. See *id.* at 97.

87. See *id.* (defining repeat players as those “who are engaged in many similar litigations over time”).

88. See *id.* (defining one-shotters as “claimants who have only occasional recourse to the courts”).

89. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 873 (1999) (“One-shot players who do not expect to litigate again are more likely to . . . trad[e] the possibility of making ‘good law’ for tangible gain—because they may not value a favorable legal opinion for future disputes.”).

90. See Galanter, *supra* note 85, at 100 (discussing repeat players’ incentives to “play for rules in litigation itself”).

91. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1450–52 (2000) (discussing how repeat players can employ this case-selection strategy to “pressur[e] judges into a favorable resolution of a case without entirely persuading them to it”).

92. See generally, e.g., Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the ‘Haves’ Come Out Ahead over Time? Applying Galanter’s Framework to the Decisions of the U.S. Courts of Appeals 1925–1988*, 33 LAW & SOC’Y REV. 811 (1999) (examining decisions in the federal courts of appeals from 1925 through 1988 and finding support for Galanter’s hypothesis that repeat players are more likely to win).

prosecutors and defendants, to labor disputes between employers and employees, to contract issues between businesses and consumers, the model illustrates how repeat players are able to game the system to their advantage.⁹³

The data in this study show that student loan bankruptcy litigation is another area in which the theory has strong explanatory power.⁹⁴ As the repeat players in this scenario, student loan creditors have taken a long-term view with respect to their litigation strategy.⁹⁵ Because they expect to be involved in similar disputes in the future, creditors quickly settle cases that could yield adverse precedent and aggressively litigate cases that are likely to yield beneficial precedent.⁹⁶ In fact, their incentives are such that they are willing to devote substantial resources to a single case when doing so will deter subsequent litigation or make it easier to win the cases that are brought.

Student loan debtors, by contrast, follow the one-shotter playbook and, accordingly, have no interest in the outcome of future litigation. For them, everything turns on the disposition of just one case.⁹⁷ This single-minded focus influences debtors' strategic decisions in two important respects. First, it promotes risk-averse behavior. Because debtors are unable to average their wins and losses across a set of cases and because the stakes are high relative to their net worth, debtors are incentivized to accept settlement offers below their case's expected value.⁹⁸ Second, because debtors do not expect to be involved in similar disputes in the future, they ignore the precedential effects that their

93. See, e.g., Albiston, *supra* note 89, at 898 (examining employment litigation involving the Family and Medical Leave Act of 1993 and finding support for Galanter's hypothesis that repeat players fare better).

94. See *supra* Part II.A.1.

95. Cf. Galanter, *supra* note 85, at 103 (noting "the superior opportunities of the [repeat player] to trigger promising cases and prevent the triggering of unpromising ones").

96. See *id.* at 101 ("We would then expect [repeat players] to 'settle' cases where they expected unfavorable rule outcomes. Since they expect to litigate again, [repeat players] can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules.").

97. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 534 (1991) ("One-shot players who expect to be involved in only one litigation will not realize such benefits [from establishing favorable precedent]. For them, there is no long run; there is only now.").

98. Cf. *id.* at 533-34 (noting that, unlike one-shotters, "[r]epet players can afford to 'play the averages' and treat each case according to its expected value because gains will offset losses over time").

cases will have on subsequent litigation.⁹⁹ This incentive structure accrues to the benefit of creditors by skewing precedent in their favor and by allowing them to settle unfavorable cases on favorable terms.¹⁰⁰

The unwarranted advantages of this repeat-player strategy are even more salient when one considers that student loan creditors, themselves, harbor doubts as to the veracity of the Broad Reading. In disclosure statements for the Securities and Exchange Commission (“SEC”), student loan creditors have repeatedly warned investors that many types of private student loans may be dischargeable in bankruptcy. For example, in its prospectus for a \$1.5 billion student loan securitization, Sallie Mae stated that the “risk of bankruptcy discharge of private credit student loans” is a factor investors should “carefully consider . . . in deciding whether to purchase any notes.”¹⁰¹ Providing further details, Sallie Mae advised that

[p]rivate credit student loans made for *qualified education expenses* are generally not dischargeable by a borrower in bankruptcy . . . [but] direct-to-consumer loans are disbursed directly to the borrowers based upon certifications and warranties contained in their promissory notes This process does not involve school certification as an additional control and, therefore, may be subject to some *additional risk that the loans are not used for qualified education expenses*. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a private credit student loan to the extent the amount of the default is not covered by the trust’s credit enhancement.¹⁰²

According to Sallie Mae’s own financial disclosures, private student loans that are not used for qualified education expenses may be dischargeable in bankruptcy. Navient, a spin-off of Sallie Mae and major student-loan servicing company in its own right, has issued similar advisements in its SEC filings. In a 2014 offering memorandum, for instance, the company warned investors that a key risk factor is the

99. See Galanter, *supra* note 85, at 102 (arguing that one-shotters “should be willing to trade off the possibility of making ‘good law’ for tangible gain”).

100. See *id.* (“[W]e would expect the body of ‘precedent’ cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to [repeat players].”).

101. SLM STUDENT LOAN TRUST 2008-1, PROSPECTUS SUPPLEMENT TO BASE PROSPECTUS DATED OCTOBER 16, 2007, at 20, 33 (2008), <https://www.navient.com/assets/about/investors/debtasset/SLM-Loan-Trusts/06-10/2008-1/20081.pdf> [<https://perma.cc/99GW-4JUJ>].

102. *Id.* at 33 (emphasis added).

“bankruptcy discharge of career training loans.”¹⁰³ As Navient explained,

Career training loans are *generally dischargeable* by a borrower in bankruptcy. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a career training loan to the extent the amount of the default is not covered by the trust’s credit enhancement.¹⁰⁴

Interestingly, in its court briefs, Navient firmly claimed that loans not used for qualified education expenses, such as career training loans, are exempt from discharge and argued that reading the statute otherwise “makes no sense” and “ignore[s] clear Congressional instruction.”¹⁰⁵ When faced with possible liability for issuing material misstatements to investors,¹⁰⁶ Navient emphasizes the dischargeability of student loans. But when making arguments in court, Navient wholly disclaims that position, arguing that such loans are clearly nondischargeable.

With respect to educational benefit litigation, creditors have used their status as repeat players to great advantage. Through careful case selection, they have managed not only to develop favorable precedent but to do so with such success that few debtors have been willing to challenge the Broad Reading’s expansive interpretation. Despite having the weaker legal arguments, student loan creditors have been the clear victors.

B. Is There Undue Hardship?

In step two of the student loan discharge analysis, the court must evaluate whether the student loan would “impose an undue hardship on the debtor and the debtor’s dependents.”¹⁰⁷ As discussed in Part I, most courts in the United States have adopted the *Brunner* test—a standard that requires debtors to establish three elements to prove undue hardship: (1) a current inability to repay the loans, (2) a future

103. NAVIENT OFFERING MEMORANDUM, at S-29 (2014), <https://www.navient.com/assets/NAVSL%202014-CT%20-%20Offering%20Memorandum%20-%20As%20Printed.pdf> [<https://perma.cc/58Y6-ZPHD>].

104. *Id.* (emphasis added).

105. *See, e.g.*, Opening Brief of Appellants at 27–28, *Crocker v. Navient Sols., LLC (In re Crocker)*, 941 F.3d 206 (5th Cir. 2019) (No. 18-20254).

106. *See* 15 U.S.C. § 78j (2018).

107. 11 U.S.C. § 523(a)(8) (2018).

inability to repay the loans, and (3) a good faith effort to repay the loans.¹⁰⁸

These prongs are best thought of as three temporal dimensions—present, future, and past, respectively—of a single analysis. The first prong evaluates the debtor’s present circumstances to determine whether the debtor has sufficient income or resources to make payments on her student loans today. The second prong examines the debtor’s future circumstances to assess whether the debtor’s financial situation is likely to improve such that she will be able to repay her student loans in the future. And finally, the third prong is backward-looking and asks whether the debtor made payments on her student loans when her financial circumstances allowed in the past.¹⁰⁹

As for the precise meaning of these elements, the available precedent seems to tilt in favor of creditors. At the extreme, a few courts require the debtor to show a “certainty of hopelessness” to satisfy the first two prongs.¹¹⁰ Striking a similarly harsh tone, other courts mandate “a total incapacity now and in the future to pay.”¹¹¹

Some courts take a more measured approach, holding that utter hopelessness is not necessary.¹¹² Even so, these courts acknowledge the strict nature of the undue hardship test and emphasize that a discharge is not permitted “merely because repayment of the borrowed funds would require some major personal and financial sacrifices.”¹¹³

Although the dominant precedent is consistent with the myth of nondischargeability, the step one analysis demonstrates that precedent

108. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

109. For detailed treatment of these elements, see Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 196–200 (2009).

110. See, e.g., *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 386 (6th Cir. 2005) (holding that the *Brunner* test requires a “certainty of hopelessness” (quoting *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993))); *O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn)*, 339 F.3d 559, 564 (7th Cir. 2003) (same).

111. See, e.g., *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995) (quoting *In re Brunner*, 46 B.R. 752, 758 (S.D.N.Y. 1985)).

112. See, e.g., *Educ. Credit Mgmt. Corp. v. Howe (In re Howe)* 319 B.R. 886, 889–90 (B.A.P. 9th Cir. 2005) (holding that courts must “conduct[] an individualized analysis of debtor’s expenses [under] § 523(a)(8)"); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004) (“[C]ourts need not require a ‘certainty of hopelessness.’ Instead, a realistic look must be made into debtor’s circumstances and the debtor’s ability to provide for adequate shelter, nutrition, health care, and the like.”).

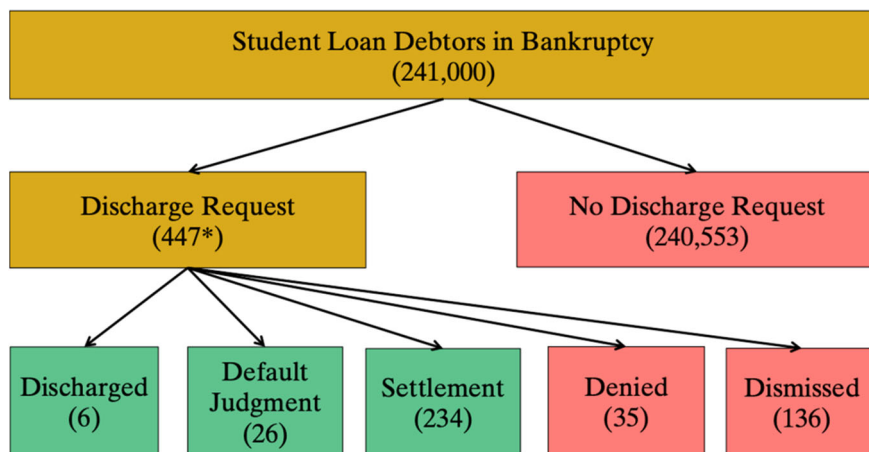
113. *Howe*, 319 B.R. at 889–90 (quoting *Faish*, 72 F.3d at 305–06).

does not always tell the full story. Actual case outcomes can reveal a very different legal landscape. Because many cases do not reach a judicial ruling on the merits, identifying how those disputes are resolved is necessary to understanding the entire spectrum of outcomes. And as the remainder of this section will show, those nonprecedential cases evidence a strong pattern of strategic settlement on the part of creditors.

1. *Data.* Despite being a consistent topic of public interest, student loan data is hard to come by—particularly data relating to undue hardship challenges. To help fill that gap, I have compiled a nationwide set of student loan bankruptcy cases. Specifically, my dataset includes every student loan undue hardship proceeding filed in 2017: 447 cases in total.

Throughout this process, I used Bloomberg Law’s Bankruptcy Docket search function. Because student loan adversary proceedings have a specific tag known as a “Nature of Suit Code,”¹¹⁴ I was able to reliably locate the relevant set of cases. Once the cases were located, I coded them along a number of dimensions, paying particular attention to the arguments made in the complaint, the answer, and the ultimate disposition of the proceeding. Figure 2 depicts the primary results of this process.

FIGURE 2: STUDENT LOAN BANKRUPTCY OUTCOMES IN 2017



**10 cases are still pending*

114. The specific Nature of Suit code is 63: Dischargeability - 523(a)(8), student loan.

The numbers in the flow chart are rather striking. In 2017, there were 241,000 student loan debtors who filed for bankruptcy. Of those, however, only 447 filed an adversary proceeding to request an undue hardship determination. In other words, more than 240,000 debtors conceded defeat without even asking the court to review their case. As the outcomes at the bottom of Figure 2 suggest, the decision to forgo an adversary proceeding was likely a poor decision for many of these people.

Contrary to what the prevailing wisdom would predict, those 447 debtors who filed adversary proceedings were highly successful. To date, 437 of those adversary proceedings have been closed, and 266 (61 percent) of those resulted in the eliminations of at least some of the borrower's student loan debt. This statistic, of course, raises the question: Why aren't more debtors bringing adversary proceedings? One might think that these successful debtors were in particularly bad financial situations. If that were true, the expectation would be for few people to file because the financial hurdles to proving undue hardship are so high.

In a previous article, however, I ruled out this possibility.¹¹⁵ Successful debtors neither exhibit unusual financial distress nor do they possess other characteristics that would make them especially well suited to proving undue hardship. In fact, along the most important financial and medical dimensions, successful debtors look very much like the broader set of 240,000 student loan debtors who failed to even file an adversary proceeding.¹¹⁶

The answer to the question of why there are so few adversary proceedings lies in a different domain. The reason does not have to do with qualities specific to the debtors but rather has to do with the distribution of case outcomes. Take a look at the number of judicial rulings on the merits. There were only 41. That is a small number, but, even more notably, 36 (85 percent) of those rulings went against the debtor, yielding a denial of discharge.

That statistic is even more surprising in light of the high number of settlements. If the law on the ground were actually so hostile to debtors, one would not expect settlements to swamp judicial rulings on

115. See Iuliano, *Empirical Assessment*, *supra* note 1, at 523–26 (finding that at least 30 percent of the student loan debtors who fail to file an adversary proceeding are faring as poorly financially and medically as the debtors who received a discharge).

116. See *id.* at 524 (concluding that more than 99 percent of the debtors who would have been likely to prove undue hardship failed to file an adversary proceeding).

the merits by a margin of 234 to 41. This striking ratio leads back to Galanter's repeat-player/one-shooter model of litigation. It appears that the student loan creditors are both aggressively litigating cases that they believe they will win and quickly settling cases that may yield adverse precedent.

This strategy, coupled with the low filing rate for adversary proceedings, suggests the following process: (1) any attorney who reviews the case law sees precedent that is stacked against debtors and concludes that few borrowers can prove undue hardship; (2) based on the judicial rulings, attorneys counsel their clients not to pursue student loan discharges; and (3) student loan debtors follow their attorneys' advice and decide not to file adversary proceedings. Those steps lead to the current situation where almost no one pursues undue hardship relief. As the full set of outcomes shows, however, this attorney advice is flawed. This Article explores these points more fully in the following Section. For now, though, the focus is on the data in Table 2.

TABLE 2: STUDENT LOAN BANKRUPTCY PROCEEDINGS BY YEAR

Year	Filers with Student Loans	Estimated Filers with Undue Hardship	Adversary Proceedings
2011	454,000	132,000	643
2012	390,000	113,000	736
2013	343,000	99,000	690
2014	299,000	87,000	685
2015	250,000	73,000	674
2016	246,000	71,000	604
2017	241,000	70,000	447
2018	222,000	64,000	404
2019	221,000	64,000	273

This table illustrates the true breadth of the Student Loan Bankruptcy Gap. The first column details the number of student loan borrowers who file bankruptcy each year.¹¹⁷ As the table shows, more

117. The data for the first column in Table 2 are derived from the following sources: Brown, *supra* note 32; *June 2018 Bankruptcy Filings Fall 2.6 Percent*, U.S. CTS. (July 24, 2018), <https://www.uscourts.gov/news/2018/07/24/june-2018-bankruptcy-filings-fall-26-percent> [https://perma.cc/VV6J-6SXP]; *June 2019 Bankruptcy Filings Fall 0.3 Percent*, U.S. CTS. (July 26, 2019), <https://www.uscourts.gov/news/2019/07/26/june-2019-bankruptcy-filings-fall-03-percent> [https://

than 2.5 million people with educational debt filed for bankruptcy over the past decade. The second column charts the number of those student loan borrowers in bankruptcy who would have been able to prove undue hardship if they filed an adversary proceeding and requested a judicial determination.¹¹⁸ For the last decade, that figure totals about one million individuals. Finally, the third column lists the number of student loan adversary proceedings that are actually filed each year.¹¹⁹ For the entire decade, that figure totals a mere five thousand.

Taking the columns together, the data show that one million people who filed for bankruptcy could have received a student loan discharge, but only five thousand people tried. As stated in the introduction, more than 99 percent of student loan borrowers who were likely to prove undue hardship gave up without even trying. The Student Loan Bankruptcy Gap is real, and it has hurt, at a minimum, one million individuals.

2. *Theory.* In analyzing the results for the first step of the student loan analysis, this Article noted strong support for the repeat-player/one-shotter model of litigation.¹²⁰ And, as touched on in the preceding Subsection, the data for the second step of the student loan analysis provide further evidence of manipulative behavior on the part of repeat-player creditors.

perma.cc/9UQY-E8ZE]; *Just the Facts: Consumer Bankruptcy Filings, 2006–2017*, U.S. CTS. (Mar. 7, 2018), <https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017> [https://perma.cc/B4YX-PQV7]. These estimates are consistent with data from the 2007 Consumer Bankruptcy Project, suggesting that the percentage of debtors in bankruptcy who have student loan debt has remained constant over the last decade. See Iuliano, *Empirical Assessment*, *supra* note 1, at 504.

118. This estimate comes from an earlier article of mine. There, I compared individuals who successfully discharged their student loans with individuals who filed bankruptcy but declined to pursue a student loan discharge. Based on those numbers, I was able to determine the number of bankrupt debtors who could have discharged their student loans if they had taken the appropriate legal steps. See Iuliano, *Empirical Assessment*, *supra* note 1, at 504–07, 512–26. By combining newly collected data from column one along with data from one of my earlier articles, I was able to determine the number of student loan debtors in bankruptcy over the last decade who would have been able to prove undue hardship if they had attempted to do so. See *id.* at 523–25 (comparing debtors who received student loan discharges with debtors who did not file an adversary proceeding to estimate the percentage of nonfiling debtors who would be likely to prove undue hardship).

119. I gathered the data for this column by searching the Bloomberg Law bankruptcy dockets for any case tagged with the student loan Nature of Suit code (63: Dischargeability - 523(a)(8), student loan) during the applicable time period.

120. See *supra* Part II.A.2.

Specifically, there are two key aspects to the data that, when combined, illustrate a clear pattern of strategic settlement. First, the ratio of settlements (234) to judicial rulings on the merits (41) is striking. There were nearly six times as many settlements as decisions on the merits. This fact alone is not dispositive of strategic settlement. It could, of course, be explained by risk aversion among both sets of litigants. Hence the importance of the second key aspect of the data: the ratio of judicial rulings finding undue hardship (6) to those denying the presence of undue hardship (35).

In short, repeat-player creditors won 85 percent of the cases that had a judicial ruling on the merits. This is true even though debtors received student loan relief in a significant majority of cases. This distribution is far from what one would expect in a fair litigation system in which both sides had equal representation and brought equal funding to the legal battle. Winning 85 percent of the judicial rulings on the merits while losing a significant majority of cases that are brought is an unusual feat. This distribution can best be explained by strategic settlement.

Student loan creditors are able to identify which discharge cases they will win and aggressively litigate those disputes to obtain favorable precedent. At the same time, these creditors offer generous settlements to debtors who are likely to prevail on the merits.¹²¹ Given debtors' one-shotter status and their corresponding risk aversion, they are eager to accept settlements. Ultimately, this dual-pronged approach allows creditors to develop significant favorable precedent while eliminating the potential for any unfavorable precedent.¹²²

Although troubling, this outcome should not be surprising.¹²³ Strategic settlement is, after all, a core prediction of Galanter's repeat-

121. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 78 (1991) ("The adversarial structure of litigation . . . permits parties to settle strategically in cases where the type of judge or set of facts seems likely to lead to unfavorable precedent.").

122. See Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 *CORNELL L. REV.* 1, 29 (2000) [hereinafter Cross, *Irrational Plaintiffs*] (writing that settlement-encouraging policies "facilitate strategic settlement and precedent manipulation by repeat players with noneconomic motives to deter litigation").

123. See Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 *INT'L REV. L. & ECON.* 467, 469-74 (1994) (developing a model showing that parties with a greater interest in precedent will prevail more often in setting precedent).

player/one-shotter model:

Repeat players will not allow the marginal cases to go to trial or judgment, because those cases present a real risk of creating adverse precedent. Instead, repeat players will push cases they are likely to win and settle the marginal cases. Hence, this [] hypothesis predicts that such repeat players will prevail in a disproportionate number of cases.¹²⁴

The pattern described here is, of course, identical to the results depicted in the student loan data. Creditors have won not just a disproportionate number of litigated cases, but every single litigated case.¹²⁵ At the same time, however, creditors have shown their willingness to settle disputes that may lead to adverse precedent. All told, settlements outnumber litigated cases by a ratio of eight to one. This distribution is strong evidence of strategic settlement.¹²⁶

Notably, strategic settlement may not always be beneficial to the repeat player. If they miscalculate the value of favorable precedent, the repeat player could end up paying more in settlement fees. In line with that thinking, the pattern here raises another question: If eight times as many cases are being settled as are being litigated, are the creditors truly coming out ahead?

When viewed in a certain light, the calculus appears questionable. Given that there were only 447 adversary proceedings in 2017, agreeing to settle 234 of those seems a high price to pay. After all, if there are only a few hundred cases a year, how much is favorable precedent

124. Cross, *Decisionmaking*, *supra* note 67, at 1493.

125. Subsequent economic analyses of litigation have reinforced and confirmed Galanter's hypothesis. *See generally*, e.g., Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980) (presenting a model of litigation in which the party with the greater stake in precedent is more likely to win); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (discussing the ways in which "parties' decision [to litigate or settle] may be affected by the precedential character of the decision in their case").

126. In commenting on Galanter's article, Richard Lempert noted that:

[T]heory tells us that the mix of cases heard by appellate courts is dominated by cases that "haves" have selected because they are likely to win. Missing from the mix are potentially important, precedent-setting cases that "have nots" are likely to win. When a "have not" threatens to appeal such a case, the "have," motivated by his or her interest as a repeat player, typically settles, on the plaintiff's terms if necessary, to prevent the appellate court from setting an adverse precedent.

Richard Lempert, Comment, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1109 (1999). Although this excerpt focuses on appeals, strategic settlement is just as effective when deployed at the initial stage of litigation. *See* Albiston, *supra* note 89, at 873 ("Strategic settlement influences the 'selection' of cases presented for adjudication by tending to select cases in which the repeat player is more likely to win.").

really worth to the creditors? The true value only becomes clear when one steps back and looks at the broader set of disputes—in particular, those adversary proceedings that could have been brought but were not.¹²⁷

As discussed in the previous Section, Table 2 shows just how substantial this number is. Each year, there are around 250,000 bankruptcy filers with student loans, and every single one represents a potential adversary proceeding. Creditors fear this inundation of cases. If the weight of precedent shifts and the myth of nondischargeability is dispelled, student loan debtors will suddenly start filing adversary proceedings en masse. Viewed from this perspective, the settlements make clear economic sense. Losing money on a couple hundred cases each year is a sound strategy if it deters hundreds of thousands of litigants from pursuing discharge claims.¹²⁸

As the data illustrate, this process of strategic settlement has been highly effective in the student loan bankruptcy context. It has played a significant role in perpetuating the myth of nondischargeability. And, by doing so, it has limited the number of student loan disputes to a few hundred annually—no small feat given that millions of student loan debtors are in need of financial relief.

III. CLOSING THE GAP

A. *Consequences of Inaction*

Is there a student loan debt crisis? When people ask this question, they tend to have a big-C Crisis in mind. They want to know whether student loan debt is on par with the Subprime Mortgage Crisis that led to the Great Recession.¹²⁹ Unsurprisingly, commentators come down

127. See Cross, *Irrational Plaintiffs*, *supra* note 122, at 13–14 (“[R]epet players [make settlement and vacatur] payments to rig the law for their benefit, and this demonstrates the monetary value of a favorable settlement”); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 906 (2004) (“A strategic settlement of a significant case is not the type of win-win, value-maximizing outcome that proponents of legal negotiation typically promise and extol.”).

128. See Cross, *Irrational Plaintiffs*, *supra* note 122, at 7 (describing how a one-shooter’s potential gain is “limited to the particular case,” while a repeat player’s “loss is equal to the value associated with a series of related actions”).

129. See, e.g., Maurice Adams, *US Higher Education Might Be a Bubble About To Burst*, OBSERVER (Feb. 23, 2018), <http://observer.case.edu/adams-us-higher-education-might-be-a-bubble-about-to-burst> [<https://perma.cc/PU8Z-4MQM>] (“Is U.S. higher education a bubble about to burst, like the housing bubble burst that triggered the 2007-2008 financial crisis? That strong possibility is now evident.”).

on both sides of the issue. Some argue that total outstanding student loan debt is too low to present a macroeconomic problem.¹³⁰ And others see parallels with previous recessions and contend that student debt will cause a global economic catastrophe.¹³¹ In favor of this latter position, one article in *Fortune* magazine describes a particularly grim future:

The higher education bubble (one-sixth of the U.S. economy) will likely burst with the force of all previous catastrophes combined—a shock wave so sudden, so large, that it gathers the full force of the savings and loan, insurance, energy, tech, and mortgage crashes, creating a blockbuster-level perfect storm.¹³²

This sensationalistic prediction notwithstanding, the economic data suggest that a student loan crisis, in the big-C sense, is an unlikely event.¹³³ Admittedly, there are many similarities between the run-up to the Great Recession and the current state of student loan debt: rapidly growing debt balances, high default rates, and exorbitant borrowing by individuals who have little hope of paying off their loans, to name just a few.¹³⁴

130. See, e.g., Susan Dynarski, *An Economist's Perspective on Student Loans in the United States 2* (Sept. 2014) (unpublished manuscript), https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf [<https://perma.cc/4KF3-K36Q>] (“[T]here is no debt crisis: student debt levels are not large relative to the estimated payoff to a college education in the US. Rather, there is a repayment crisis, with student loans paid when borrowers’ earnings are lowest and most variable.”); Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99, 145 (2016) (“[D]efaults on student loans are unlikely to cause the ripple effects caused by defaults on home loans in the period leading up to the 2008 crisis.”).

131. See, e.g., Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 606 (2012) (noting the harmful macroeconomic and sociological effects of defaulting on student loans). See generally Jessica L. Gregory, *The Student Debt Crisis: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481 (2014) (arguing that student debt has reached a critical level and closely resembles the mortgage crisis that led up to the Great Recession starting in 2008).

132. Jim Rogers & Robert Craig Baum, *This Economic Bubble Is Going To Wreak Havoc When It Bursts*, FORTUNE (July 10, 2017, 1:51 PM), <https://fortune.com/2017/07/10/higher-education-student-loans-economic-bubble-federal> [<https://perma.cc/QYV9-2JNW>].

133. See generally Glater, *supra* note 130 (arguing that student loan defaults are unlikely to cause market instability).

134. See Jesse L. Noa, *The Student Loan Bubble: A Pending Crisis or Overblown Threat?*, 20 TRINITY L. REV. 65, 79 (2014) (“[T]he causes of the student loan bubble reflect many of the causes of the housing bubble. Negative incentives, government policy, investor pressure, and greed are all playing a part in the run up of another possible crisis.”); Patrick B. Healey, *We Should All Be Concerned About the Student Debt Crisis*, CNBC (Nov. 4, 2019, 10:01 AM), <https://www.cnbc.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html> [<https://www.cnbc.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html>]

But despite these common features, there are several important differences.¹³⁵ First, the magnitude of the debt is quite different. In the lead-up to the Great Recession, mortgage debt hit \$9.3 trillion.¹³⁶ At present, student loan debt sits at \$1.7 trillion—a large number but by no means devastating on a national scale. Moreover, given that student loan default rates hover around 11 percent, the total amount in default is dwarfed by the amount of debt that was not being repaid during the mortgage crisis.¹³⁷

Second, the vast majority of student loan debt, including most student loan debt issued by private lenders, is federally guaranteed.¹³⁸ This means that the government already has a plan in place to handle widespread defaults—which was not the case for the mortgage crisis. The plan, of course, is a taxpayer bailout of the student loan industry, which, though less than ideal, does guarantee that systemically important banks will not fail because of student loan debt.

perma.cc/9DW4-MAKL] (“Much like the mortgage industry before the housing crisis, lenders are extending credit to students without fully weighing their ability to repay the debt.”).

135. See Alan White, *The Student-Loan Sweatbox*, CREDIT SLIPS (Feb. 26, 2018, 8:31 AM), <https://www.creditslips.org/creditslips/2018/02/the-student-loan-sweatbox.html> [<https://perma.cc/PM5P-L7DA>] (“Unlike the subprime mortgage bubble, the student loan bubble will not explode and drag down the bond market, banks and other financial institutions.”).

136. See Harriet Torry, *U.S. Mortgage Debt Hits Record, Eclipsing 2008 Peak*, WALL ST. J. (Aug. 13, 2019, 3:21 PM), <https://www.wsj.com/articles/u-s-mortgage-debt-hits-record-eclipsing-2008-peak-11565708431> [<https://perma.cc/K2BJ-GU3X>] (noting that the mortgage highpoint during the Great Recession was \$9.294 trillion in the third quarter of 2008).

137. See *A Look at the Shocking Student Loan Debt Statistics for 2020*, STUDENT LOAN HERO (Jan. 15, 2020), <https://studentloanhero.com/student-loan-debt-statistics> [<https://perma.cc/Y7X4-9D37>] (finding that “11.1% of student loans are 90 days or more delinquent or are in default”). Nearly two-thirds of student loan debt would need to enter default for the numbers to be comparable. See Lee E. Ohanian, *Who Defaults on Their Mortgage, and Why? Policy Implications for Reducing Mortgage Default*, FED. RSRV. BANK OF MINNEAPOLIS (Sept. 13, 2017), <https://www.minneapolisfed.org/article/2017/who-defaults-on-their-mortgage-and-why-policy-implications-for-reducing-mortgage-default> [<https://perma.cc/2DQY-WU2V>] (“The default rate on all mortgages rose from about 2 percent in 2006 to over 11 percent by 2011”); *Mortgage Debt Outstanding, All Holders (DISCONTINUED)*, ECON. RSCH. FED. RSRV. BANK OF ST. LOUIS (Dec. 12, 2019), <https://fred.stlouisfed.org/series/MDOAH> [<https://perma.cc/P3XZ-VGFR>] (indicating that more than \$13 trillion in mortgage debt was outstanding in 2011).

138. See Travis Hornsby, *Student Loan Debt Statistics in 2020: A Look at The Numbers*, STUDENT LOAN PLANNER (July 18, 2020), <https://www.studentloanplanner.com/student-loan-debt-statistics-average-student-loan-debt> [<https://perma.cc/MQK8-JM5C>] (reporting that, as of December 2019, outstanding direct student loans total more than \$1.25 trillion, outstanding Federal Family Education Loans total more than \$257 billion, and outstanding private loans total nearly \$125 billion); *What Is a Federally Guaranteed Student Loan?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-is-federally-guaranteed-student-loan.html> [<https://perma.cc/QFS4-GWSL>] (discussing the Federal Family Education Loan program).

Third, unlike with mortgage defaults, student loan defaults do not lead to foreclosures or distressed asset sales. Even in default, most student loans are profitable.¹³⁹ This fact owes to the extensive collection tools that Congress has provided the U.S. Department of Education. From administrative wage garnishments that collect 15 percent of a debtor's after-tax incomes without a court order, to federal income tax seizures, to nonpayment penalties, student loan creditors have many methods at their disposal to ensure their loans are profitable. This is perhaps why the federal government turns a profit on its student loan portfolio.¹⁴⁰ Ultimately, there is little reason to think that even the worst-case student loan outcome would cause problems on the scale of the mortgage crisis.

However, just because a crisis on the order of the Great Recession is not brewing does not mean that there is no reason to worry. Student loan debt may not be a big-C macroeconomic crisis, but it is undeniably a small-c microeconomic crisis. Specifically, there are a number of trends that suggest student loan debt has been a heavy weight on economic growth.

At the top level, Americans owe more than \$1.7 trillion in student loan debt¹⁴¹—a sixfold increase since 2003.¹⁴² As you might expect, growing numbers of borrowers are taking on greater debt burdens.

139. See James B. Steele & Lance Williams, *Who Got Rich Off the Student Debt Crisis?*, REVEAL (June 26, 2018), <https://www.revealnews.org/article/who-got-rich-off-the-student-debt-crisis> [<https://perma.cc/6GZQ-4PKG>] (“42 million people owe \$1.3 trillion in student debt. It’s a profit center for Wall Street and the government . . . Today, just about everyone involved in the student loan industry makes money off students—the banks, private investors, even the federal government.”).

140. See Letter from Sen. Elizabeth Warren, to Arne Duncan, Sec’y, U.S. Dep’t of Educ. 1 (Feb. 25, 2015), https://www.warren.senate.gov/files/documents/2015_25_02_Letter_to_Secretary_Duncan_re_Student_Loan_Profits.pdf [<https://perma.cc/C6SC-TATV>] (“[T]he Congressional Budget Office’s most recent baseline indicates that the federal government is . . . expected to produce \$110 billion in profits from its student loans over the next decade.”); see also Matthew M. Chingos, *End Government Profits on Student Loans: Shift Risk and Lower Interest Rates*, BROOKINGS INST. (Apr. 30, 2015), <https://www.brookings.edu/research/end-government-profits-on-student-loans-shift-risk-and-lower-interest-rates> [<https://perma.cc/MJH5-2UF5>] (discussing the debate over the accounting methods used to determine government profits from student borrowers).

141. See *Student Loan Debt Clock*, FINAID, <http://www.finaid.org/loans/studentloandebt/clock.phtml> [<https://perma.cc/9GNV-98HX>] (estimating total student loan debt to be in excess of \$1.7 trillion).

142. FED. RSRV. BANK OF N.Y.C., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT (2020), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/hhd_c_report_2020q1.xlsx [<https://perma.cc/5H33-M4AK>] (calculating the national student loan debt burden to be \$240 billion in the first quarter of 2003).

Today, forty-five million Americans have student loan debt,¹⁴³ with an average balance of \$37,000.¹⁴⁴ Given increasing debt loads and increased college enrollment, it should come as no surprise that the number of student loan borrowers who cannot repay their loans is increasing as well. There are now nearly eight million student loan debtors in default.¹⁴⁵ Today, student loan debt accounts for 11 percent of all household debt,¹⁴⁶ up from 4 percent a decade ago.¹⁴⁷

Although the general statistics tell an unfortunate story, the problems are more severe for individuals from underrepresented demographic groups. For instance, 90 percent of Black students and 72 percent of Latino students leave school with student loan debt, compared with only 66 percent of white students.¹⁴⁸ The racial gap gets even worse down the road. Ten years after graduation, white borrowers have paid down 30 percent of their loan balances, but Black borrowers owe 113 percent of the amount they originally took on.¹⁴⁹

143. Nigel Chiwaya, *These Five Charts Show How Bad the Student Loan Debt Situation Is*, NBC NEWS (Apr. 24, 2019, 6:00 AM), <https://www.nbcnews.com/news/us-news/student-loan-statistics-2019-n997836> [<https://perma.cc/2UT7-89H7>].

144. *Students & Debt*, DEBT.ORG, <https://www.debt.org/students> [<https://perma.cc/DY2M-DHE3>].

145. See *A Look at the Shocking Student Loan Debt Statistics for 2020*, STUDENT LOAN HERO (Jan. 15, 2020), <https://studentloanhero.com/student-loan-debt-statistics> [<https://perma.cc/SGV8-CGNW>]. Whereas a default occurs when a debtor is at least 270 days behind on payments, a delinquency occurs if the debtor is behind on a payment by any amount of time. See Christina Majaski, *Delinquency vs. Default: What's the Difference?*, INVESTOPEDIA (Apr. 14, 2019), <https://www.investopedia.com/ask/answers/062315/what-are-differences-between-delinquency-and-default.asp> [<https://perma.cc/THM7-6QXW>].

146. Mark Catanzaro, *A Snapshot of Record-High U.S. Household Debt*, FED. RSRV. BANK OF ST. LOUIS (Apr. 22, 2020), <https://www.stlouisfed.org/open-vault/2020/april/snapshot-record-high-household-debt> [<https://perma.cc/CWT9-LANC>].

147. See Beth Akers, *The Typical Household with Student Loan Debt*, BROOKINGS INST. (June 19, 2014), <https://www.brookings.edu/research/the-typical-household-with-student-loan-debt> [<https://perma.cc/U5PF-HB79>] (“[In 2010] the median household devoted four percent of their monthly earnings to [student] loan repayment. Seventy-five percent of households devoted less than seven percent of monthly earnings to student loan repayment.”).

148. Aissa Canchola & Seth Frotman, *The Significant Impact of Student Debt on Communities of Color*, CONSUMER FIN. PROT. BUREAU (Sept. 15, 2016), <https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color> [<https://perma.cc/ZRM3-9D35>] (“Federal government data shows that over 90 percent of African-American and 72 percent of Latino students leave college with student loan debt, compared to 66 percent of white students and 51 percent of Asian-American students.”).

149. See Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017, 9:00 AM), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers> [<https://perma.cc/P34K-XKAJ>] (“12 years after entering college, the median African American borrower owed . . . 113 percent of what they originally borrowed.”);

Individuals from minority groups not only owe more but default at higher rates. A study by the Federal Reserve Bank of San Francisco found that, in neighborhoods with the lowest percentage of Black and Latino residents, only 4.9 percent of borrowers were in default and only 10 percent had experienced a default since 2003.¹⁵⁰ By contrast, in the neighborhoods with the highest percentage of Black and Latino residents, the default rate more than tripled to 15.3 percent, with more than 26 percent of the residents having experienced a default since 2003.¹⁵¹ This is a gap that exists nationwide. Tellingly, the most important factor in predicting whether residents of a zip code will struggle with student debt is not household income, but race. All told, these disparities have a significant effect on the racial wealth gap.

There is a sizable gender gap as well. Women make up 57 percent of all college students¹⁵² but owe nearly two-thirds of all student loan debt.¹⁵³ The gender pay gap only exacerbates the problem, making it harder for women to close the wealth gap with their male colleagues.¹⁵⁴

When considering the negative effects of student loan debt, there is a tendency to focus on the individuals who are behind on their payments. But the impact is far broader. Even those individuals who are dutifully making payments are harmed by student loan debt. To stay current on their debts, many people postpone marriage, delay buying a home, put off saving for retirement, and push back having children.¹⁵⁵ In short, student loan debt has inhibited asset accumulation

Jillian Berman, *How Race Affects Student Debt*, MARKETWATCH (Dec. 27, 2017, 7:59 PM), <https://www.marketwatch.com/story/how-race-affects-student-debt-2017-10-16> [<https://perma.cc/K8TY-LBTO>] (“Black borrowers who began school during the 2003-2004 academic year owed 113% of what they originally borrowed 12 years later That’s compared to 65% for white borrowers and 83% for Hispanic or Latino borrowers.”).

150. See FED. RSRV. BANK OF S.F., *AT WHAT COST? STUDENT LOAN DEBT IN THE BAY AREA* 29 (2019), <https://www.frbsf.org/community-development/files/student-loan-debt-in-the-bay-area.pdf> [<https://perma.cc/C2M2-DKNK>].

151. *Id.*

152. Richard Fry, *U.S. Women Near Milestone in the College-Educated Labor Force*, PEW RSCH. CTR. (June 20, 2019), <https://www.pewresearch.org/fact-tank/2019/06/20/u-s-women-near-milestone-in-the-college-educated-labor-force> [<https://perma.cc/5PG5-4MW9>].

153. *Deeper in Debt: Women & Student Loans*, AM. ASS’N OF U. WOMEN (May 2019), <https://www.aauw.org/research/deeper-in-debt> [<https://perma.cc/T6GS-WH9U>].

154. See *id.* (“From the moment women graduate from college, most face a gender pay gap—which widens as they age. This makes it even harder to pay off their larger share of student debt.”).

155. See Tom Anderson, *Debt-Locked: Student Loans Force Millennials To Delay Life Milestones*, NBC NEWS (Aug. 5, 2015, 2:14 PM), <https://www.nbcnews.com/better/money/debt-locked-student-loans-force-millennials-delay-life-milestones-n404636> [<https://perma.cc/3JW6-NDNR>] (“A survey by Bankrate.com released Wednesday found that 56 percent of people aged 18 to 29

and has increased the generational wealth gap. Ironically, the federal student loan program—which was supposed to help level the playing field—has in many ways fueled economic, gender, and racial inequality.

Although student loan debt is unlikely to cause an economic catastrophe on the order of the Great Recession, it is a crisis nonetheless. Fortunately, something can be done to alleviate the problem. As this Article argues, bankruptcy offers a way to help individuals who are most burdened by their student loan debts receive discharges. The next Section presents solutions that may encourage student loan debtors to take advantage of their legal rights and enable them to obtain relief.

B. Solutions

To reduce the disadvantages that one-shotters face in the legal system, scholars have offered a variety of solutions.¹⁵⁶ These proposals fall into two groups: institutional reforms and litigant-focused reforms. Whereas the former focus on changing the system at the congressional or judicial levels, the latter focus on improving the ability of one-shotters to litigate their cases.

Although they have not discussed the merits of educational benefit litigation directly, many commentators have identified the need for student loan bankruptcy reform more broadly. In this context, proposals center on institutional changes. Ideas range from congressional abolishment of the student loan discharge exemption to increased judicial monitoring of student loan disputes.¹⁵⁷

In theory, these reforms would be effective, but, in practice, they would be difficult to implement. Institutional reforms require significant resources and political capital. And given that bankrupt student loan debtors tend to lack both, Congress and the judiciary are

have put off major life events like getting married, purchasing a car or home, or saving for retirement, because of student debt.”).

156. See, e.g., Galanter, *supra* note 85, at 135–44 (proposing four potential reforms); Donald Songer, Ashlyn Kuersten & Erin Kaheny, *Why the Haves Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged*, 53 POL. RSCH. Q. 537, 553 (2000) (“[T]he support of organized groups [through the filing of amicus briefs] appears to overcome the normal disadvantages that afflict one-shot litigants with inferior resources of their own.”).

157. See Cloud & Fossey, *supra* note 13, at 497 (advocating for the repeal of the undue hardship standard); Pardo, *supra* note 13, at 2177–78 (advocating for a system of managerial judging). For a discussion of managerial judging, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

unlikely to enact changes that benefit these individuals—particularly when doing so will harm powerful banking institutions.¹⁵⁸

Setting the implementation concern aside, another problem is that these institutional reforms place the emphasis on the wrong issue. Student loan debtors are not being denied their legal rights because the statute was poorly drafted or because courts have been derelict in their duties. Instead, the problem is that creditors have abused their status as repeat players to develop precedent that is legally indefensible, then used this precedent to cultivate the myth of nondischargeability.

In light of these problems with institutional reforms, it is worth considering litigant-focused approaches, of which there are many. Some examples include increasing the availability of legal services,¹⁵⁹ distributing educational materials to debtors,¹⁶⁰ encouraging one-shotters to take beneficial legal actions,¹⁶¹ and helping one-shotters organize into groups that will enable them to better compete against repeat players.¹⁶² Because each of these options targets a slightly different problem, determining which will prove most beneficial in the student loan setting requires understanding why creditors have an advantage there.

As the data in the preceding Part show, creditors' success depends on two factors: first, that few debtors bring lawsuits and second, that those who do bring such claims are willing to settle. If either of these factors change, then the repeat-player advantage that student loan

158. Although members of Congress routinely introduce bills that would make student loans dischargeable in bankruptcy, these bills rarely gain more than nominal support. *See, e.g.,* Josh Mitchell & Katy Stech Ferek, *Trump Administration Looking at Bankruptcy Options for Student Debt*, WALL ST. J. (Feb. 20, 2018, 5:37 PM), <https://www.wsj.com/articles/trump-administration-looking-at-bankruptcy-options-for-student-debt-1519146215> [<https://perma.cc/Q6ME-UFA3>] (“Several bills in Congress that would make student loans dischargeable in bankruptcy . . . have gained little traction.”); *see also* Top U.S. Student Loan Official Quits, *Saying White House is Hostile to Protecting Borrowers*, L.A. TIMES (Aug. 27, 2018, 4:15 PM), <http://www.latimes.com/business/la-fi-student-loans-20180827-story.html> [<https://perma.cc/W9YR-YKMY>] (reporting the resignation of the student loan ombudsman due to lack of government cooperation in various student loans investigations).

159. *See* Galanter, *supra* note 85, at 140–41.

160. *See* Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1804 (2001) (“Innovative projects and reform proposals are not in short supply. Examples include . . . increased educational materials . . .”).

161. *See* D. James Greiner, Dalíé Jiménez & Lois R. Lupica, *Self-Help Reimagined*, 92 *IND. L.J.* 1119, 1136–38 (2017) (conducting an experiment and finding that informational mailers can help poor debtors increase their win-rate against repeat-player creditors).

162. *See* Galanter, *supra* note 85, at 141–43 (“The reform envisaged here is the organization of ‘have-not’ parties . . . into coherent groups that have the ability to act in a coordinated fashion . . .”).

creditors enjoy will dissipate. After all, if debtors start bringing lawsuits in large numbers, creditors will be forced to offer many settlements, thereby increasing the cost of maintaining the myth of nondischargeability. And if debtors refuse to settle, their cases will yield precedent in support of discharge, thereby encouraging additional debtors to seek discharges.¹⁶³

Given creditors' litigation strategy, there appears to be a number of ways to address the problem. For example, legal aid organizations could ensure their bankruptcy clients are informed regarding the dischargeable nature of certain student loan debts. Alternatively, legal trade associations, such as the National Association of Consumer Bankruptcy Attorneys, could work to rectify the widespread misperception among consumer bankruptcy attorneys that student loans are never dischargeable.¹⁶⁴

Solutions of this sort, however, require coordinated, sustained efforts to be effective and, in light of the already strained legal aid system, necessarily compete with other important matters involving access to justice. There are, fortunately, options that do not suffer from these defects. At step one of the discharge analysis, bankruptcy class actions could help level the playing field.¹⁶⁵ And at step two, increased attorney awareness of student loan bankruptcy data could mitigate the current problems in undue hardship litigation.

1. *Educational Benefit: Class Action Litigation.* Although bankruptcy courts vary in their treatment of debtor class actions, the past two decades have seen a more permissive standard take hold. Whereas the earliest cases precluded debtor class actions entirely,¹⁶⁶ more recent cases permit their certification at a district-wide—and sometimes nationwide—level.¹⁶⁷ Today, debtor class actions are a

163. See Cross, *Irrational Plaintiffs*, *supra* note 122, at 15–23 (discussing “the corrective capacity of the irrational litig[ation]” in which society benefits when one-shotters litigate cases that would be economically rational to settle).

164. For a discussion of the widespread nature of this belief among consumer bankruptcy attorneys, see *supra* note 68.

165. See Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 24 (2013) (“[C]lass actions may enhance regulation of consumer bankruptcy cases without placing additional resource strains on the bankruptcy system and without the need for protracted reform efforts.”).

166. See, e.g., *Sunstar Acceptance Corp. v. Knox (In re Knox)*, 237 B.R. 687, 693 (Bankr. N.D. Ill. 1999) (“No core jurisdiction lies in this bankruptcy case over [other class members’] claims.”).

167. See Bruce, *supra* note 165, at 69 (“The nationwide-jurisdiction approach has gained prominence in class action cases decided since the global financial crisis of the mid-2000s.”); see also *Neilson v. Death Row Recs., Inc. (In re Death Row Recs., Inc.)*, No. 06-11205, 2012 WL

viable, if infrequently used, means of aggregating bankruptcy claims and minimizing some of the advantages enjoyed by repeat players.¹⁶⁸

Despite the trend in bankruptcy, class certification is still not simple to achieve. The primary difficulty lies in the fact that debtor classes must meet the same standards in the Federal Rules of Civil Procedure that apply to all plaintiffs' classes.¹⁶⁹ This includes Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, as well as Rule 23(b)'s requirement that questions common to the class predominate.¹⁷⁰ Although a discussion of these criteria is beyond the scope of this Article, the educational benefit litigation is likely the sort of dispute that would qualify for class action certification.

First, there are tens of thousands of similarly situated debtors. Second, the claims, as seen in the case law, present common legal and factual issues. And third, two cases seeking class certification are now pending in the Fifth and Tenth Circuits.¹⁷¹ With the right lead plaintiff and counsel, class certification is possible. A class action lawsuit is not an easy solution, but it is perhaps the most pragmatic one. If successful, such a case would not only provide many debtors with the relief they are entitled to under the Bankruptcy Code but would also definitively

952292, at *1 (B.A.P. 9th Cir. Mar. 21, 2012) (remanding the case "to the bankruptcy court to issue a certification order . . . under Civil Rules 23(a) and 23(b)(2)"); *HomeSide Lending Inc. v. Sheffield* (*In re Sheffield*), 281 B.R. 24, 32–33 (Bankr. S.D. Ala. 2000) (certifying a nationwide debtor class). A number of scholars have defended nationwide class actions on pragmatic and legal grounds. See generally, e.g., Elizabeth Warren & Jay L. Westbrook, *Class Actions for Post-Petition Wrongs: National Relief Against National Creditors*, 22 AM. BANKR. INST. J. 14 (2003) ("Beyond doubt, the district court has jurisdiction of the claims and beyond doubt could certify a nationwide Rule 23 class, if the other elements of Rule 23 are satisfied."). For a critique of nationwide class certification, see generally Corinne Ball & Michele J. Meises, *Current Trends in Consumer Class Actions in the Bankruptcy Arena*, 56 BUS. LAW. 1245 (2001).

168. See Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 450 (2016) ("[T]he debtor class action remains a relatively obscure phenomenon.").

169. Another potential obstacle is that creditors may file a motion to compel arbitration. However, this occurred in a pending student loan bankruptcy class action, and in that case, the bankruptcy court denied the motion. See generally Order, *Haas v. Navient Sols., LLC* (*In re Haas*), No. 15-35886 (DRJ) (S.D. Tex. Jan. 10, 2017) (denying Navient's motion to compel arbitration).

170. See FED. R. CIV. P. 23(a)–(b). In recent years, federal courts have heightened some of the requirements for class certification. See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (analyzing "the key areas in which federal courts have made class actions more difficult for plaintiffs to bring").

171. See *Navient Sols., LLC v. McDaniel* (*In re McDaniel*), 590 B.R. 537 (Bankr. D. Colo. 2018), *aff'd*, No. 17-1445, 2020 WL 5104560 (10th Cir. Aug. 31, 2020); *Navient Sols., LLC v. Crocker* (*In re Crocker*), 585 B.R. 830 (Bankr. S.D. Tex. 2018), *aff'd in part, rev'd in part*, 941 F.3d 206 (5th Cir. 2019).

show that many types of student loan debt are dischargeable even absent a showing of undue hardship.

Notably, class actions are primarily a solution for step one claims involving the scope of the student loan discharge exception. Given the fact-specific nature of step two undue hardship claims, class certification is very improbable in that context. Accordingly, an alternative approach is necessary for those cases.

2. Undue Hardship: Increasing Attorney Awareness. For undue hardship cases, the solution lies in reducing the incentives for strategic settlement at the individual level—namely, informing attorneys of the legal realities surrounding student loan adversary proceedings. Nearly all bankruptcy attorneys accept the myth of nondischargeability. By not doing the legal research required to challenge the veracity of the myth, bankruptcy attorneys have failed to serve their clients' best interests. And this failure has led to a pricing model that is untenable.

Owing to their belief in the myth of nondischargeability, attorneys view adversary proceeding litigation as consuming an exorbitant amount of time. Accordingly, they price student loan bankruptcy services as high as \$40,000.¹⁷² Compare this price to the cost of a Chapter 7 bankruptcy, which averages about \$1,500.¹⁷³ In other words, an individual can pay \$1,500 to get all of their non-student loan debts discharged or pay upward of \$40,000 to roll the dice on getting their student loans discharged. Viewed from that perspective, a student loan adversary proceeding sounds like a bad deal. Not to mention that, for an individual who is bankrupt, coming up with tens of thousands of dollars for legal fees is all but impossible.

This situation has led to a bit of a vicious circle. Because of the myth of nondischargeability, attorneys charge high rates for adversary proceedings. The high rates discourage debtors from filing adversary proceedings. And finally, the low number of adversary proceedings allows creditors to engage in strategic settlement and, thereby, reinforce the myth of nondischargeability.

172. Aarthi Swaminathan, *'I Have a Chance Now To Have a Life': Navy Vet Who Won Watershed Student Loan Ruling Tells His Story*, YAHOO! FIN. (Jan. 12, 2020), <https://finance.yahoo.com/news/student-loans-discharged-in-bankruptcy-kevin-rosenberg-190151284.html> [<https://perma.cc/8ETF-YGTW>] (quoting a student loan debtor as reporting attorney fee estimates of “around \$40,000 because the lawyers see it as this really hard, arduous process”).

173. *Chapter 7 Bankruptcy: What Will It Cost and Will It Wipe Out My Debts?*, NOLO, <https://www.nolo.com/legal-encyclopedia/chapter-7-bankruptcy-survey-article.html> [<https://perma.cc/DMN9-GCED>].

Breaking this cycle requires convincing attorneys that student loans can be discharged in bankruptcy and that doing so does not require an extraordinary time investment. There are three interrelated ways to address this problem. First, the media must report stories of successful student loan discharges. Second, judges must call out the myth of nondischargeability in their judicial opinions. And third, attorneys must adopt a workable pricing model. These points are worth exploring further, so let me take each in turn.

Regarding the media, there is reason to be optimistic. The last few months have seen a notable shift in the way in which journalists portray student loan bankruptcy proceedings. Instead of focusing solely on student loan debtors who were unable to obtain a discharge, journalists have begun to depict debtors who successfully navigated the discharge process.¹⁷⁴ As more media reports emphasize favorable outcomes, the myth of nondischargeability grows weaker. And, at a certain point, bankruptcy attorneys will realize that what they have always believed about student loan debt may not be true.

Although the media plays an important role, judges are indispensable in dispelling the myth. Without court cases granting discharges and explaining the true contours of the undue hardship standard, there will be little positive news for the media to report. Again, though, there is reason to be optimistic. In a recent bankruptcy case in the Southern District of New York, *Rosenberg v. New York State Higher Education Services Corp. (In re Rosenberg)*,¹⁷⁵ the judge

174. See, e.g., Aisha Al-Muslim, *Upending Bankruptcy 'Myths,' Judge Erases \$220,000 Student Loan Debt*, WALL ST. J. (Jan. 8, 2020, 9:00 AM), <https://www.wsj.com/articles/upending-bankruptcy-myths-judge-erases-220-000-student-loan-debt-11578523767> [<https://perma.cc/WB3C-5MQJ>] (discussing a recent student loan discharge); Chris Arnold, *Myth Busted: Turns Out Bankruptcy Can Wipe Out Student Loan Debt After All*, NPR (Jan. 22, 2020, 7:13 AM), <https://www.npr.org/2020/01/22/797330613/myth-busted-turns-out-bankruptcy-can-wipe-out-student-loan-debt-after-all> [<https://perma.cc/TVF2-XMQV>] (same); Leigh Jones & Vanessa Blum, *'It Was a Constant, Daily Stressor': This Law Grad Got \$221K in Student Loans Wiped Out. Who's Next?*, LEGAL SPEAK (Jan. 24, 2020), <https://legalspeak.libsyn.com/it-was-a-constant-daily-stressor-this-law-grad-got-221k-in-student-loans-wiped-out-whos-next> [<https://perma.cc/576W-FAMR>] (same); Karen Sloan, *Law Grad's \$221K Loan Discharge Has Bankruptcy Bar Buzzing*, LAW.COM (Jan. 9, 2020, 5:15 PM), <https://www.law.com/2020/01/09/law-grads-221k-loan-discharge-has-bankruptcy-bar-buzzing> [<https://perma.cc/H2XG-W9QX>] (same); Swaminathan, *supra* note 172 (same).

175. *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, 610 B.R. 454 (Bankr. S.D.N.Y. 2020).

came down firmly on the side of the debtor and discharged more than \$220,000 in student loan debt.¹⁷⁶

This case is striking for its outcome. As the data showed, the process of strategic settlement has ensured that almost all judicial rulings on the merits cut against the debtor. Accordingly, a judicial opinion that grants a discharge stands out for that reason alone.

Even more notable than the outcome, though, is the rhetoric used in the opinion. Attacking the myth of nondischargeability, the judge declared that the belief that student loans cannot be eliminated in bankruptcy has “become a quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.”¹⁷⁷ This opinion is the first to call out the myth so forcefully and directly. Given the strength of this decision’s language, it has attracted the attention of other judges and the broader consumer bankruptcy community.¹⁷⁸ Of particular note, in a ruling handed down mere weeks later, another bankruptcy judge cited *Rosenberg* favorably and granted a partial discharge to the debtor.¹⁷⁹

Although it is too early to say for sure, *Rosenberg* may mark a turning point. Instead of growing ever wider, the Student Loan Bankruptcy Gap may, at last, begin to narrow. Truly closing the gap, however, will require complete buy-in from bankruptcy attorneys. And that goal leads to the third and final solution: a workable pricing model.

As discussed, most bankruptcy attorneys charge tens of thousands of dollars to handle student loan adversary proceedings. Given that anyone who is likely to prove undue hardship is bankrupt, very few debtors can afford this fee. To find a better pricing model, I spoke with several successful bankruptcy attorneys who have made student loan debt a key part of their practice.¹⁸⁰ These attorneys had two

176. *Id.* at 462 (holding that the debtor “satisfied the *Brunner* test” and is entitled to a complete discharge).

177. *Id.* at 459.

178. See, e.g., Debra Cassens Weiss, *Law Grad Wins Discharge of His Student Debt in Opinion Criticizing ‘Punitive Standards,’* A.B.A. J. (Jan. 9, 2020, 10:25 AM), <https://www.abajournal.com/news/article/law-grad-wins-discharge-of-his-student-debt-in-opinion-criticizing-punitive-standards> [<https://perma.cc/4K54-DYZ3>] (discussing *Rosenberg*, 610 B.R. at 454).

179. See U.S. Dep’t of Educ. v. Clavell (*In re Clavell*), 611 B.R. 504, 529 (Bankr. S.D.N.Y. 2020) (citing, with approval, *Rosenberg*, 610 B.R. at 461).

180. A number of successful bankruptcy attorneys make student loans a significant part of their practice by handling them on a contingency fee. See, e.g., *Florida Consumer Attorneys: Bankruptcy, Debt Relief, Student Loans and Estate Planning*, CHRISTIE D. ARKOVICH, P.A., <https://www.christiearkovich.com> [<https://perma.cc/5W7T-CETJ>] (noting that the firm has

recommendations: automate the administrative work and offer a payment plan.

To the first point, while student loan adversary proceedings may seem daunting, the actual process is straightforward and formulaic. There is a significant upfront investment in learning the case law and developing pleadings, but that is a one-time cost. By creating high-quality pleadings and teaching a paralegal how to collect the information necessary to tailor the filings to individual debtors, attorneys can free up substantial time that can be used for legal review and analysis. This strategy reduces the overall cost of the adversary proceeding, allowing for lower fees.

And that leads to the second distinguishing feature of these attorneys: the use of payment plans. By allowing clients to pay over time, these attorneys are able to service a much broader set of debtors—namely, all those individuals who are unable to come up with thousands of dollars before litigation has even started. This payment plan offering also has the important benefit of aligning incentives. After all, if the attorney is able to discharge a significant portion of a client's student loans, that client will be far more likely to pay his legal fees.

The Student Loan Bankruptcy Gap is a massive problem, and there is no way to solve it overnight. But there is a path forward. It involves dispelling the myth of nondischargeability and showing attorneys how to handle—and win—student loan cases.

CONCLUSION

“Student loan debt cannot be discharged in bankruptcy.” Journalists report this claim as an undeniable truth. Financial advisers recite it as an immutable fact. And attorneys state it as a definitive conclusion of law. Everyone is in agreement. If you have student loan debt, bankruptcy is not an option. There is just one problem—this accepted “wisdom” is a myth.

income-contingent payment plans); *Student Loans*, HOVERSON L. OFFS., P.A., <https://hoversonlaw.com/student-loans> [<https://perma.cc/9QR6-NGQ8>]; *The Firm*, SMITH L. GRP., <https://www.acsmithlawgroup.com/aboutslg> [<https://perma.cc/WH4R-8QLL>]. Unfortunately, attorneys like these represent a very small percentage of the consumer bankruptcy bar. See Jillian Berman, *These Lawyers May Have Discovered a Way To Wipe Away Student Debt in Bankruptcy*, MARKETWATCH (Mar. 3, 2017, 3:44 PM), <https://www.marketwatch.com/story/these-lawyers-may-have-discovered-a-way-to-wipe-away-student-debt-in-bankruptcy-2017-02-13> [<https://perma.cc/6CCU-YEJ9>] (describing student loan bankruptcy as a “niche practice area”).

This Article confronts the myth of nondischargeability, illustrating how it has harmed millions of Americans by convincing them not to pursue student loan adversary proceedings. Drawing upon original data, this Article shows that the Student Loan Bankruptcy Gap is not a necessary feature of the current bankruptcy laws. Instead, it is a predictable consequence of litigation between repeat-player creditors and one-shotter debtors.

As repeat players, student loan creditors are more concerned with establishing favorable precedent than they are with winning individual cases. Given these incentives, creditors have worked to stack the set of cases that go to trial in their favor. This strategy has been highly successful, enabling creditors to develop extensive precedent in support of their side. Unfortunately, because debtors lack the funds to mount aggressive legal defenses and are unconcerned with the establishment of sound precedent, they are not in a natural position to challenge student loan creditors. To address the problem, this Article proposes two solutions—one focused on each step of the student loan bankruptcy discharge analysis.

For step one educational benefit claims, debtors should pursue bankruptcy class actions. Given the trend toward permitting bankruptcy class actions and the common legal and factual issues present in educational benefit cases, there is reason to believe that class actions will be certified, at least at the district-wide level. If one is successful, it will both grant relief to individuals within the class and help dispel the myth of nondischargeability.

For step two undue hardship claims, three complementary approaches can help close the Student Loan Bankruptcy Gap. Journalists should shift their focus to student loan success stories that are more representative of actual case outcomes. Judges must directly challenge the myth of nondischargeability in their rulings. And attorneys need to adopt a fee structure that debtors can afford. Taken together, these reforms will go a long way toward closing the Student Loan Bankruptcy Gap.