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Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans

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TEMPERING BANKRUPTCY NONDISCHARGEABILITY TO PROMOTE THE PURPOSES OF STUDENT LOANS

*John Patrick Hunt**

ABSTRACT

Student loans, unlike other debts, are not dischargeable in bankruptcy unless the debtor starts a special proceeding and proves that repayment would cause “undue hardship.” This requirement probably accounts for the fact that only a tiny fraction of bankrupt debtors succeed in discharging their student loans. This article is the first to make the case that student-loan nondischargeability interferes with achieving the student-loan programs’ goals and to propose solutions that courts and the Department of Education (the Department) can employ under current law.

The article draws on the legislative history of the student-loan programs to establish that they serve at least four distinct purposes: providing equality of access to higher education, educating the population for the benefit of the country, enabling students’ free choice of career, and providing a benefit to students.

The article then looks to the empirical literature and to fundamental precepts of bankruptcy law to show that nondischargeability can thwart the purposes of the student-loan programs through four different effects: deterring students from higher education, distorting career choice, discouraging borrowers from economic and social participation, and rendering student loans harmful to borrowers.

Accordingly, nondischargeability should be applied narrowly, only in situations where its goals are advanced without undue interference with other goals of the programs. The article offers ideas for tempering each of the four negative effects. To avoid deterring education, the fact that bankruptcy relief often can be had if requested should be made more salient. To combat distortion of career choice, bankruptcy courts should stop ruling that debtors should abandon lower-paying jobs for which their education has prepared them. To mitigate borrower discouragement and harm, courts and the Department should take account of the likelihood of these effects in deciding on discharge. The debt-income ratio may be a proxy for discouragement, and inability to find a job in one’s field may be a proxy for harm.

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I. INTRODUCTION

CYNTHIA Matthews-Hamad worked as a Salvation Army counselor¹ and was at the top of her field.² But her field did not pay enough to allow her to repay her student loans, and she sought relief in bankruptcy.³ The bankruptcy court denied relief and told her to leave a career for which she had trained and in which she had found success in order to get higher-paying work.⁴ The message was that certain occupations are closed off except to those who can pay for their education up front. Surely that was not what Congress intended in creating the student-loan programs—and as this article demonstrates, it wasn't.

This article is the first sustained critique of student-loan nondischargeability⁵ as a matter of student-loan law, not just bankruptcy law. It analyzes how nondischargeability relates to the overall goals of the student-loan programs and argues for the first time that an overly strict approach to student-loan bankruptcy thwarts the overarching purposes of the student-loan programs. In so doing, the article offers a new account of the purpose of student-loan programs, based on primary source research, and a new account of the effects of loan nondischargeability on borrowers, based on a review of the latest empirical literature. The article also offers novel approaches for tempering nondischargeability's harm to the student-loan programs' purposes.

This work lies at the intersection of bankruptcy law and higher-education law. A substantial bankruptcy literature addresses student-loan nondischargeability,⁶ but it generally does not draw on the purposes of the student-loan programs to make its points.⁷ In education law, many scholars have written on the purposes of financial aid under the Higher

1. See *Matthews-Hamad v. Educ. Credit Mgmt. Corp. (In re Matthews-Hamad)*, 377 B.R. 415, 419 (Bankr. M.D. Fla. 2007).

2. See *id.* at 422. Although the court cites only Matthews-Hamad's own assertion to this effect, the claim apparently was undisputed.

3. See *id.* at 419.

4. See *id.* at 422.

5. Most student debt is nondischargeable in bankruptcy, absent a showing of "undue hardship." See 11 U.S.C. § 523(a)(8) (2012). This article uses the shorthand term "nondischargeability" to refer to this conditional nondischargeability of student-loan debt. See discussion *infra* Part III.

6. For recent examples, see AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY (2019) [hereinafter ABI COMMISSION REPORT]; Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175 (2017); Matthew Bruckner, Dalié Jiménez & Chrystin Ondersma, *A No-Contest Discharge for Uncollectable Student Loans*, COLO. L. REV. (forthcoming 2020); Dalié Jiménez et al., *Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114 (2018); Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115 (2016).

7. In an article reporting that holding a college degree did not decrease the likelihood that African-Americans would file for bankruptcy, Professor Abbye Atkinson recognized the tension between nondischargeability and the goals of the student-loan programs. See Abbye Atkinson, *Race, Educational Loans, and Bankruptcy*, 16 MICH. J. RACE & L. 1, 22 (2010) ("With one hand Congress giveth, encouraging students to borrow for school, yet

Education Act⁸ (HEA), but they by and large have not drawn a connection to student bankruptcy.⁹ While Professor Jonathan Glater has discussed the purposes of the HEA¹⁰ and how debt financing can harm students¹¹ and undermine those purposes,¹² his work has not emphasized the implications of his research for bankruptcy law.¹³

This article's foundation is its review of the purposes of the student-loan programs. The article identifies four distinct purposes that Congress has sought to achieve through decades of student-loan legislation: providing equal access to higher education;¹⁴ creating an educated population for the country's benefit;¹⁵ minimizing the distorting effect of debt on career choice;¹⁶ and—critically, and perhaps controversially—providing a benefit to students rather than harming them.¹⁷

The article then describes four likely effects of nondischargeability that probably interfere with achieving the goals Congress has established. First, nondischargeability likely deters people from getting an education in the first place.¹⁸ The empirical literature shows that fear of debt deters some from starting higher education and that excessive debt deters others from finishing. Nondischargeability can magnify both these effects by making debt inescapable and, therefore, more frightening and unmanageable.

Second, nondischargeability likely distorts some students' career choices by leading them to pursue higher-paying jobs rather than lower-paying jobs that may make better use of their education or that may be

with the other hand Congress taketh away, not mitigating the financial vulnerability and risks involved with this sort of borrowing with the safety net of bankruptcy.”).

8. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219.

9. See, e.g., Matthew Bruckner, *Higher Ed “Do Not Resuscitate” Orders*, 106 KY. L.J. 223, 250–51 (2018) (discussing the purpose of federal higher-education support under the HEA in the context of bankruptcy of higher-education institutions).

10. See Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 43 J.C. & U.L. 195, 210–17 (2017) [hereinafter Glater, *To the Rich Go the Spoils*]; Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 L. & CONTEMP. PROBS. 89, 92–95 (2016) [hereinafter Glater, *Debt, Merit, and Equity*]; Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1579 (2015) [hereinafter Glater, *Student Debt and Higher Education Risk*]; Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 37–41 (2011) [hereinafter Glater, *The Other Big Test*].

11. See Glater, *The Other Big Test*, *supra* note 10, at 30.

12. See Glater, *To the Rich Go the Spoils*, *supra* note 10, at 195–96; Glater, *Debt, Merit, and Equity*, *supra* note 10, at 101–04, 107; Glater, *Student Debt and Higher Education Risk*, *supra* note 10, at 1585.

13. Professor Glater may not have discussed the proper bankruptcy treatment of student loans in light of the student-loan programs' purposes because he does not view bankruptcy as a viable response to the problems of student debt. See Glater, *Student Debt and Higher Education Risk*, *supra* note 10, at 1594 (amending Bankruptcy Code “does not address the underlying shift of higher education risk”).

14. See discussion *infra* Part II.B.1.

15. See discussion *infra* Part II.B.2.

16. See discussion *infra* Part II.B.3.

17. See discussion *infra* Part II.B.4.

18. See discussion *infra* Part III.A.

more personally rewarding or socially valuable.¹⁹ It is well-documented that educational debt has this effect, and nondischargeability can worsen the effect by magnifying the risk the student assumes when taking a lower-paying job. Bankruptcy court decisions that deny student-loan discharge because the court believes the debtor should switch jobs to make more money directly interfere with career choice. Some decisions even go so far as to instruct the debtor to leave a lower-paying field for which the debtor has been trained in order to take a higher-paying job elsewhere to repay loans. Such reasoning is particularly harmful to Congress's purposes, because it tends to deprive society of the benefits of the debtor's education.

Third, nondischargeability probably discourages some borrowers from participating in the economy and society.²⁰ The idea that excessive nondischargeable debt leads debtors to drop out, called the "debt overhang" thesis, has been fundamental to bankruptcy law for over eighty years. It also is backed by empirical research: taking a portion of workers' earnings, as debt service does, reduces labor supply. When student-loan debtors withdraw, the student-loan programs' goals of benefiting society through education, enabling free choice of career, and benefiting students all fail.

Fourth, nondischargeability perpetuates the harmfulness of some students' loans, defeating Congress's goal of providing a benefit to student borrowers.²¹ An extensive body of research documents harms that arise from indebtedness, particularly unmanageable indebtedness. Although the benefits of education outweigh these harms for many student borrowers, this is not true for all student borrowers. Student loans have made some borrowers worse off, harming rather than helping them.

Having reviewed nondischargeability's negative effects, the article offers suggestions for moderating them. First, it explains that nondischargeability's interference with broad student-loan program goals is a reason to apply the open-ended nondischargeability provision more narrowly than would otherwise be the case.²² Congress enacted nondischargeability to combat borrower opportunism and promote creditor financial recovery. It should be applied only when doing so clearly serves those purposes and does not unduly impede achieving the other goals of the student-loan programs.

Next, the article establishes that bankruptcy is a valuable tool to cope with the problems of unmanageable student debt. Importantly, courts and the Department of Education (the Department) can use that tool today, without the congressional action that most other proposals require.²³

19. See discussion *infra* Part III.B.

20. See discussion *infra* Part III.C.

21. See discussion *infra* Part III.D.

22. See discussion *infra* Part IV.A.

23. See discussion *infra* Part IV.B.

The article then addresses each of the specific negative effects of nondischargeability that it identifies. To counter the first effect—deterrence of education—the Department should educate borrowers about the fact that student-loan discharge is actually granted fairly often when it is requested.²⁴ Currently, the Department tells prospective borrowers that discharge is available only in “rare” cases.²⁵ It can do better.

To counter the second effect—career distortion—bankruptcy courts should stop denying discharges on the ground that debtors should change jobs to earn more money.²⁶ At a minimum, they should do so where debtors are working in the field for which they have been trained. In light of Congress’s purposes of promoting access, education, and career choice, this approach is sound despite arguments that it encourages “worthless degrees.”

To combat the third effect—debt overhang—bankruptcy courts and the Department should try to identify debtors who are likely to be discouraged by their debts and grant or consent to discharge in such cases.²⁷ The debt-income ratio is a promising candidate for a proxy for debt overhang, and the Department could experiment with forgiving some high debt-income ratio debtors to test the relationship.

To alleviate the fourth effect—nondischargeability renders some student loans harmful to debtors—the judiciary and the Department could consider granting or consenting to discharge where loans are harming a debtor who has acted in good faith.²⁸ It is not always easy to tell whether loans have harmed a debtor, given the nonfinancial costs of student loans and nonfinancial benefits of education. The article suggests that where the debtor’s education was aimed at a particular field, debtor harm could be presumed if the debtor cannot find a job in that field. Where training is not directed at a specific field, harm could be presumed if the debtor does not earn, after accounting for loan payments, at least as much as the median person of the education level the debtor was at before taking out the loans.

The article proceeds as follows. Part II identifies critical purposes of the student-loan programs. Part III argues that nondischargeability has four effects that interfere with achieving those purposes. Part IV proposes measures to address each of the effects identified in Part III.

24. See discussion *infra* Part IV.C.1. The influential *Brunner* opinion said it was announcing a “draconian” test that made bankruptcy relief from student loans “very difficult” and reserved it for “extreme circumstances.” See *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 756 (S.D.N.Y. 1987), *aff’d*, 831 F.2d 395 (2d Cir. 1987) (per curiam). However, in practice, only some courts have applied the *Brunner* test so harshly. Compare *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 328 (3d Cir. 2001) (holding *Brunner* test requires showing a “certainty of hopelessness” of repayment), with *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004) (explaining that in applying *Brunner*, “courts need not require a certainty of hopelessness”) (internal quotation marks omitted).

25. See discussion *infra* Part IV.C.1–4.

26. See discussion *infra* Part IV.C.1–4.

27. See discussion *infra* Part IV.C.1–4.

28. See discussion *infra* Part IV.C.1–4.

II. THE FEDERAL STUDENT-LOAN PROGRAMS AND THEIR PURPOSES

Part II demonstrates that Congress has repeatedly embraced four goals for federal student-loan programs: equal access to education, freedom of choice of career, producing an educated population for the benefit of the country, and benefiting students. The part does not pretend to give an exhaustive legislative history of the programs.²⁹ An entire law-review article probably could not accomplish such a task given the scale of the enterprise: the federal student-loan programs have existed since 1958 and have been part of the HEA since it was enacted in 1965. The HEA has been formally reauthorized eight times,³⁰ and at least five other statutes have made significant changes to the student-loan programs.³¹ Instead of absolute completeness, Part II offers observations about recurring themes. In so doing, it reports the results of considerable research and provides the fullest picture of the programs' purposes of which the author is aware.³²

29. For a summary of the history of the student-loan programs through 2005, see ANGELICA CERVANTES ET AL., TG RESEARCH & ANALYTICAL SERVS., OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER (2005).

30. Reauthorizations occurred in 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. See *id.* at iii (listing reauthorizations through 2005); *Reauthorization of the Higher Education Act of 1965*, FINAID, <http://www.finaid.org/educators/reauthorization.phtml> [<https://perma.cc/3U2M-AL3W>] (last visited Oct. 14, 2019) (listing reauthorizations, including 2008 reauthorization).

31. The five statutes referenced in the text are the Middle Income Student Assistance Act of 1978, Pub. L. No. 95-566, 92 Stat. 2402; the Omnibus Budget Reconciliation of 1981, Pub. L. No. 97-35, 95 Stat. 357; the Omnibus Budget Reconciliation of 1993, Pub. L. No. 103-66, 107 Stat. 312; the College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784; and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. All are discussed in the article text.

32. The author has reviewed the following materials. For the Higher Education Act of 1965: *Higher Education Act of 1965: Hearings on H.R. 3220 and Similar Bills Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Lab.*, 89th Cong. (1965) [hereinafter *1965 HEA Hearings*]; S. REP. NO. 89-673 (1965); H.R. REP. NO. 89-621 (1965) (Conf. Rep.); 111 CONG. REC. 21,876-948 (1965).

For the Middle-Income Student Assistance Act of 1978: *Middle Income Student Assistance Act: Hearing on H.R. 10854 Before the H. Subcomm. on Post-Secondary Educ. of the H. Comm. on Educ. & Lab.*, 95th Cong. (1978) [hereinafter *1978 MISAA Hearings*]; S. REP. NO. 95-643 (1978); H.R. REP. NO. 95-951 (1978).

For the Omnibus Budget Reconciliation Act of 1993: *Student Loan Reform: Hearing on S. 920 Before the S. Comm. on Lab. & Hum. Res.*, 103d Cong. (1993) [hereinafter *1993 OBRA Hearings*]; H.R. REP. NO. 103-111 (1993); H.R. REP. NO. 103-213 (1993) (Conf. Rep.); 139 CONG. REC. 9,441 (1993).

For the College Cost Reduction and Access Act of 2007: *Paying for a College Education: Barriers and Solutions for Students and Families: Hearing Before the H. Subcomm. On Higher Educ., Lifelong Learning & Competitiveness of the H. Comm. on Educ. & Lab.*, 110th Cong. (2007) [hereinafter *2007 CCRAA Hearings*]; H.R. REP. NO. 110-317 (2007) (Conf. Rep.); H.R. REP. NO. 110-210 (2007); 153 CONG. REC. 18,486 (2007); 153 CONG. REC. 19,424 (2007); 153 CONG. REC. 19,715 (2007); 153 CONG. REC. 19,885 (2007); 153 CONG. REC. 23,861 (2007); 153 CONG. REC. 23,915 (2007); President's Statement on Signing the College Cost Reduction and Access Act, 2 PUB. PAPERS 1244 (Sept. 27, 2007).

For the Health Care and Education Reconciliation Act of 2010: H.R. REP. NO. 111-232 (2009); 155 CONG. REC. 21,842 (2009); 155 CONG. REC. 21,951 (2009); 156 CONG. REC. 4,132 (2010); 156 CONG. REC. 4,791 (2010).

A. OVERVIEW OF THE PROGRAMS

Part II.A provides a brief background about the student-loan programs that is helpful in understanding the rest of Part II. Loans are outstanding today under three major federal student-loan programs. The oldest and smallest³³ has its roots in the post-*Sputnik* 1958 National Defense Education Act,³⁴ under which the federal government provided higher education institutions with funds to make loans to students.³⁵ The program continued as the Perkins Loan Program until 2017.³⁶

The middle program, in terms of both age and size, is the Federal Family Education Loan (FFEL) Program, which has its roots in the Guaranteed Student Loan Program created by the 1965 HEA.³⁷ The HEA marked a major turning point in student lending, and this article discusses it extensively. Under the FFEL program, private lenders made student loans that were ultimately guaranteed by the federal government.³⁸ Congress terminated the FFEL program in 2010.³⁹

The newest and largest program is the William D. Ford Federal Direct Loan Program. Under this program, created by the Omnibus Budget Reconciliation Act of 1993 (OBRA),⁴⁰ the federal government makes loans directly to students.

B. PURPOSES OF THE FEDERAL STUDENT-LOAN PROGRAMS

Part II.B reviews four major purposes of the student-loan programs: providing equal access to higher education, producing an educated population for the benefit of the nation, providing students freedom of career choice, and granting a benefit to students.

1. *Providing Equality of Access to Higher Education*

Higher education access regardless of economic circumstance is probably the goal of federal student-loan programs most commonly cited in the

33. For data on the amounts outstanding under the three programs, see U.S. Dep't of Educ., *Federal Student Aid Portfolio Summary*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> [https://perma.cc/Z4PK-WCA9] (last visited Oct. 14, 2019) (reporting outstanding amount of \$6.9 billion under the Perkins program, \$277.0 billion under the FFEL program, and \$1,163.3 billion under the Ford program as of the first quarter of 2019).

34. Pub. L. No. 85-864, §§ 201–09, 72 Stat. 1580, 1583–87 (1958).

35. *See id.*

36. *See* Jack O'Brien, *Congress Fails to Reauthorize Federal Perkins Loan Program*, INSIDE SOURCES: NH J. (Oct. 2, 2017), <https://www.insidesources.com/congress-fails-reauthorize-federal-perkins-loan-program-heres-impact-students/> [https://perma.cc/25W7-ZZMC].

37. *See* Higher Education Act of 1965, Pub. L. No. 89-329, §§ 421–35, 79 Stat. 1219, 1236–48.

38. *See* John Patrick Hunt, *Consent to Student-Loan Bankruptcy Discharge*, 95 IND. L.J. (forthcoming 2020) (explaining the structure of the FFEL program).

39. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, §§ 2201–08, 124 Stat. 1029, 1074–77 (2010) (codified as amended at 20 U.S.C. § 1071 (2012)).

40. Pub. L. No. 103-66, §§ 4001–4301, 107 Stat. 312, 340–78 (1993) (codified as amended at 20 U.S.C. § 1087(a) (2012)).

legislative history. A glimmer of this purpose was evident at the beginning. The 1958 National Defense Education Act, which created the antecedent to the Perkins Program, included among its “findings and declaration of policy” that, for national security reasons, “we must increase our efforts to identify and educate more of the talent of our Nation,” which in turn “requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need.”⁴¹ Although this provision mainly emphasized strengthening national defense, one might find in the language of “opportunity” and “financial need” an embryonic commitment to equality of educational opportunity.

With the HEA of 1965, providing educational opportunity regardless of financial need moved from being a possible secondary purpose to the likely primary purpose. In January 1965, when President Johnson introduced the administration proposals that led to the HEA,⁴² he told Congress, “I have proposed that we set full educational opportunity as our first national goal. Every child must be encouraged to get as much education as he has the ability to take. We want this for his sake, and we want this for the country’s sake.”⁴³

In hearings shortly thereafter on the bills embodying the administration’s proposals, Secretary Anthony Celebrezze of the Department of Health, Education, and Welfare (HEW) reminded the committee that Congress “now has before it the education program proposed last month by President Johnson,”⁴⁴ reflecting Johnson’s proposal “that we give new meaning to the phrase ‘equality of opportunity.’”⁴⁵

Francis Keppel, the Commissioner of Education, occupied the top education position within the then-existing HEW.⁴⁶ Testifying in favor of the administration’s proposal, he described the “general objectives and needs that determined the ultimate design” as follows:

The first objective was expressed by the President when he proposed that ‘we begin a program in education to insure every American child the fullest development of his mind and skills’ It is now time to take steps to insure that academically qualified students in all economic circumstances have the means to finance their higher education.⁴⁷

41. National Defense Education Act, Pub. L. No. 85-864, § 101, 72 Stat. 1580, 1581 (1958).

42. See Nat’l TRIO Clearinghouse, *The Early History of the Higher Education Act of 1965*, PELL INST. (Feb. 2003), http://www.pellinstitute.org/downloads/trio_clearinghouse-The_Early_History_of_the_HEA_of_1965.pdf [<https://perma.cc/7USH-ASRQ>].

43. President Lyndon B. Johnson, Remarks to Congress on Education (Jan. 12, 1965) [hereinafter 1965 Remarks to Congress].

44. 1965 HEA Hearings, *supra* note 32, at 26.

45. *Id.*

46. See Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 363–64 (2006).

47. 1965 HEA Hearings, *supra* note 32, at 80.

The emphasis was no longer so much on educated workers' benefits to society as on the opportunity that society was to provide individuals.

Congressional debates on the HEA reflect the same concern with equal opportunity as the hearings. In introducing the bill that became the HEA, Representative Adam Clayton Powell stated, "[W]e declare our recognition that higher education is the keystone of our educational program upon whose strength the success of our efforts to achieve full educational opportunity vitally depends."⁴⁸ Few went as far as Representative Patsy Mink did when she declared a child's "right" to education "regardless of his family circumstance,"⁴⁹ but the record is full of references to equality of educational opportunity, often with specific reference to equality of opportunity regardless of economic circumstance.⁵⁰

After the Higher Education Bill went to the Senate, the committee report clarified the purpose of grant and loan assistance to college students.⁵¹ It identified "keeping the college door open to all students of ability"⁵² and "offer[ing] every child the fullest possible educational opportunity"⁵³ as the key challenges the programs was to address.

Access to education regardless of finances continued to be a goal of later student-loan laws, although the idea was mentioned less often. Introducing the proposal that became the Middle Income Student Assistance Act (MISAA), President Carter asserted, "No one should be denied the opportunity for a college education for financial reasons alone."⁵⁴ In hearings on the bill, Subcommittee Chair Representative William D. Ford stated that the goals of the legislation included "access to education" and "complete freedom of choice."⁵⁵

Fifteen years later, legislators offered access as a justification for OBRA's introduction of widespread direct federal lending.⁵⁶ Senator Paul Simon predicted on the Senate floor that when direct lending was "fully enacted, there will be hundreds of thousands of students . . . who

48. 111 CONG. REC. 21,880 (1965).

49. *Id.* at 21,898 (statement of Rep. Mink).

50. Perhaps the most ringing example comes from the statement of Representative Tunney:

We are untrue to our democratic ideals if youths are barred from a college education because of their economic status. The program of student assistance contained in the Higher Education Act gives priority to closing the gap which exists in equality of opportunity for attending college and attempts to make higher education a possibility for all.

Id. at 21,908 (statement of Rep. Tunney). For further examples, see *id.* at 21,881 (statement of Rep. Green); *id.* at 21,882 (statement of Rep. Green); *id.* at 21,883 (statement of Rep. Quieat); *id.* at 21,892 (statements of Rep. Perkins and Rep. Reid); *id.* at 21,896 (statement of Rep. Carey); *id.* at 21,899 (statement of Rep. Helstowski); *id.* at 21,900 (statement of Rep. Boland); *id.* at 21,904 (statement of Rep. Fogarty); *id.* at 21,906 (statement of Rep. Schisler); *id.* at 21,908 (statement of Rep. Cohelan); *id.* at 21,913 (statement of Rep. Donohue); *id.* at 21,915 (statement of Rep. Roybal).

51. See generally S. REP. NO. 89-673 (1965), as reprinted in 1965 U.S.C.C.A.N. 4027.

52. *Id.* at 4055.

53. *Id.* at 4060.

54. 1978 MISAA Hearings, *supra* note 32, at 284.

55. *Id.* at 15.

56. Pub. L. No. 103-66, §§ 4001-4301, 107 Stat. 312, 340-78 (1993).

can go to college and are not going now.”⁵⁷ Senator Paul Wellstone stated that direct lending “is going to mean that many more young and not so young people are going to be able to pursue their higher education.”⁵⁸

When Congress expanded income-driven repayment and created the Public Service Loan Forgiveness Program in the College Cost Reduction and Access Act of 2007,⁵⁹ the debate reflected bipartisan support for access regardless of income. Senator Mike Enzi, Republican of Wyoming, stated, “Higher education is the onramp to success in the global economy, and it is our responsibility to make sure everyone can access that opportunity and reach their goals.”⁶⁰ According to Representative George Miller, Democrat of California, the legislation “says to those individuals who are fully qualified to go to college, we will not deny you access to the college of your choice, to the education of your choice, . . . and to the curriculum of your choice because you can’t afford to pay for it.”⁶¹

Members of Congress continued to express a concern for access in the debate in 2010 over terminating the FFEL program and moving completely to direct lending. Given the subject matter, the main debating points were the projected federal cost savings on one side⁶² and the perils of “nationalizing the student loan industry” on the other.⁶³ However, Senator Barbara Mikulski, speaking about the broader purpose of the student loan programs, extolled the value of access in terms that called to mind Representative Mink’s declaration in 1965 of a right to education, speaking of “an implicit freedom [the] Constitution doesn’t lay out in writing[:] . . . the freedom to achieve.”⁶⁴

Courts and scholars have recognized that providing equal access to higher education is a central purpose of the student-loan programs. The Ninth Circuit’s statement is typical: echoing the 1965 Senate committee report, it found that the HEA was adopted “to keep the college door open to all students of ability, regardless of background.”⁶⁵ Professor Glater may overstate the case for rhetorical effect when he writes, “The goal of extending [student] loans is access, not repayment.”⁶⁶ However,

57. 139 CONG. REC. 9,423 (1993) (remarks of Sen. Simon).

58. *Id.* at 9,500 (remarks of Sen. Wellstone).

59. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (codified as amended at 20 U.S.C. §§ 1001–1099(e) (2012)).

60. 153 CONG. REC. 23,864 (2007) (statement of Sen. Enzi).

61. 153 CONG. REC. 18,538 (2007) (statement of Rep. Miller); *see also id.* at 18,522 (statement of Rep. Miller) (stating legislation is “about” making sure that the “doors [of higher education institutions] will not be closed to people who are talented and ready to go to college”).

62. *See, e.g.*, 156 CONG. REC. 4,832 (2010) (statement of Sen. Feingold) (stating transfer of lending authority to direct lending program “will save approximately \$61 billion over 10 years”).

63. *See, e.g., id.* at 4,797 (statement of Sen. Gregg).

64. *Id.* at 4,858 (statement of Sen. Mikulski).

65. *Chae v. SLM Corp.*, 593 F.3d 936, 938 (9th Cir. 2010); *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009); *Pelfrey v. Educ. Credit Mgmt. Corp.*, 71 F. Supp. 2d 1161, 1162–63 (N.D. Ala. 1999).

66. Jonathan D. Glater, *The Narrative and Rhetoric of Student Loan Debt*, 2018 UTAH L. REV. 885, 891 (2018).

Professor Glater's basic point seems to command general acceptance.⁶⁷

When members of Congress spoke specifically about the barriers to access that the student-loan programs were to overcome, they apparently mentioned economic barriers more often than those arising from race, ethnicity, or gender. Professor Glater concluded that advancing civil rights was not a primary goal of the HEA.⁶⁸ However, there is evidence of specific concern with race, ethnicity, and gender,⁶⁹ including from President Johnson himself.⁷⁰ Moreover, the many general references in the record to equality of opportunity also can be understood to encompass them.⁷¹ Accordingly, this article notes instances where nondischargeability's burdens fall disproportionately on particular racial, ethnic, and/or gender groups.

2. *Educating the Population for the Benefit of the Country*

Probably the oldest purpose of federal student-loan programs is to educate people so that they can use their education for the benefit of society more broadly. The 1958 National Defense Education Act opened with the finding that "the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women."⁷² It defined the Act's purpose as providing assistance to individ-

67. See Bruckner, *supra* note 9, at 249 ("One of the HEA's primary goals is to increase student access to post-secondary education."); 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, 495-96 (2014) (describing the original purpose of the federal student loan program as "keeping the college door open to all students of ability, regardless of socioeconomic background"); Mala Gusman Bridwell, *Student Loan Bankruptcies*, 1978 WASH. U. L.Q. 593, 595-96 (1978) (stating the purpose of student loan programs is "to allow every person the fullest possible educational opportunity by making loans available to those who could not otherwise obtain a loan because of their age and lack of collateral borrowing history"); Kevin J. Smith, *Should the "Undue Hardship" Standard for Discharging Student or Educational Loans Be Expanded?*, 18 BARRY L. REV. 333, 335 (2011) (stating the purpose of the HEA "was to ensure that all students wishing to attend college would be financially able to attend by providing financial assistance for education to students that had no means to do so, other than grants").

68. See Jonathan D. Glater, *Debt, Merit, and Equity*, *supra* note 10, at 93 (stating that members of Congress "understood the ambition [of the HEA] as limited and distinct from the goals of legislation aimed explicitly at protecting civil rights").

69. See 1965 HEA Hearings, *supra* note 32, at 83 (statement of Comm'r Keppel) (noting that for low-income families "[t]he situation for girls is even less equitable" than it is for boys because fewer low-income girls from the top half of their classes went on to college).

70. See The Fifth Freedom: The President's Message to Congress on Education, 4 WEEKLY COMP. PRES. DOC. 215, 219 (Feb. 5, 1968) (proposing Educational Opportunity Act of 1968 "[t]o set a new and sweeping national goal: that in America there must be no economic or racial barrier to higher education").

71. See 111 CONG. REC. 21,876 (1965). See generally *supra* Part II.B.1. In addition, Princeton President William Bowen's testimony that "we have an interest as a society in having an educational system that encompasses people from all kind of backgrounds, hopeful always that they will learn from each other" may foreshadow modern appreciation of diversity. See 1978 MISAA Hearings, *supra* note 32, at 16.

72. National Defense Education Act, Pub. L. No. 85-864, § 101, 72 Stat. 1580, 1581 (1958). The NDEA's findings section goes on to state, "The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles. It

uals and state and local governments “in order to insure trained manpower [sic] of sufficient quality and quantity to meet the national defense needs of the United States.”⁷³

The legislative record of MISAA reflects not just the idea that educational opportunity is fair to individuals, but also that “we have an interest as a society in having an educational system that encompasses people from all kinds of backgrounds, hopeful always that they will learn from each other,” as William Bowen, president of Princeton University and board chair of the American Council on Education, testified.⁷⁴

Proponents of the HEA of 1965 continued to emphasize education’s benefits for the country. President Johnson emphasized that education was not just for the child’s sake but “for the country’s sake.”⁷⁵ As reasons for Title IV, the Senate committee report identified the “continuing shortage of trained, educated persons in many areas”⁷⁶ and the “present and future shortage of competent, well-trained professional and technical personnel,”⁷⁷ without indicating that the shortage affected only particular subjects.

Administration officials supporting the HEA appealed to a “national interest” in education. Testifying in favor of the initial bill that ultimately evolved into the HEA of 1965, HEW Secretary Celebrezze stated of Title IV, “It is in the national interest that more of the country’s young people have the opportunity to acquire better training and education,”⁷⁸ without limiting the assertion to scientific, engineering, and language education.

Commissioner Keppel likewise testified in committee hearings on the predecessor bill to the HEA that “the urgency” of the need for Title IV “is compounded by the fact that our economic growth is seriously hampered by a shortage of highly trained manpower”⁷⁹ and that the fact that people from lower-income families were less likely to go to college was, “[i]n the light of our needs as a nation, [a] situation [that] represents serious loss.”⁸⁰

In later debates over the bill, Representative Joseph Minish echoed the administration officials’ points. He argued that “the dollars spent on opportunity grants and government loans to students can be justified if for no other reason than on the grounds of a sound economic investment.”⁸¹

The idea that college-education payments are an investment that pays off for society also shows up in the history of later statutes. In the House

depends as well upon the discovery and development of new principles, new techniques, and new knowledge.” *Id.*

73. *Id.* at 1581–82.

74. 1978 MISAA Hearings, *supra* note 32, at 16.

75. See 1965 Remarks to Congress, *supra* note 43.

76. S. REP. NO. 89-673 (1965), as reprinted in 1965 U.S.C.C.A.N. 4027, 4053.

77. *Id.*

78. 1965 HEA Hearings, *supra* note 32, at 28.

79. *Id.* at 80.

80. *Id.* at 83.

81. 111 CONG. REC. 21,912 (1965) (statement of Rep. Minish) (“Special skills and a highly trained working force are of vital national concern.”).

debate over the 2007 College Cost Reduction and Access Act, Representative Miller described the legislation as “investing in the students and the talent of the future,” in “the young people that will take their talents and provide the next generation of discovery, . . . innovation, . . . jobs . . . , [and] economic activity here at home [T]hat’s the investment we . . . make in this generation of young people for the future of this country.”⁸²

3. *Enabling Free Choice of Career*

Congress has designed the student-loan program with an eye toward students’ freedom of choice of career. Recognizing that student loans are to be repaid in most instances,⁸³ members of Congress have acknowledged and sought to mitigate the influence of high loan balances on career choice. Particularly by providing income-driven repayment options and public-service loan forgiveness, Congress has sought to structure student-loan repayment so that borrowers will not feel constrained to take higher-paying jobs to repay loans but, rather, will have the choice to pursue valuable but lower-paying careers.

Congress first authorized income-driven repayment for a broad class of student-loan borrowers in the OBRA of 1993.⁸⁴ The Act made income-contingent repayment (ICR), the first full-scale income-driven repayment program, available to federal direct-loan borrowers.⁸⁵ As noted elsewhere, “The most frequently referenced goal for ICR was making it easier for graduates to pursue lower-paying but important vocations, such as public-service careers.”⁸⁶ The committee report on the house bill that led to OBRA 1993 identified one of the purposes of the student-loan reform as “provid[ing] [borrowers] a variety of repayment plans, including [a]n income-contingent repayment [plan] . . . so that they have flexibility in managing their student loan repayment obligations, and so that those obligations do not foreclose community service-oriented career choices for [them].”⁸⁷

The 2007 College Cost Reduction and Access Act made IDR more generous⁸⁸ and instituted public-service loan forgiveness (PSLF), which provides for cancellation of federal student loans after ten years of pub-

82. 153 CONG. REC. 18,522 (2007).

83. See, e.g., 1965 HEA Hearings, *supra* note 32, at 324 (statement of Rep. Green). (describing NDSL program loans as entailing students’ “obligation . . . to repay . . . just the same as their income tax or any other obligation they owe to the Federal Government”). In this pre-nondischargeability statement, Representative Green did not address whether the obligation to repay should extend to bankrupt borrowers.

84. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

85. See *id.* § 4021 (codified as amended at 20 U.S.C. § 1087e(d)(1)(D) (2012)).

86. John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1313–14 (2018).

87. H.R. REP. NO. 103-111, at 119 (1993).

88. The 2007 Act provided for an IDR “program that capped payments at fifteen percent of discretionary income instead of twenty percent, and that covered federally guaranteed private loans and not just federal direct loans.” Hunt, *supra* note 86, at 1316.

lic-service employment.⁸⁹ Enhancing students' freedom to pursue lower-paying careers was a central purpose of the Act. Early in the debates over the bill, Representative Miller said that the legislation "says to those individuals who are fully qualified to go to college, we will not deny you access . . . to the career of your choice . . . because you can't afford to pay for it."⁹⁰

The fullest explanation of the bill's career-choice-enhancing purpose came during the final Senate debate on it. There, Senator Patty Murray identified a "problem with high student loan debt" in that it "limits the career choices of college graduates."⁹¹ Senator Russ Feingold likewise observed, "It is unfortunate that so many students are forced to consider their debt loads when deciding which jobs to take or pursue."⁹² Senator Richard Durbin told the story of a young teacher who "wanted to teach in an inner-city school" but took a higher-paying job in the suburbs because "I have student loans, you know."⁹³

Senators did not just identify the burden on career choice as a problem; they saw themselves as acting to deal with it. Senator Hillary Clinton predicted that PSLF would "provid[e] an incentive for college graduates to pursue lower paying, but vital professions."⁹⁴ Senator Sherrod Brown observed,

Two-thirds of Ohio students graduating are burdened with an average of \$20,000 in student loan debt. That makes a big difference in career choice. . . . This seems to be a generation of idealism, and [with the legislation] we will see those students be able to pursue a career in public service and be able to take those jobs, sometimes—often—at lower pay, but be able to relieve themselves of the huge burden of debt.⁹⁵

To be sure, the statements just quoted appeared in the context of enacting specific debt-relief programs, IDR and PSLF, with specific rules. However, the expressions of concern are general in nature. They bespeak the existence of a policy that informs the interpretation the entire statu-

89. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, § 401, 121 Stat. 784 (codified as amended at 20 U.S.C. § 1087e (2012)) (adding public service loan forgiveness to the HEA).

90. 153 CONG. REC. 18,538 (2007); see 2007 CCRAA Hearings, *supra* note 32, at 40 (statement of Rep. Petri) ("[IDR] would also give people the opportunity to do low-income work to prepare for maybe more lucrative careers later.").

91. 153 CONG. REC. 23,873 (2007).

92. *Id.* at 23,872.

93. *Id.* at 23,868.

94. *Id.* at 23,869; see *id.* at 23,880 (statement of Sen. Kennedy) (noting that a "mountain of debt is distorting the basic life choices of countless Americans," including by "discouraging many young people from choosing . . . low-paying but vital jobs that bring large benefits to society").

95. *Id.* at 23,864–865 (Sept. 7, 2007); see *id.* at 23,878 (statement of Sen. Kennedy) (stating that legislation would "help us take advantage of that idealism that is out there" by addressing the current situation, that students "have to choose careers in order to deal with the indebtedness").

tory scheme, including the undue-hardship provision.⁹⁶

4. *Providing a Benefit to Students*

Perhaps implicit in the discussion above, but worthy of explicit mention, is the notion that the purpose of student loans is to help borrowers, not harm them. As President Johnson stated in kicking off the process that led to the HEA, encouraging “[e]very child . . . to get as much education as he has the ability to take” is “for his sake,” as well as “the country’s sake.”⁹⁷ Secretary Celebrezze testified that Title IV was designed “to make the benefits of higher education available” more broadly.⁹⁸

In the hearings leading up to the HEA, Commissioner Keppel called upon Congress to “insure every American child the fullest development of his mind and skills.”⁹⁹ Representative Jeffery Cohelan stated that a goal of the HEA was “an educational system that allows each and every American to pursue his schooling to the fullest extent of his capabilities.”¹⁰⁰ None of the many references to equality of educational opportunity quoted above refer to equality of opportunity to take risks, as opposed to equality of opportunity to receive a benefit.¹⁰¹

And the emphasis on helping borrowers continued as the student loan program evolved. In 1993, Senator Simon predicted on the Senate floor that when direct lending was “fully enacted, there will be hundreds of thousands of students who will be able to be helped, who can go to college and are not going now.”¹⁰² Later, in 2007, Senator Enzi described higher education as “the onramp to success in the global economy,”¹⁰³ and in 2010, Senator Mikulski spoke of “the freedom to achieve” through higher education.¹⁰⁴ Members of Congress stressed the upside for students of debt-financed education without mentioning its potential downside.

It might be argued that Congress intended to help borrowers by financing education but intended to subject borrowers to an obligation to repay that could not be escaped, even if the borrower would have been better off never borrowing the funds in the first place—that is, even if the loans turned out to be harmful. In this view, taking out federally supported student loans is comparable to investing in stock market index funds¹⁰⁵ or

96. See discussion *infra* Part VI.A (discussing interpretation of “undue hardship” in light of the overall purposes of the student-loan statutes).

97. See 1965 Remarks to Congress, *supra* note 43.

98. 1965 HEA Hearings, *supra* note 32, at 29.

99. *Id.* at 80.

100. 111 CONG. REC. 21,908 (1965).

101. See *supra* note 50. See generally *supra* Part II.B.1.

102. 139 CONG. REC. 9423 (1993).

103. 153 CONG. REC. 23,864 (2007).

104. 156 CONG. REC. 4,858 (2010).

105. See, e.g., James Chen, *Introduction to Investing: A Beginner’s Guide to Asset Classes*, INVESTOPEDIA, <https://www.investopedia.com/articles/basics/11/3-s-simple-investing.asp> [<https://perma.cc/9B76-NT5U>] (last visited Oct. 14, 2019) (“[M]ost people are too busy to worry about monitoring their portfolios on a daily basis. Therefore, sticking with index funds that mirror the market is a viable solution.”).

perhaps splitting aces or eights as a blackjack player¹⁰⁶—a usually advantageous but risky bet, one to be undertaken only with the expectation that one may very well lose one's stake and end up worse off because of the venture. Some courts have adopted this view, emphasizing a distinction between a purpose to promote education and one to “insure the future success” of individual students.¹⁰⁷

But the language quoted above is that of aid, not of risk. In the legislative history the author has reviewed,¹⁰⁸ the overall gist was not, “We are going to help students by enabling them to make a risky bet that may leave them worse off.”¹⁰⁹ Instead, members of Congress, as well as hearing witnesses, including administration officials, treated student loans as straightforward vehicles for aid to students.

To be sure, Congress expected that student loans generally would be repaid¹¹⁰ and has not been blind to the risk of nonpayment. But the legislative history reveals no expression of intention that loans be an instrument of harm to even a minority of borrowers. Instead, the leading themes are: (1) students who can repay their student loans without hardship but “feel like they can get away with” not doing so are worthy of opprobrium;¹¹¹ (2) loan programs should be administered efficiently to promote repayment, for example by keeping track of borrowers' locations;¹¹² and (3) a basic feature and function of the government student-loan programs is to assume the risk that borrowers would ultimately be

106. See, e.g., *When to Split Aces and Eights in Blackjack*, COUNTING EDGE, <https://www.countingedge.com/splitting-aces-eights/> [<https://perma.cc/D7WV-WQN4>] (last visited Oct. 14, 2019) (“Basic strategy states that you should always split aces and eights.”).

107. See *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993). But see *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (“It is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the words of the statute itself.”).

108. See *supra* note 32.

109. But see 111 CONG. REC. 21,933 (1965) (statement of Rep. Brademas) (arguing that education grants are justified because “able students from exceptionally needy families, particularly girls” are “unable to accept the risk and burden of substantial debt in order to continue their education”).

110. See *supra* note 83 and accompanying text.

111. 1965 HEA Hearings, *supra* note 32, at 701 (statement of Rep. Gibbons). This sentiment underlays the limitation on discharging student loans in bankruptcy. See *Hunt*, *supra* note 86, at 1302–07.

112. See 1965 HEA Hearings, *supra* note 32, at 333 (statement of Rep. Brademas and William R. Patterson, Assistant to the Treasurer, Georgetown University).

unable to pay,¹¹³ a risk that would make private lenders unable to offer acceptable terms.¹¹⁴

Thus, Congress's overall purpose has been for student loans to help students and there seems to be no clear statement that the risks of failed investments in education were to fall on the borrowers. These observations round out our understanding of the undue-hardship standard for student-loan bankruptcies. They provide a fuller picture of Congress's relevant purposes than the picture that emerges from examining the nondischargeability provision in isolation, as courts typically have done.¹¹⁵ And they complement the well-documented finding that the primary targets of nondischargeability were debtors who had benefited from their student loans and could repay them without hardship but chose not to do so.¹¹⁶

III. NONDISCHARGEABILITY THWARTS FOUR STUDENT-LOAN PROGRAM PURPOSES

Student loans are not dischargeable in bankruptcy unless the debtor commences a special proceeding against the student-loan creditor within the bankruptcy¹¹⁷ and shows that repayment would be an "undue hardship."¹¹⁸ Courts in most jurisdictions¹¹⁹ evaluate undue hardship using the *Brunner* test, which requires the debtor to show that the debtor cannot maintain a minimal standard of living while repaying the loans, that "additional circumstances" indicate that this condition is likely to persist for a significant portion of the repayment period, and that the debtor has made a good faith effort to repay.¹²⁰ The requirement to show undue

113. For statements acknowledging the possibility that students might not be able to repay loans, see *1993 OBRA Hearings*, *supra* note 32, at 47 (statement of Sen. Durenberger) ("It seems to me that the Government has no business loaning money out on the basis of potential earnings without either accepting a greater risk at the repayment end or providing repayment choices which help students through life's problems."); *id.* at 139 (statement of John Schullo, Director of Financial Aid, Bemidji State University); *1978 MISAA Hearings*, *supra* note 32, at 220–21 (statement of Rep. Erlenborn); *1965 HEA Hearings*, *supra* note 32, at 425–26 (statement of Peter P. Muirhead, Associate Comm'r for Higher Education, U.S. Office of Education) (stating that the problem of collection of NDSL loans arises from fact that borrowers' "future income cannot . . . be forecast with confidence"); H.R. REP. NO. 95-951, at 21 (discussing possibility that lenders in GSL program would lend to "lower risk-higher income" students); S. REP. NO. 95-643, at 12 (same).

114. *1965 HEA Hearings*, *supra* note 32, at 338 (statement of William R. Patterson, Assistant to the Treasurer, Georgetown University) (stating federal loan program gives loans on basis of need where commercial lender would not because of lack of assurance of ability to repay).

115. See discussion *infra* Part IV.A.

116. See Hunt, *supra* note 86, at 1302–07.

117. Specifically, the debtor must commence an "adversary proceeding." See FED. R. BANKR. P. 7001(6) (including the following as an advisory proceeding: "a proceeding to determine the dischargeability of a debt").

118. See 11 U.S.C. § 523(a)(8) (2012) (providing that student loans are nondischargeable absent a showing of undue hardship).

119. See *supra* note 1 (indicating nine federal judicial circuits have adopted the *Brunner* test).

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

hardship, which does not apply to any other type of debt, is probably responsible for the fact that only around 0.1%–0.2% of bankrupt student-loan debtors succeed in discharging their student loans.¹²¹ For economy, this article refers to the just-described conditional nondischargeability of student loans simply as “nondischargeability.”

This part explains how nondischargeability probably interferes with accomplishing the student-loan program purposes that Part II described. Part III argues that nondischargeability, at least in some cases, probably deters students from commencing and completing education, distorts both students’ courses of study and their choice of jobs, discourages borrowers from economic and social activity, and harms borrowers. The argument draws both on empirical social-science literature and on factual propositions that are broadly accepted as underpinnings of bankruptcy law.

Empirical scholars have studied nondischargeability in particular much less than they have studied debt in general. Thus, most of the negative effects described in Part III have been shown more directly for indebtedness in general than for nondischargeability in particular, and more research on nondischargeability specifically is certainly desirable. However, given that nondischargeability perpetuates indebtedness, the circumstantial case against nondischargeability is strong.

A. DETERRENCE OF EDUCATION

Increased student debt and increased enrollment in higher education have gone together.¹²² Nevertheless, fear of debt apparently keeps at least some prospective students from starting higher education and keeps others from finishing. Nondischargeability probably contributes to this “debt deterrence,” thereby interfering with accomplishment of the purposes of the student-loan programs.

1. Enrollment

The empirical literature on debt deterrence is still developing, but considerable evidence exists that debt deterrence is real. For example, the authors of a recent study of 265,000 student debtors report that their approach “strongly support[s] a causal interpretation” of the association they found between having high undergraduate debt and not attending graduate school.¹²³

Other work focuses on underlying psychological causes of debt deterrence. A substantial body of scholarship examines “debt aversion” (also called “loan aversion”) which has been defined as the unwillingness to

121. See Hunt, *supra* note 38.

122. See, e.g., Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133, 1136 (2012) (collecting studies).

123. Vyaceslav Fos et al., *Debt and Human Capital: Evidence from Student Loans* 3, 9 (Apr. 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901631 [<https://perma.cc/37S9-X85G>].

take out student loans even when doing so probably would be a good idea given the benefits of higher education.¹²⁴ Several studies find that 20% to 50% of potential student borrowers are debt-averse.¹²⁵ Researchers have reported that low-income,¹²⁶ LatinX,¹²⁷ and possibly Asian-American students¹²⁸ are more likely to be debt-averse.

Debt aversion is an attitude and, therefore, is not identical to debt deterrence. Someone might express debt-averse attitudes but borrow for school anyway. However, studies indicate that the eminently plausible link between debt aversion and debt deterrence actually exists: prospec-

124. See Angela Boatman et al., *Understanding Loan Aversion in Education: Evidence from High School Seniors, Community College Students, and Adults*, AM. EDUC. RES. ASS'N OPEN, Jan.–Mar. 2017, at 1 (defining loan aversion as “an unwillingness to take a loan to pay for college, even when that loan would likely offer a positive long-term return.”). Debt (or loan) aversion has also been defined as simple unwillingness to take out student loans. See Angela Boatman & Brent J. Evans, *How Financial Literacy, Federal Aid Knowledge, and Credit Market Experience Predict Loan Aversion for Education*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 53 (2017) (measuring loan aversion through answer to survey question, “Do you think it is ok to borrow for education?”).

125. See BORIS PALAMETA & JEAN-PIERRE VOYER, WILLINGNESS TO PAY FOR POST-SECONDARY EDUCATION AMONG UNDER-REPRESENTED GROUPS 51 (2010) (stating that of Canadian students in final year of high school or first year of college surveyed in 2008–2009, between 5% and 20% were debt-averse); Boatman et al., *supra* note 124, at 1 (reporting survey finding that 20% to 40% of high school seniors were debt-averse); Mo Xue & Xia Chao, *Non-Borrowing Students' Perceptions of Student Loans and Strategies of Paying for College*, 45 J. STUDENT FIN. AID 25, 28, 30 (2015) (finding in interviews that thirteen of thirty non-borrowing students from lower- or lower-middle-class backgrounds stated they would be unwilling to take education loans); Sara Goldrick-Rab & Robert Kelchen, *Making Sense of Loan Aversion: Evidence from Wisconsin*, in STUDENT LOANS AND THE DYNAMICS OF DEBT 317, 333–34, 346 (Brad Hershbein & Kevin Hollenbeck eds., 2015) (finding that 48% of sample of Wisconsin Pell Grant recipients surveyed in 2008 were debt-averse); see also PAMELA BURDMAN, THE STUDENT DEBT DILEMMA: DEBT AVERSION AS A BARRIER TO COLLEGE ACCESS 6–8 (2005) (providing anecdotal examples of debt aversion).

126. See THOMAS G. MORTENSON, ACT PROGRAM, ATTITUDES OF AMERICANS TOWARD BORROWING TO FINANCE EDUCATIONAL EXPENSES 1959–1983, at 13, 21 (1988) (finding that “[t]he group that thinks least favorably toward loans is the lowest income population” based on analysis of survey data collected by the Fed from 1959–1983); Claire Callender & Geoff Mason, *Does Student Loan Debt Deter Higher Education Participation? New Evidence from England*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 20 (2017) (concluding, based on nationally representative surveys of students in England who were studying toward higher education entry-level qualifications or vocational qualifications, that “[d]ebt-averse attitudes remain much stronger among lower-class students than among upper-class students.”); Claire Callender & Jonathan Jackson, *Does the Fear of Debt Deter Students from Higher Education?*, 34 J. SOC. POL'Y 509, 509 (2005) (concluding based on survey of just under 2,000 prospective students in England that “those from low social classes are more debt averse than those from other social classes”).

127. See ALISA F. CUNNINGHAM & DEBORAH A. SANTIAGO, INST. FOR HIGHER EDUC. POL'Y & EXCELENCIA IN EDUC., STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T? 18 (2008) (reporting LatinX students have lower-than-average rates of borrowing); MORTENSON, *supra* note 126, at 21 (reporting that LatinX people have less favorable views of student loans than African-American or white people); PALAMETA & VOYER, *supra* note 125, at 51 (finding in Canadian study that Aboriginals, boys, and students without college-educated parents were more likely to be loan-averse); Boatman et al., *supra* note 124, at 1 (reporting that surveyed men and LatinX people were more likely to be loan-averse than women and white respondents).

128. See CUNNINGHAM & SANTIAGO, *supra* note 127, at 18 (reporting that Asian-American students have lower-than-average rates of borrowing and reporting debt-averse attitudes expressed in focus groups).

tive students with debt-averse attitudes are in fact less likely to plan on higher education.¹²⁹ Among students of lower social class (to use the study authors' term),¹³⁰ the effect is particularly strong.¹³¹

Findings such as those just described suggest that unease about debt deterrence is justified, and in fact, anxiety about the issue is widespread. No less a figure than the president and CEO of the Federal Reserve Bank of Philadelphia expressed apprehension in a speech last year, declaring, "I am concerned that the looming shadow of student debt, coupled with increasing uncertainty about loan forgiveness programs and income-driven repayment, may dissuade some potential students—particularly those from low- and middle-income families—from going to college or pursuing jobs in public service."¹³²

Debt deterrence seems, perhaps unsurprisingly, to be of particular concern to the medical profession.¹³³ The American Medical Association, for example, has stated that the high debt burden of medical school "may dissuade students from attending medical school altogether, especially students from diverse ethnic and socioeconomic backgrounds."¹³⁴ Public-health researchers working on medical education have expressed similar views.¹³⁵

129. See Callender & Jackson, *supra* note 126, at 524 ("[O]n average, debt aversion was a deterrent to applying to university."); Callender & Mason, *supra* note 126, at 36, 46 n.16 (explaining that loan-averse attitudes "are negatively related to planned [higher education] participation," using both 2002 and 2015 data, and stating that the 2002 association is significant when applying the model of the 2017 paper to the 2002 sample of students used in the 2005 paper).

130. These studies measure social class by occupation and economic activity of the household's primary earner. See Callender & Jackson, *supra* note 126, at 519–20; Callender & Mason, *supra* note 126, at 30.

131. See Callender & Jackson, *supra* note 126, at 509 ("Those from low social classes are . . . far more likely to be deterred from going to university because of their fear of debt."); Callender & Mason, *supra* note 126, at 41 ("Lower-class students are still far more likely than students from other social classes to be deterred from planning to enter [higher education] because of fear of debt. . . . Debt aversion seems more likely to deter anticipated [higher education] participation among lower-class students in 2015 than in 2002."). But see Mauricio Olavarría Gambi & Claudio Allende González, *Endeudamiento Estudiantil y Acceso a la Educación Superior en Chile* [*Student Debt and Access to Higher Education in Chile*], 141 REVISTA ESPAÑOLA DE INVESTIGACIONES SOCIOLOGICAS 91, 91 (2013) ("[F]ear of indebtedness for post-secondary studies is not a limiting factor for young people from lower-income sectors to go on to tertiary education.").

132. See Patrick T. Harker, President & Chief Exec. Officer, Fed. Reserve Bank of Phila., *The Economics of Equitable Education: How Today's Loans, Access, and Training Affect Tomorrow's Economy* 8 (Apr. 17, 2018), available at <https://www.philadelphiafed.org/-/media/publications/speeches/harker/2018/04-17-18-saint-josephs-university.pdf?la=en> [HTTPS://PERMA.CC/5NPA-E9NZ].

133. See, e.g., Rick Seltzer, *Antidote to Med Student Debt*, INSIDE HIGHER ED. (Aug. 17, 2018), <https://www.insidehighered.com/news/2018/08/17/nyu-scholarships-cover-medical-school-tuition-doctors-debt-continues-raise-concern> [HTTPS://PERMA.CC/D2FA-F9FD] ("High costs have for years stoked concerns about how debt affects aspiring doctors. Leaders worry some of the best and the brightest students, particularly those from poor and immigrant communities, are dissuaded from attending medical school at all.").

134. AM. MED. ASS'N, REDUCING MEDICAL STUDENT DEBT STRENGTHENS THE PHYSICIAN WORKFORCE (2015).

135. Robert A. Dugger et al., *The Color of Debt: Racial Disparities in Anticipated Medical Student Debt in the United States*, 9 PLOS ONE e74693, Sept. 3, 2013, at 1, 5 (reporting

Worries about debt deterrence are not limited to the United States. Debt deterrence has been reported in Japan,¹³⁶ and belief in the phenomenon has inspired the University of Cambridge to consider offering fully funded, “debt-free” studentships.¹³⁷

The empirical research in this area has focused so far on debt in general rather than nondischargeability in particular, and nondischargeability-specific research would be desirable. Nevertheless, scholars have posited that nondischargeability deters attendance,¹³⁸ and the circumstantial case to that effect is strong. Certainly, it seems likely that nondischargeability deters education that must be debt-financed, because it puts the borrower in a worse position if the investment does not pan out. Nondischargeability hinders, and may altogether prevent, escape via bankruptcy.

Although it might be argued that potential student borrowers are unaware of or unconcerned with the nuances of bankruptcy law, student-loan nondischargeability is firmly in the popular domain. Media accounts frequently state (incorrectly) that student-loan debt is always nondischargeable.¹³⁹ Internet commentators cite nondischargeability as a reason not to pursue higher education, even if such arguments sometimes are made without great legal precision.¹⁴⁰

on study finding that African-American medical students anticipate higher education debt than other groups: “It is plausible that this disproportionate debt burden may play a role in the decline in medical school attendance among Black students.”)

136. See Yoshiaki Nohara, *Japan’s Students Face Uncertain Future Under Cloud of Debt*, JAPAN TIMES (Dec. 29, 2016), <https://www.japantimes.co.jp/news/2016/12/29/national/social-issues/japans-students-face-uncertain-future-cloud-debt> [https://perma.cc/7BL7-CDGM] (“[T]he rise of college loans . . . dissuades poorer students, who worry that they won’t get the jobs needed to be able to repay the loan.”).

137. Louis Ashworth & Rosie Bradbury, *Cambridge Considers Funding Debt-Free Education for its Poorest Students*, VARSITY (Aug. 17, 2018), <https://www.varsity.co.uk/news/16010> [https://perma.cc/N6M8-CQJ9] (reporting that consideration of such studentships is “part of an extensive access initiative set to launch in the coming year”).

138. See Atkinson, *supra* note 7, at 12 (“For potential borrowers, this burden [(i.e., the burden of debt that may be nondischargeable)] may deter members of this group from seeking an education if, in so doing, they must make themselves more vulnerable financially.”); *id.* at 25 (stating that nondischargeability “might also affect educational and career choices”).

139. See Robert Farrington, *The 2020 Presidential Candidates’ Proposals for Student Loan Debt*, FORBES (Apr. 23, 2019), <https://www.forbes.com/sites/robertfarrington/2019/04/24/the-2020-presidential-candidates-proposals-for-student-loan-debt/#753776c8520e> [https://perma.cc/ESS9-2HQ8] (stating that the 2005 bankruptcy bill made it “impossible to discharge private student loan debt in bankruptcy”); Theodor Meyer, *Inside Biden and Warren’s Yearslong Feud*, POLITICO (Mar. 12, 2019), <https://www.politico.com/magazine/story/2019/03/12/biden-vs-warren-2020-democratic-primaries-bankruptcy-bill-225728> [https://perma.cc/P5QG-BZZD] (noting that the 2005 bankruptcy bill contained a provision to “bar those who file for bankruptcy from getting rid of private student loan debt”); Andrew Ross Sorkin, *No Tuition, But You Pay a Percentage of Your Income (If You Find a Job)*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/business/dealbook/education-student-loans-lambda-schools.html> [https://perma.cc/8WW9-NVA8] (noting that student loans borrowers “can’t escape [their loans] even by filing for bankruptcy”).

140. See, e.g., Casey Bond, *Why College Isn’t Worth the Money*, FORBES (Sept. 4, 2015), <https://www.forbes.com/sites/caseybond/2015/09/04/why-college-isnt-worth-the-money/#2545dd53653d> [https://perma.cc/K92N-UAU3] (“It should be noted that student loan debt is the only type of debt that can’t be discharged through bankruptcy.”); Michael Price, *7 Reasons Why You Shouldn’t Go to College and 4 Things To Do Instead*, HUFFINGTON POST

In a similar vein, it is not always relevant (or accurate) to observe that “high-school seniors aren’t thinking about bankruptcy.”¹⁴¹ As of fall 2017, 26.5% of American higher-education students were twenty-five or older, and 16.2% were thirty or older.¹⁴² Moreover, high schoolers may be more financially savvy about student loans, and may act more on such knowledge, than is commonly appreciated. Data from a 2015 multi-state survey indicates that approximately 40% of high-school students are aware of income-driven repayment programs¹⁴³ and that awareness of such programs is associated with approximately an eight-point reduction in debt aversion,¹⁴⁴ relative to an overall debt-aversion rate of 21%.¹⁴⁵

If potential students who are deterred are more likely to be from disadvantaged backgrounds, as seems to be the case, nondischargeability interferes with equal access. And potential students who are deterred from higher education do not contribute to an educated population or enjoy freedom of career choice. Thus, nondischargeability-fueled debt deterrence would interfere with accomplishing the goals of the student-loan programs.

2. Completion

Borrowing, at least beyond a certain point, appears to interfere with the borrower’s completing an education program. A study of a 2007 sample of people aged twenty-five and above who were formerly students at four-year colleges¹⁴⁶ found that for public-university students, increases in debt load beyond \$10,000 reduced the probability of having graduated.¹⁴⁷ The decrease was especially pronounced for students whose parents’ income was in the bottom 75% of the distribution.¹⁴⁸ Perhaps unsurprisingly, given that many students cannot pay for higher education without debt, those who borrowed some but less than \$10,000 were more

(Sept. 6, 2017), https://www.huffpost.com/entry/7-reasons-why-you-shouldn_1_b_5501111 [<https://perma.cc/3LGY-H73X>] (“As a result of the scheme Wall Street, the Federal Government, and the college system concocted, America now holds \$1 Trillion in student loan debt. . . . The Federal Government loves this by the way, because student loans are the only debt that can’t be expunged in bankruptcy proceedings.”). Bond’s and Price’s statements are incorrect. See 11 U.S.C. § 523(a) (2012) (listing types of nondischargeable debt other than student loans, such as domestic support obligations).

141. See Boatman & Evans, *supra* note 124, at 8–10.

142. See THOMAS D. SNYDER ET AL., NAT’L CENTER FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2017, at 411 tbl.303.50 (2017).

143. See Boatman & Evans, *supra* note 124, at 58.

144. *Id.* at 60.

145. *Id.* at 59. In this study, loan aversion is defined as not answering “yes” to the survey question, “Do you think it is ok to borrow for education?” *Id.* at 53.

146. See Dwyer et al., *supra* note 122, at 1140 (describing sample). The sample was made up of students who were no longer attending college; that is, students who had graduated or dropped out. *Id.*

147. See *id.* at 1146 fig.2. For private-university students, defined as those who had ever attended a private university, *id.* at 1141, increasing debt was associated with an increasing probability of having graduated at all levels of debt. *Id.* at 1145 fig.1. For the sample of all students (that is, public and private university students combined), graduation rates did start to decrease as debt climbed past approximately \$12,000. See *id.*

148. See *id.* at 1149 fig.3.

likely to have graduated than those who did not borrow at all.¹⁴⁹

A study of 2,475 students at a large public university in the Midwest in 2014 to 2015¹⁵⁰ reached a similar conclusion. The researchers found that students who discontinued their education “had taken out \$2,000–\$3,000 more in loans in their first two years of college.”¹⁵¹

Empirical studies provide evidence that excessive debt interferes in general with completion of studies. Bankruptcy cases, by contrast, provide specific examples. Kent Alan Holtorf’s story is one such example. Holtorf completed medical school and started a residency in anesthesiology.¹⁵² According to the bankruptcy court’s findings of uncontested facts, Holtorf “became depressed over his perceptions of his prospects for employment and for repaying his educational loans,” began abusing substances, and dropped out of his residency program.¹⁵³ Unmanageability, real or perceived, of educational debt apparently contributed to Holtorf’s failure to complete his education.¹⁵⁴

A purely rational economic actor might decide to discontinue an educational program and stop borrowing if it becomes apparent that the increased difficulty of handling the debt needed to complete the program outweighs the net benefits of completion. Such a rational actor would not have begun the program in the first place without believing at that time that its benefits outweighed its costs, but changes in the calculus could come in various ways. Such a student may at first have had earnings expectations that later came to seem too optimistic or may initially have underestimated either the amount of borrowing needed or the difficulty of repayment.¹⁵⁵

Apart from a hypothetical rational actor’s analysis of marginal costs and benefits, unmanageable debt can be discouraging¹⁵⁶ and depressing,¹⁵⁷ leading a student to drop out, even if the existing debt is a sunk cost. Holtorf’s case might well illustrate this scenario.

Whatever the pathway by which excessive debt leads to dropping out, it seems likely that nondischargeability makes matters worse. Nondischargeability makes future debts more threatening, and thus less attrac-

149. *See id.* at 1145 fig.1 (all students combined); *id.* at 1146 fig.2 (public and private universities separately). For an additional study suggesting that debt interferes with completion, see, e.g., Lyle McKinney & Andrea Backschneider Burrige, *Helping or Hindering? The Effects of Loans on Community College Student Persistence*, 56 RES. HIGHER EDUC. 299, 314 (2015) (noting that based on Fall 2003 data, community college students who borrowed federal loans in their first year were more likely to drop out).

150. Sonya L. Britt et al., *Student Loans, Financial Stress, and College Student Retention*, 47 J. STUDENT FIN. AID 25, 28 (2017).

151. *Id.* at 32.

152. Holtorf v. Ill. Student Assistance Comm’n (*In re Holtorf*), 204 B.R. 567, 568 (Bankr. S.D. Cal. 1997).

153. *Id.*

154. *Id.* at 571–72. The bankruptcy court denied discharge, finding that Holtorf did not work enough hours per week and had made insufficient efforts to get work that would use the medical education he did have. *Id.*

155. *See* Dwyer et al., *supra* note 122, at 1137.

156. *See* discussion *infra* Part III.C.

157. *See* discussion *infra* Part III.D.

tive, and makes existing debts less manageable, and therefore more discouraging.

When nondischargeability contributes to a student's dropping out, the purposes of the student-loan programs are frustrated for the same reasons that they are frustrated when a student does not enroll in the first place: the disparate impact on disadvantaged groups means access is unequal, and the dropouts do not become (completely) educated and cannot pursue the careers they had planned. In addition, as Professor (and Representative) Katherine Porter has found, when a student has taken out loans and does not finish the program, it is more likely that borrowing will have harmed rather than benefited the student.¹⁵⁸

B. DISTORTION OF CAREERS

As discussed,¹⁵⁹ Congress designed the student-loan programs to minimize the debt-induced pressure on borrowers to seek lucrative careers at the expense of worthwhile but lower-paying ones.¹⁶⁰ Part III.B discusses the empirical evidence that debt in fact distorts career choices and argues that nondischargeability probably contributes to the distortion. One way in which nondischargeability plays a direct role is that bankruptcy courts often deny discharge based on the thesis that debtors should change jobs and earn more money, even for debtors working in fields for which their education has prepared them.

Nondischargeability may distort career choice by inducing the borrower to seek a higher-paying job in a field for which the borrower's education is relevant. It may also, interfering more seriously with the goals of the student-loan programs, cause the borrower to seek a job entirely outside the scope of the borrower's education. Part III.B discusses each possibility in turn.

1. Distortion to a Within-Field Job

The pressure of nondischargeability could influence a student to pursue a more lucrative career within the field for which they trained than they otherwise would.¹⁶¹ Two examples are becoming a corporate tax lawyer rather than a public interest lawyer or becoming a radiologist rather than a general practitioner.¹⁶² In such cases, nondischargeability would distort

158. See Katherine Porter, *College Lessons: The Financial Risks of Dropping Out, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 85, 92 (Katherine Porter ed., 2012) (describing poorer economic outcomes for dropouts).

159. See discussion *supra* Part II.B.3.

160. Although Congress was concerned that indebted borrowers might pursue money to the exclusion of other goods, it is in fact far from clear that debt is on average associated with higher earnings. See discussion *infra* Part III.D. Moreover, a major underpinning of American bankruptcy law is that excessive indebtedness reduces economic activity. Part III.C discusses this issue in detail.

161. Debt may also induce borrowers to choose career paths that maximize immediate pay at the expense of long-term prospects. See Alexandra Minicozzi, *The Short Term Effect of Educational Debt on Job Decisions*, 24 *ECON. EDUC. REV.* 417, 418–19 (2005).

162. *Id.*

the student's career choice, contrary to Congress's purpose in creating the student-loan programs. It is important that the point here is not that students should not seek high-paying jobs if that is what they want. Instead, it is that Congress wanted to minimize the extent to which debt financing forces borrowers to seek such employment.

The evidence indicates that debt in fact distorts job selection. Researchers examined the career choices of graduates of a particular selective college who entered from 1995 to 2002.¹⁶³ This time frame encompassed the period in which the college changed its financial aid policies to replace loans with grants—first in part, then completely.¹⁶⁴ The researchers concluded that “debt causes graduates to choose substantially higher-salary jobs and reduces the probability that students choose low-paid ‘public interest’ jobs.”¹⁶⁵

Another study, conducted at the New York University School of Law, indicates that even calling a financial aid package a loan, as opposed to a grant, deters the recipient from choosing a public interest job. In this experiment, some randomly selected admitted students were given a “loan” that would be forgiven if they worked in low-paying public interest jobs, while others were given an economically equivalent “tuition waiver” that they would have to repay if they did not work in such jobs.¹⁶⁶ In other words, the packages were identical in substance, but one was called a “loan” and the other was called a “tuition waiver.” The “tuition assistance” recipients had a 36% to 45% higher rate of placement in eligible jobs—that is to say, lower-paying public interest jobs.¹⁶⁷ The study author interpreted the results as “provid[ing] strong evidence of the influence of debt burden on job choice in a real world setting.”¹⁶⁸

The search of some indebted students for higher starting salaries may come at the cost not just of public service, but also of the student's own long-term career prospects. Based on a 1987 survey of men who received guaranteed student loans between 1976 and 1985 and who left school in 1983 or before,¹⁶⁹ one researcher found that students with more education debt had higher initial salaries but lower salary growth for the first four years after leaving school.¹⁷⁰

Debt's distorting effects apparently start before graduation. Researchers who studied surveys of medical students from 1993 to 2010 found that students with more debt were more likely to switch in medical school

163. Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. PUB. ECON. 149, 154 (2011).

164. *Id.* at 151–52.

165. *Id.* at 149. The authors gathered the data for this paper before Congress adopted the most broadly available and extensive public-service loan forgiveness program in 2007.

166. See Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 2009 AM. ECON. J. 1, 1 (2006).

167. *Id.*

168. *Id.* at 19.

169. See Minicozzi, *supra* note 161, at 420–21.

170. *Id.* at 417.

from primary care to high-paying non-primary care specialties.¹⁷¹

As is the case for deterrence of education, discussed above, the empirical research here has focused on the effects of debt generally rather than nondischargeability specifically. But again, it stands to reason that nondischargeability would play a role: choosing to accept lower pay while indebted generally entails assuming a financial risk, and the risk is less attractive if bankruptcy provides no potential escape.

Moreover, there is direct evidence from the courts that nondischargeability goads some borrowers to veer from the career path they sought to follow by pursuing higher education. Courts have denied discharge of student-loan debt based on the belief that the debtor should try to get a higher-paying job, even when the debtor is working in the field for which the debt-financed education has prepared the debtor.

*Oyler v. Education Credit Management Corp. (In re Oyler)*¹⁷² is an example. In *Oyler*, the U.S. Court of Appeals for the Sixth Circuit held that Michael Oyler, the pastor of a start-up church, could not discharge his student loans despite his income of less than \$10,000 per year, earned while apparently working sixty to seventy hours a week.¹⁷³ The court found that “[b]y education and experience he qualifies for higher-paying work and is obliged to seek work that would allow debt repayment before he can claim undue hardship.”¹⁷⁴ It so held even though Oyler was working in ministry and had taken out the loans for training in that very field.¹⁷⁵ Courts outside the Sixth Circuit have followed the career-distorting reasoning of *Oyler*.¹⁷⁶

Beyond inferences about the effects of nondischargeability that can be drawn from studies of debt, cases like *Oyler* send an unmistakable signal that paying debts comes first and using one’s education to pursue one’s career as one chooses comes second. They illustrate a clear conflict between nondischargeability and the career-choice purpose of the student-loan programs.

2. Distortion to an Out-of-Field Job

The message of *Oyler* may just have been that the debtor needed to find a higher-paying job within the fields for which he had been

171. See Martha S. Grayson et al., *Payback Time: The Associations of Debt and Income with Medical Student Career Choice*, 46 MED. EDUC. 983, 983 (2012).

172. 397 F.3d 382 (6th Cir. 2005).

173. See *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 300 B.R. 255, 257, 260–61 (B.A.P. 6th Cir. 2003), *rev’d*, 397 F.3d 382 (6th Cir. 2005).

174. *Oyler*, 397 F.3d at 386.

175. See *Oyler*, 300 B.R. at 258–59 (recounting that Oyler had taken out his student loans to finance his studies for the ministry and that the fact that the government guaranteed loans to study for work in such low-paying fields influenced the bankruptcy judge to grant a discharge).

176. See *Kehler v. Nenet Loan Servs. (In re Kehler)*, 326 B.R. 142, 148 (Bankr. N.D. Ind. 2005) (denying discharge to minister who took lower-paying job to be near and care for aging parents: “He has not attempted to maximize his income by finding the better-paying work for which he is qualified.”).

trained.¹⁷⁷ Courts sometimes go further and explicitly tell debtors to look outside the scope of their training for higher-paying employment. In such cases, nondischargeability's harm to the purposes of the student-loan programs is particularly grave because society loses the benefit of the debtor's education if the debtor does what the court instructs.

*United States Department of Education v. Gerhardt (In re Gerhardt)*¹⁷⁸ is an example. Jonathon Gerhardt was a professional cellist who was unable to maintain a minimal standard of living on his cellist's salary.¹⁷⁹ The court denied discharge, finding that "nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim that it would be an undue hardship to repay his student loans."¹⁸⁰

Other decisions have adopted *Gerhardt's* reasoning. An example is *Matthews-Hamad v. Educational Credit Management Corp. (In re Matthews-Hamad)*,¹⁸¹ mentioned in the introduction. In that case, the debtor, Cynthia Matthews-Hamad, had a master's degree in counseling and worked at a Salvation Army shelter as a counselor to battered and abused women, earning approximately \$30,445 per year.¹⁸² In seeking to discharge her \$60,000 in student loan debt,¹⁸³ she argued that her failure to make more money should not be held against her because she was "at the top of her profession" and was "unlikely to find other employment in her field that will pay more than her current position."¹⁸⁴ Citing *Gerhardt*, the court held that "the fact that a debtor has a low-paying job without much upside earning potential is not enough" and denied discharge.¹⁸⁵

The debtor's economic situation in *Mallinckrodt v. Educational Credit Management Corp. (In re Mallinckrodt)*¹⁸⁶ was apparently even worse. George Mallinckrodt had a master's degree in mental health counseling but had been able to find only very minimal employment in that field, earning \$6,000 per year.¹⁸⁷ Noting that the debtor "only considers positions in the fields of mental health counseling and tennis instruction"¹⁸⁸ and that there was "no evidence" that he had "made efforts to generate

177. A dissenting opinion in the Bankruptcy Appellate Panel suggested that Oyler had skills in music, audio engineering, and sales that he could use to increase his income. *Oyler*, 300 B.R. at 260. It is not clear from the opinions whether the Sixth Circuit's reference to "education and experience" referred to these skills or whether he acquired them through higher education.

178. 348 F.3d 89 (5th Cir. 2003).

179. *Id.* at 92.

180. *Id.* at 93.

181. 377 B.R. 415 (Bankr. M.D. Fla. 2007).

182. *Id.* at 419.

183. *Id.* at 418.

184. *Id.* at 422.

185. *Id.*

186. 274 B.R. 560 (Bankr. S.D. Fla. 2002).

187. *Id.* at 563.

188. *Id.* Mallinckrodt was a former professional tennis player. *Id.*

income outside of his chosen profession,”¹⁸⁹ the court reversed the bankruptcy court’s grant of discharge of Mallinckrodt’s \$73,000¹⁹⁰ in student loans.¹⁹¹ It held, “The student loan program does not guarantee that debtors will find financially rewarding employment in the field of their choice.”¹⁹²

In sum, empirical scholarship demonstrates that debt distorts students’ career choices, just as Congress feared. That nondischargeability contributes to this distortion is not just inherently reasonable. It is also shown by court decisions that deny discharge because the debtor, who is working in a field for which they trained, should change jobs to make more money. Such decisions work against the student-loan programs’ goal of career choice. Decisions that go further, instructing the debtor to abandon the trained-for field to service loans, further undermine the programs’ goals by tending to deny society the benefits of the debtor’s education.

C. DISCOURAGEMENT OF BORROWERS: DEBT OVERHANG

Excessive debt may interfere with the debtor’s participation in the economy and society. If enough of the rewards of the debtor’s economic activity go to creditors rather than the debtor, the debtor may simply give up in despair on economic activity and/or social participation.¹⁹³ This condition is called “debt overhang.”¹⁹⁴

Student-loan debt overhang frustrates the purposes of the student-loan programs: borrowers who are discouraged from participating in the economy and society are not using their education to benefit the nation, are probably not fully pursuing their careers of choice, and likely have been harmed rather than helped by their student loans. Nondischargeability would seem to contribute to student-loan debt overhang because eliminating the debts in bankruptcy should stop them from discouraging debtors.

Indeed, many scholars have cited solving the debt-overhang problem as a basic justification for American bankruptcy law.¹⁹⁵ The debt-overhang

189. *Id.* at 568.

190. *Id.* at 563.

191. *Id.* at 569.

192. *Id.* at 568.

193. See H.R. DOC. NO. 93-137, pt. 1, at 71 (1973) (stating that excessive debt threatens “continued and more value-productive participation” in the economy and society); *id.* at 79 (eliminating excessive debt promotes “continuation of [the debtor’s] household as a social and economic unit”).

194. See Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 140 (2004) (“Debt-overhang robs [a consumer] of her will to work hard and to save.”).

195. See Vincent S.J. Buccola, *Law and Legislation in Municipal Bankruptcy*, 38 CARDOZO L. REV. 1301, 1303 (2017) (noting “the principal economic function” of consumer bankruptcy is “to grant the debtor a fresh start and thus ameliorate the costs associated with debt overhang”); Clayton Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1437–38 (2014) (arguing that solving debt-overhang problem for cities is analogous to fresh start in individual bankruptcy); Hynes, *supra* note 194, at 140 (stating consumer bankruptcy’s “fresh start” can “remove . . . debt overhang”); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420–24 (1985) (explaining that debt’s reduction of the debtor’s incentives to

justification for bankruptcy finds support in primary legal sources as well. The Supreme Court embraced it in 1934 in *Local Loan Co. v. Hunt*.¹⁹⁶ The Court wrote that a “primary purpose[]” of the then-existing Bankruptcy Act was to “relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh”¹⁹⁷ by giving the debtor “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”¹⁹⁸

Elaborating on the idea of a “clear field for future effort” free from the “discouragement of pre-existing debt,” the Court wrote:

From the viewpoint of the wage-earner there is little difference between not earning at all and earning wholly for a creditor. . . . The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage-earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.¹⁹⁹

The legislative history of the 1978 Bankruptcy Reform Act, which created the modern Bankruptcy Code, cited debt overhang as a basis for giving a fresh start in bankruptcy. The 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, which served as the starting point for the 1978 Act, invoked as a function of bankruptcy law “rehabilitat[ing] debtors continued and more value-productive participation,”²⁰⁰ including participation in the economy.²⁰¹ The legislative history of subsequent bankruptcy legislation also acknowledges debt overhang. The Senate committee report for a forerunner bill to the Bankruptcy Amendment and Federal Judgeships Act of 1984²⁰² states that, in the presence of “[c]rushing debt burdens,” “work productivity often suffers” and bankruptcy discharge “allow[s] troubled borrowers to become productive members of their communities.”²⁰³

earn supports the existence of bankruptcy discharge); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1435 (2012) (“Overleveraged individuals have limited incentives to increase productivity because the gains from their labor go to their creditors. . . . Bankruptcy . . . [is] a method of fixing this incentive problem and returning overleveraged individuals . . . to productivity.”); David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217, 2236 n.75 (2014) (“[T]he fresh start in consumer bankruptcy . . . address[es] debt overhang concerns.”); see also Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 639 (2018) (writing of situation where debtor is unable to repay loans over a long period of time: “This debt trap disincentivizes work.”).

196. 292 U.S. 234 (1934).

197. *Id.* at 244 (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915)).

198. *Id.*

199. *Id.* at 245.

200. H.R. DOC. NO. 93-137, pt. 1, at 71 (1973).

201. See *id.* at 73–74.

202. For the place of the cited Senate committee report in the legislative history of the 1984 Act, see E1 COLLIER ON BANKRUPTCY VI–X (Lawrence E. King et al. eds., 16th ed. rev. 2019).

203. S. REP. NO. 98-65, at 53 (1983).

The 1973 bankruptcy commission report also embraced a conception of debt overhang that included participation not just in the economy, but in society.²⁰⁴ Although the social dimension of debt overhang apparently has not received as much attention from scholars or courts as the economic dimension,²⁰⁵ it too has a place in American law.

After enactment of the Bankruptcy Code, the Supreme Court²⁰⁶ and appellate courts have repeatedly reaffirmed²⁰⁷ bankruptcy's purpose of affording a "clear field for future effort." Two particularly vivid examples illustrate that the "clear field" entails the absence of debt overhang as discussed here.

In *Turner v. Boston*,²⁰⁸ the Ninth Circuit held that a debtor's listing of debts on a bankruptcy petition filed too soon after a previous petition did not render those debts nondischargeable in a bankruptcy started by a subsequent, third petition.²⁰⁹ The court wrote, "Society is injured by forever saddling the debtor with undischARGEABLE debts, for the discharge denied might have provided the debtor 'with the incentive to use his skills and talents, and thereby contribute to society even after financial disaster.'"²¹⁰

In *In re Attanasio*,²¹¹ the bankruptcy court applied § 707(b), which at the time authorized the court to dismiss a consumer debtor's bankruptcy case for "substantial abuse" of the system.²¹² Considering whether it

204. See Hunt, *supra* note 86, at 1296–97 (arguing 1973 Bankruptcy Commission expresses concern with social effects of debt overhang).

205. See *supra* note 195 (citing scholars who emphasize economic dimension of debt overhang).

206. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991); *Brown v. Felsen*, 442 U.S. 127, 128 (1979); *Kokoszka v. Belford*, 417 U.S. 642, 647 (1974); *Perez v. Campbell*, 402 U.S. 637, 648 (1971) ("This Court on numerous occasions has stated" that one of the primary purposes of the Bankruptcy Act is to give debtors a new opportunity in life and a "clear field for future effort"); *Lines v. Frederick*, 400 U.S. 18, 19 (1970) (per curiam) (stating "clear field for future effort" is a "basic purpose" of the Bankruptcy Act); see also *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 958 (1971) (Black, J., dissenting from denial of cert.) ("Bankruptcy is designed to permit a man to make a new start unhampered by overwhelming debts in hopes of achieving a useful life.").

207. For recent decisions, see *In re Trump Entm't. Resorts*, 810 F.3d 161, 173 n.55 (3d Cir. 2016) (quoting *Perez*, 402 U.S. at 648); *Berger & Assocs. Att'ys, P.C. v. Kran (In re Kran)*, 760 F.3d 206, 210 (2d Cir. 2014) (quoting *Grogan*, 498 U.S. at 286–87); *Pasquina v. Cunningham (In re Cunningham)*, 513 F.3d 318, 324 (1st Cir. 2008); *Nunnery v. Rountree (In re Rountree)*, 478 F.3d 215, 220 (4th Cir. 2007); *Jeff v. Sidoroff (In re Sidoroff)*, 401 F.3d 1101, 1104 (9th Cir. 2005); *Leonard v. St. Rose Dominican Hosp. (In re Majewski)*, 310 F.3d 653, 658 (9th Cir. 2002); *Hickman v. Texas (In re Hickman)*, 260 F.3d 400, 404 (10th Cir. 2001); *Mason v. Young (In re Young)*, 237 F.3d 1168, 1178 (5th Cir. 2001) (stating debtors are not compelled, "in Dickensian fashion, to labor for the rest of their lives under the crushing weight of gigantic debt; under our law, the world is not to be made a debtor's prison by a lifelong sentence of penury"); *McCrorry v. Spigel (In re Spigel)*, 260 F.3d 27, 31 (1st Cir. 2001).

208. 393 F.2d 683 (9th Cir. 1968).

209. *Id.* at 683–84, 687.

210. *Id.* at 686 (quoting 1 COLLIER ON BANKRUPTCY ¶ 14.01 (14th ed. 1967)).

211. 218 B.R. 180 (Bankr. N.D. Ala. 1998).

212. *Id.* at 184. The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amended § 707(b) so that it now provides for dismissal for "abuse" (rather than for "substantial abuse") and for an elaborate and controversial "means test" designed to prevent

should dismiss the case in light of the debtor's alleged ability to repay some loans, the court expressed the debt-overhang thesis with memorable force:

[W]ould not an impoverished debtor be more inclined to simply throw hands up and give up, rather than continue to work simply for the purpose of turning all income over and above that needed for necessities, to creditors, if not allowed the opportunity to improve a meager existence?²¹³

Finding that the debtor "is being hampered from achieving a useful life by the burden of overwhelming debts" and that "[r]equiring repayment . . . is likely to cause his . . . work productivity to suffer,"²¹⁴ the court refused to dismiss the debtor's case.²¹⁵

Turning to student loans specifically, the legislative history of student-loan nondischargeability does not indicate that Congress found student debtors somehow immune from debt overhang.²¹⁶ Indeed, it seems as though unmanageable student debts are as likely as other unmanageable debts to keep borrowers from working.²¹⁷

To be sure, Congress enacted nondischargeability despite the risk of debt overhang. But the point here is that the scope of nondischargeability should be evaluated in light of debt overhang's interference with the purposes of the student-loan programs.²¹⁸ That interference is manifest: student borrowers who are discouraged from participating in the economy and society are not using their education to benefit society, are probably not fully pursuing their careers of choice, and likely have been harmed rather than helped by their student loans.

There appears to have been surprisingly little empirical research on consumer debt overhang, despite the concept's legal prominence. Completed research links self-reported financial stress to work absenteeism²¹⁹ and indicates that debt overhang reduces consumer investment.²²⁰ A

"can-pay" debtors from getting a discharge under Chapter 7. See 11 U.S.C. § 707(b) (2012); Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352–53 (2008) (describing means test as "controversial" and reporting that data did not suggest that it succeeded in weeding out high-income abusers).

213. *Attanasio*, 218 B.R. at 194.

214. *See id.* at 239.

215. *Id.* at 241.

216. *See* Hunt, *supra* note 86, at 1310.

217. *Id.* at 1322–23.

218. *See* discussion *infra* Part IV.C.2–4 (advocating restricting the scope of nondischargeability to further student-loan program goals).

219. *See* Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An Empirically Derived Model*, 14 FIN. COUNS. & PLAN. 31, 39 (2003). *Cf.* Jinhee Kim et al., *Relationship Between Financial Stress and Workplace Absenteeism of Credit Counseling Clients*, 27 J. FAM. & ECON. ISSUES 458, 469–73 (2006) (finding that financial stress increases time spent on financial matters at work but does not have a significant effect on other measures of absenteeism).

220. *See* Brian T. Melzer, *Mortgage Debt Overhang: Reduced Investment by Homeowners at Risk of Default*, 72 J. FIN. 575, 575 (2017). Melzer found that homeowners whose mortgages exceeded their home values, so that they were at risk of foreclosure, spent less

number of studies, discussed in the next section, associate student debt with negative financial outcomes such as lower earnings, net worth, financial satisfaction, and likelihood of car or home ownership.²²¹ These might be taken as indirect evidence of debt overhang.

The tax field provides perhaps the strongest evidence that debt overhang is likely to be real. Tax scholars have long noted that income taxes might have two opposing effects on the labor supply.²²² The first, analogous to debt overhang, is the “substitution effect”: the fact that people keep less of what they earn may tend to make them work less, “substituting” leisure for work.²²³ The second, and countervailing, effect is the “income effect”: the fact that people get less money for the same amount of work may induce them to work more to maintain their standard of living.²²⁴ This effect is analogous to debt-driven pressure to seek higher-paying jobs, as discussed in the previous part.²²⁵

Tax researchers have studied both effects extensively, and the Congressional Budget Office’s recent summary of the research indicates that the “substitution effect” (the tendency of taxes or debt payments to make people work less) is decidedly larger than the “income effect” (the tendency of taxes or debt payments to make people work more).²²⁶ On net, the population in aggregate seems to work less when taxes (or, presumably, debt payments) increase.

For a concrete example of the aggregate effect, we can look to IDR programs. Under such programs, the student-loan payment may be as little as 10% of income in excess of 150% of the poverty line.²²⁷ According to the Congressional Budget Office’s tax models, a middle-of-the-road estimate is that 10% of after-tax²²⁸ income from the entire population would reduce labor output by something in the neighborhood of 3%.²²⁹

on home repairs than other homeowners. *Id.* They did not spend less on appliances and cars, which, unlike homes, the debtors would not lose in the event of foreclosure. *Id.*

221. See discussion *supra* Part III.D.

222. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1920 (1987).

223. *Id.*

224. *Id.*

225. See discussion *supra* Part III.B.

226. See CONG. BUDGET OFFICE, HOW THE SUPPLY OF LABOR RESPONDS TO CHANGES IN FISCAL POLICY 4 tbl.1 (2012) [hereinafter CBO, SUPPLY OF LABOR] (noting substitution effect greater than income effect); Robert McClelland & Shannon Mok, *A Review of Recent Research on Labor Supply Elasticities*, 30 tbl.2 (Cong. Budget Office, Working Paper No. 2012-12, 2012) (stating that substitution effect is generally greater than income effect); *id.* at 30–41 tbl.3–6 (summarizing studies).

227. *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> [<https://perma.cc/3U5U-PSD4>] (last visited Oct. 8, 2019).

228. See CBO, SUPPLY OF LABOR, *supra* note 226, at 5 (explaining that CBO elasticity estimates refer to after-tax earnings). Because IDR apparently takes 10% of pre-tax discretionary income, it is likely to take more than 10% of post-tax income for many borrowers (i.e., those who earn significantly more than 150% of the federal poverty level and pay significant income taxes).

229. *Id.* (providing illustrative calculation of tax increase’s effect on labor supply); see also Bankman & Griffith, *supra* note 222, at 1923 (reporting that then-current studies

The reduction is estimated to be larger for lower-income groups,²³⁰ into which many IDR payers considering bankruptcy may fall.

Tax research is concerned with overall net effects, and it bears highlighting that that is not exactly our concern here. Some borrowers' career plans are distorted as they seek higher-paying jobs to service debt. Some borrowers are discouraged by debt and give up altogether. Although these effects net out in studies like those just cited, for us the analysis is just the opposite: the effects are cumulative. Distortions are distortions. The medical student who would prefer family practice but becomes a radiologist to pay debts²³¹ represents a failure of the student-loan programs' purposes, just as does the borrower discouraged by debt from participating in the labor force at all. One of each makes two failures, not zero net failures.

D. HARM TO BORROWERS

Some student-loan recipients—an astonishing 44% of younger borrowers, according to a recently published media poll²³²—regret ever taking out loans to go to college in the first place. Such students, and students like them who attended institutions other than colleges, seem likely to be worse off because they took out student loans. If such borrowers cannot discharge their loans in bankruptcy, nondischargeability perpetuates this worse-off-for-borrowing condition. To the extent it does so, it undermines achievement of another goal of the student-loan programs: making borrowers better off.²³³

A sizeable body of evidence now indicates that being in debt is harmful. A meta-analysis published in 2013 of sixty-five studies found that “[t]here was a statistically significant relationship between debt and presence of a mental disorder, depression, suicide completion, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders . . . and psychotic disorders.”²³⁴ Specific indicia of over-indebt-

showed “compensated” (i.e., ignoring income effect) elasticities for men of between 0.1 and 0.3).

230. See CBO SUPPLY OF LABOR, *supra* note 226, at 4 tbl.1.

231. See discussion *supra* Part III.B.1.

232. See Hillary Hoffower, *Nearly Half of Indebted Millennials Say College Wasn't Worth It, and the Reason Is Obvious*, BUS. INSIDER (Apr. 11, 2019, 12:09 PM), <https://www.businessinsider.de/millennials-college-not-worth-student-loan-debt-2019-4?r=US&IR=T> [<https://perma.cc/KCW6-CQGC>] (reporting on survey of 1,207 Americans aged twenty-two to thirty-seven who have or had student debts that found that 21% of respondents said that college was “definitely” not worth it given their loans and that 23% of respondents said that college “probably” was not worth it).

233. See discussion *supra* Part II.B.4.

234. See Thomas Richardson et al., *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 CLINICAL PSYCHOL. REV. 1148, 1153 (2013). Through doing a meta-analysis, the authors achieved a pooled sample size of almost 34,000 for inquiry into mental disorder. *Id.* tbl.1. For examples of studies linking debt to depression, see Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 338, 392 (2010); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441, 447 tbl.3, 448 tbl.5 (2001). Looking beyond strictly indebtedness to financial strain in general, re-

edness, such as the debt-to-assets ratio,²³⁵ the occurrence of repossession or other debt-collection events,²³⁶ or using a credit-counseling agency,²³⁷ have been associated with various negative health effects.

Researchers have associated negative effects with student loans specifically: student loans have been found to be associated with lower post-graduation income;²³⁸ lower future net worth (with net worth calculated excluding the student loans)²³⁹ and satisfaction with personal finances;²⁴⁰ lower probability of owning a house²⁴¹ or car,²⁴² or getting married;²⁴³ a

searchers reportedly have found links to smoking, obesity, and psychological symptoms. See Jinhee Kim & Swarn Chatterjee, *Student Loans, Health, and Life Satisfaction of US Households: Evidence from a Panel Study*, 40 J. FAM. & ECON. ISSUES 36, 36–37 (2019) (reporting on studies); Eva Selenko & Bernard Batinic, *Beyond Debt. A Moderator Analysis of the Relationship Between Perceived Financial Strain and Mental Health*, 73 SOC. SCI. & MED. 1725, 1727–28 (2011) (among Austrian credit-counseling clients who were filing for bankruptcy, perceived financial strain was highly correlated with poor mental health, but the gross amount of debt “did not play a role” in mental health).

235. See Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197, 1211 (2005).

236. See Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RES. 755, 759, 763 (2009).

237. See Eva Münster et al., *Over-Indebtedness as a Marker of Socioeconomic Status and Its Association with Obesity: A Cross-Sectional Study*, 9 BMC PUB. HEALTH 286, 287, 290 (2009).

238. See Minicozzi, *supra* note 161, at 420–21 (finding that students with more education debt had higher initial salaries but lower salary growth); Justin Weidner, *Does Student Debt Reduce Earnings?* i (Nov. 11, 2016) (unpublished manuscript), available at https://scholar.princeton.edu/sites/default/files/jweidner/files/Weidner_JMP.pdf [<https://perma.cc/V228-24GF>] (“I find that graduates with an additional ten thousand dollars of debt have 1–2% lower income one year after graduation.”).

239. See William Elliott & IISung Nam, *Is Student Debt Jeopardizing the Short-Term Financial Health of U.S. Households?*, 95 FED. RES. BANK ST. LOUIS REV. 405, 412–13 (2013).

240. See RICHARD FRY, PEW RESEARCH PROJECT, *YOUNG ADULTS, STUDENT DEBT, AND ECONOMIC WELL-BEING* 18 (2014), <https://www.pewsocialtrends.org/2014/05/14/young-adults-student-debt-and-economic-well-being/> [<https://perma.cc/RDA2-QQ7V>].

241. See Alvaro A. Mezza et al., *Student Loans and Homeownership* i (Fed. Reserve Bd., Working Paper No. 2016-010, 2017); Rajashri Chakrabarti et al., *Diplomas to Doorsteps: Education, Student Debt, and Homeownership*, LIBERTY ST. ECON. BLOG (Apr. 3, 2017), <https://libertystreeteconomics.newyorkfed.org/2017/04/diplomas-to-doorsteps-education-student-debt-and-homeownership.html> [<https://perma.cc/JM27-CGRH>]. Although a 2015 study’s review of the then-existing literature concluded that “the evidence is mixed” regarding a connection between student loans and homeownership, the study itself found a negative association between the presence of student debt and homeownership, at least in some models. See Jason Houle & Lawrence Berger, *Is Student Loan Debt Discouraging Homeownership Among Young Adults?*, 89 SOC. SERV. REV. 589, 589, 593 (2015). A recent survey of loan officers suggests that debt can interfere with homebuying. It reports that student loans increase the ratio of debt payments to income, which must be below certain levels for the borrower to qualify for certain types of mortgages. See Clarence C. Rose, *Overcoming the Obstacles Student Debt Presents to the Ability to Buy a Home*, 70 J. FIN. SERV. PROFS. 72, 77 (2016). This suggests student debt makes it harder to buy a house.

242. See Meta Brown & Sydney Caldwell, *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, LIBERTY ST. ECON. BLOG (Apr. 17, 2013), <https://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html> [<https://perma.cc/QUU7-EVX9>] (measuring auto debt at age twenty-five).

243. SUSAN P. CHOY & C. DENNIS CARROLL, NAT’L CTR. FOR EDUC. STATISTICS, *DEBT BURDEN FOUR YEARS AFTER COLLEGE* 46 (2000) (stating that although “concern exists

higher risk of experiencing future financial difficulties;²⁴⁴ and a lower probability of pursuing further education.²⁴⁵ They have been associated with lower self-reported mental health²⁴⁶ and with greater risk of material hardship, health-care hardship, and financial difficulty.²⁴⁷ A recent study finds the amount of student debt “negatively associated with . . . life satisfaction and psychological well-being after controlling for other types of debt, such as medical and credit card debt, assets and income, and a number of other sociodemographic factors.”²⁴⁸

The risk of harm from educational debt appears to be distributed along income and racial lines. As compared to white students, African-American students are more likely to borrow²⁴⁹ and borrow larger amounts.²⁵⁰ African-American student-loan borrowers are more likely than white

that heavy borrowing for education may affect lifestyle choices, such as delaying marriage,” as of 1997 “[a]mong 1992–93 bachelor’s degree recipients, there is no evidence of such effects”). Compare Dora Gicheva, *Student Loans or Marriage? A Look at the Highly Educated*, 53 *ECON. EDUC. REV.* 207, 207 (2016) (“Using data from a panel survey of registrants for the Graduate Management Admission Test, I show that the amount of accumulated student debt is negatively related to the probability of first marriage.”), with Lei Zhang, *Effects of College Educational Debt on Graduate School Attendance and Early Career and Lifestyle Choices*, 21 *EDUC. ECON.* 154, 154 (2013) (“[D]ebt has no effects on early career choices such as salary, sector of occupation, marital status, and homeownership.”).

244. See Jesse Bricker & Jeffrey Thompson, *Does Education Loan Debt Influence Household Financial Distress? An Assessment Using the 2007–2009 Survey of Consumer Finances Panel*, 34 *CONTEMP. ECON. POL’Y* 660, 661 (2016) (noting association with payment delinquency and credit denial).

245. Fos et al., *supra* note 123, at 1.

246. See Katrina M. Walsemann et al., *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 *SOC. SCI. & MED.* 85, 86 (2015). The authors acknowledged that the effect they found “may seem modest.” *Id.* at 91.

247. See Mathieu R. Despard et al., *Student Debt and Hardship: Evidence from a Large Sample of Low- and Medium-Income Households*, 70 *CHILD. & YOUTH SERVS. REV.* 8, 12 (2016).

248. See Kim & Chatterjee, *supra* note 234, at 36 (2019). The authors also found a negative relationship between past student debt and health for LatinX individuals. *Id.* at 46.

249. See Michal Grinstein-Weiss et al., *Racial Disparities in Education Debt Burden Among Low- and Moderate-Income Households*, 65 *CHILD. & YOUTH SERVS. REV.* 166, 166 (2016) (finding that based on a study of a low- and medium-income sample, “the odds of student loan indebtedness are twice as high for [low- and moderate-income] Black students as for White counterparts”); Brandon A. Jackson & John R. Reynolds, *The Price of Opportunity: Race, Student Loan Debt, and College Achievement*, 83 *SOC. INQUIRY* 335, 340–41, 344 (2013) (reporting that 57% of African-American students and 48% of white students starting college in 1995–1996 had taken out student loans by 2001); Aissa Canchola & Seth Frotman, *The Significant Impact of Student Debt on Communities of Color*, *CONSUMER FIN. PROT. BUREAU BLOG* (Sept. 15, 2016), <https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/> [<https://perma.cc/W4FS-4TRC>] (reporting that based on 2011–2012 data, among fourth-year undergraduates, 90% of African-American students and 66% of white students had student loan debts).

250. See JUDITH SCOTT-CLAYTON & JING LI, *BROOKINGS INST.*, *BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION* 1 (2016) (reporting that upon graduation, African-American college graduates owe \$7,400 more on average than white graduates).

ones to carry excessive student debt burdens²⁵¹ and undergo default.²⁵² Unlike the median white borrower, the median African-American borrower on average experiences a growing rather than a shrinking student-loan balance.²⁵³

Moreover, African-American people apparently derive less economic security from higher education than white people. Professor Abbye Atkinson has found that “African-Americans in bankruptcy are just as likely to have earned a college degree as African-Americans in the general population.”²⁵⁴ Among white people, by contrast, bankrupt debtors are less likely to have a college degree than the general population.²⁵⁵ With more negative effects and fewer positive effects from debt-funded education, it seems likely that African-American people are more likely to suffer harm from student borrowing.²⁵⁶

Of course, student loans can have positive effects as well as negative ones. Most obviously, student loans may make a borrower’s higher education possible. The author has found surprisingly little academic research that attempts to measure the net positive or negative effect of student borrowing. One study finds that households with a four-year college graduate have higher net worth than others, even controlling for student debt,²⁵⁷ and another finds that finishing a degree is itself associated with better mental health, although the degree does not shield the holder

251. See Derek V. Price, *Educational Debt Burden Among Student Borrowers: An Analysis of the Baccalaureate & Beyond Panel, 1997 Follow-Up*, 45 RES. HIGHER EDUC. 701, 718 (2004).

252. See Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS tbl.4 (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/67RA-63KP] (reporting that among students who entered college in 2003–2004 and took out federal loans for undergraduate education, 49% of African-American borrowers and 21% of white borrowers defaulted within twelve years after entry).

253. See *id.* tbl.2 (reporting that median African-American borrower owes 113% of original loan balance twelve years after college entry, while average white borrower owes 65%).

254. Atkinson, *supra* note 7, at 11.

255. *Id.* at 11–12.

256. Although more research examines outcomes for African-American people than for other groups, studies have found that LatinX students are more likely to take out student loans, see Canchola & Frotman, *supra* note 249, and more likely to default, see Miller, *supra* note 252, at tbl.4, than white students. The median LatinX student makes less progress on repayment in the twelve years after college entry than the median white student. See Miller, *supra* note 252, tbl.2. Native students have been found more likely to default than white students. See J. Fredericks Volkwein et al., *Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 216 fig.1 (1998). See generally Dalié Jiménez, Professor of Law, Univ. of Cal., Irvine Sch. of Law, *Written Testimony of Dalié Jiménez Before the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law* 4–7 (June 25, 2019), available at <https://www.law.uci.edu/news/in-the-news/2019/Jimenez-testimony.pdf> [https://perma.cc/YY4D-TMTF] (collecting research on effects of student loans on disadvantaged groups).

257. See Elliott & Nam, *supra* note 239, at 420. The authors presumably refer to a table showing that the positive effect of a four-year degree on net worth was greater than the negative effect of student loans. *Id.* at 414 tbl.4.

from the negative mental-health effects of student loans.²⁵⁸ Although these studies focus on graduates, a recent study of homebuying concludes that even student debtors who attend college but do not graduate are more likely to own homes than those who do not pursue college at all, at least after age twenty-seven.²⁵⁹

These findings suggest that student-loan borrowing is, on average, justified where necessary to earn a degree. But debt-financed education is a risky investment, even if it may on average be a good one. Some students are harmed, even if most are helped. One study finds a net positive effect of student debt on the likelihood of financial distress, even taking into account education's positive effects on financial well-being.²⁶⁰ This finding is particularly relevant to us, given that nondischargeability most affects borrowers with below-average economic outcomes.

IV. RECONCILING NONDISCHARGEABILITY WITH THE PROGRAMS' PURPOSES

Part IV argues that nondischargeability can and should be reformed to reduce its interference with the overall goals of the student-loan programs. Part IV.A argues that considering the overall objectives of the student-loan programs counsels a narrow application of nondischargeability, limiting it to cases where its purposes are served and it does not unduly interfere with other goals of the programs. Part IV.B argues that although approaches other than freer dischargeability could help student borrowers, liberalizing discharge is a particularly attractive solution because courts can do it without Congress. The Department can also act on nondischargeability and—unlike with other possible approaches to helping overburdened students—has shown some inclination to do so.

Part IV.C presents four specific proposals for harmonizing nondischargeability with the student-loan programs' overall design. It advocates (1) increasing public awareness of the availability of bankruptcy as a potential solution to student-loan debt; (2) stopping the practice of penalizing bankrupt student debtors for working in fields in which they have been trained; (3) granting discharge to debtors whose debts are particularly likely to discourage them from participating in the economy and society; and (4) allowing discharge where the student loans have harmed, rather than helped, the borrower.

258. See Walsemann et al., *supra* note 247, at 89–90, 89 tbl.2 (“[E]ducation . . . did not moderate the relationship between cumulative student loans and psychological functioning.”).

259. See Raji Chakrabarti et al., Fed. Reserve Bank of N.Y., Press Briefing on Household Debt, with Focus on Student Debt 41 (Apr. 3, 2017), available at <https://www.newyorkfed.org/medialibrary/media/press/PressBriefing-Household-Student-Debt-April32017.pdf> [<https://perma.cc/3C65-SJ79>].

260. Bricker & Thompson, *supra* note 244, at 671.

A. NONDISCHARGEABILITY SHOULD BE APPLIED NARROWLY IN
LIGHT OF THE STUDENT-LOAN PROGRAMS' OBJECTIVES

Despite the tension with the overall goals of the student-loan program, Congress did enact the student-loan nondischargeability provision²⁶¹ and has repeatedly amended it.²⁶² Indeed, the amendments have expanded both the time periods and the types of loans to which nondischargeability applies.²⁶³ Congress thus has determined that nondischargeability serves a purpose. Scholars²⁶⁴ and courts²⁶⁵ have identified two basic goals: combating borrower opportunism and enhancing creditor recoveries. The paradigmatic case of borrower opportunism is the doctor or lawyer who discharges student debts just before beginning a lucrative career when the borrower has few assets to liquidate.²⁶⁶

However, crucially, Congress did not choose to promote these purposes through a flat ban on discharging student loans. Instead, nondischargeability has always been subject to an exception courts have

261. See Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081, 2141 (adding conditional nondischargeability provision to HEA of 1965).

262. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)) (amending conditional nondischargeability provision and incorporating it into newly created Bankruptcy Code); Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4964–65 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).

263. The original nondischargeability provision provided that student loans it covered could be discharged without a showing of undue hardship after five years of repayment. See Education Amendments § 127(a); Bankruptcy Reform Act § 523. The Crime Control Act of 1990 increased this period to seven years, see Crime Control Act § 3621(2), and the Higher Education Amendments of 1998 completely eliminated discharge of covered loans without a showing of undue hardship, see Higher Education Amendments § 971(a). BAPCPA extended nondischargeability for the first time to private loans not issued or backed by the government. See BAPCPA § 220.

264. See Hunt, *supra* note 86, at 1300 (stating that the “underlying purposes” of nondischargeability are to “combat abuse and to promote financial recovery”); Terrence L. Michael & Janie M. Phelps, “Judges?!—We Don’t Need No Stinking Judges!!!”: *The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH. L. REV. 73, 77–81 (2005) (focusing on fear of opportunism); 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, 425 (2005) [hereinafter Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*] (noting concern expressed by nondischargeability proponents with “financial solvency of the federal student loan program” and “purported abuse of the bankruptcy system” by borrowers).

265. See 4 COLLIER ON BANKRUPTCY ¶ 523.14[1] (Lawrence E. King et al. eds., 16th ed. rev. 2019). (“[C]ourts have focused on two purposes of this exception to discharge: preventing abuses of the educational loan system . . . and safeguarding the financial integrity of governmental entities and nonprofit institutions.”). For examples, see Educ. Credit Mgmt. Corp. v. Frushour (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004); Cazenovia Coll. v. Renshaw (*In re Renshaw*), 222 F.3d 82, 86–87 (2d Cir. 2000); Pa. Higher Educ. Assistance Agency. v. Faish (*In re Faish*), 72 F.3d 298, 302 (3d Cir. 1995); *In re Cheesman*, 25 F.3d 356, 359 (6th Cir. 1994).

266. See H.R. REP. NO. 95-595, at 133 (1978) (indicating that reports of the behavior described in the text “have generated the movement for an exception to discharge”).

described as “open-ended.”²⁶⁷ Student loans have always been dischargeable upon a showing of “undue hardship.”²⁶⁸ This vague phrase contains little to guide courts and the Department in interpreting and applying it.²⁶⁹

Judicial and administrative officials should interpret “undue hardship” in light of the overall purposes of the statutory scheme that governs the federal student-loan programs. Absent meaningful textual constraint, reference to legislative purpose is critical.²⁷⁰ And the relevant purpose is not that of the nondischargeability provision in isolation. Where, as here, the provision in question is embedded in a complex statutory scheme, determining purpose “requires an examination of all legislation in [the] particular field.”²⁷¹ The Supreme Court explained the principle in an opinion interpreting the Bankruptcy Act together with a related statute:

[T]he court . . . will take in connection with [the specific clause at issue] the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.²⁷²

267. See, e.g., *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 759 (7th Cir. 2015) (describing undue-hardship standard as “open-ended”); *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013) (same).

268. See Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (1976) (codified as amended at 20 U.S.C. § 1087-3 (1996)) (including “undue-hardship” discharge provision in new § 439A of HEA of 1965).

269. See, e.g., *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 943 (“‘Undue hardship’ is not defined in the Bankruptcy Code.”). All the text seems to require is that a hardship exist and that it be (according to whatever standard) “undue,” meaning “excessive” or “disproportionate.” See *Frushour*, 433 F.3d at 399 (“ordinary” or “general” meaning of “undue” is “unwarranted” or “excessive”); *Undue*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“excessive or unwarranted”); *Undue*, OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid> [<https://perma.cc/5AZY-D8N8>] (last visited Oct. 14, 2019) (“not appropriate or suitable; improper”; “not in accordance with what is just and right; unjustifiable; illegal”; “going beyond what is appropriate, warranted, or natural; excessive”); *Undue*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/undue> [<https://perma.cc/E3E2-L9HN>] (last visited Oct. 14, 2019) (“exceeding or violating propriety or fitness: excessive”). A Google search on “define undue” performed August 1, 2019, returns the result “unwarranted or inappropriate because excessive or disproportionate.” *Undue*, GOOGLE, <http://google.com> [<https://perma.cc/SXQ6-7UTR>] (search “define undue”) (last visited Oct. 10, 2019). Without a statutory definition for “hardship” or standard for what is “undue,” the text standing alone is of little help to those who must apply it.

270. See STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 81 (2010) (“[J]udges faced with open-ended language and a difficult interpretive question rely heavily on purposes and related consequences.”); John F. Manning, *The New Purposivism*, 2011 S. CT. REV. 113, 173 (2011) (“Certainly . . . when an interpreter makes sense of an open-ended statute, it is appropriate if not necessary to read such a statute in light of the broad purposes that inspired its enactment.”).

271. See NORMAN SINGER & SHAMBIE SINGER, *2A SUTHERLAND STATUTORY CONSTRUCTION* § 45:10 (7th ed. 2018); see also *id.* 2B § 51:1 (“Other statutes dealing with the same subject as the one being construed . . . are . . . useful in questions of interpretation.”).

272. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. 183, 194 (1856)). Bankruptcy is not the only complex field of federal law where the Supreme Court has construed statutes on similar subjects together. One other example comes from environmental law. See *Andrus v. Allard*, 444 U.S. 51, 62 (1979) (interpreting Migratory Bird Treaty Act, together with Eagle Protection Act and Endangered Species

The student-loan nondischargeability provision of the Bankruptcy Code²⁷³ is, given the common subject matter, related to the student-loan provisions of the HEA.²⁷⁴ Indeed, the nondischargeability provision is more than just related to the HEA because it actually had its origin in the 1976 amendments to that statute.²⁷⁵ Thus, the purposes of the student-loan programs as discussed in this article are relevant in defining whether the elastic phrase “undue hardship” should be given a broad or a narrow scope.

Unfortunately, courts typically have not interpreted “undue hardship” in light of the overarching design of the student-loan programs.²⁷⁶ Instead, when they have looked to statutory purpose, they have considered the goals of the nondischargeability provision itself in isolation.²⁷⁷ For its

Act). Another comes from labor law. *See* *Kasten v. Saint-Gobain Performance Plastics, Inc.*, 563 U.S. 1, 13 (2011) (adopting broad interpretation of Fair Labor Standards Act provision in part because Supreme Court had adopted a broad interpretation of a parallel provision of another labor statute with “similar enforcement needs”). A third comes from immigration law. *See* *INS. v. Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. 183, 187, 194 n.8 (1991) (interpreting provision of Immigration and Nationality Act in light of a “concern” of “the immigration laws” that the Court grounded in part in the Immigration Reform and Control Act of 1986, which amended the INA but not the provision in question). In a famous antitrust case below the Supreme Court level, Judge Learned Hand interpreted the Sherman Act in light of two related statutes. *See* *United States v. Aluminum Corp. of Am.*, 148 F.2d 416, 428–29 (2d Cir. 1945); *see also* *Craig v. Boren*, 429 U.S. 190, 213 & n.5 (1976) (Stevens, J., concurring) (supporting finding as to purpose of one statute with provisions of related statutes).

273. *See* 11 U.S.C. § 523(a)(8) (2012).

274. *See* 20 U.S.C. §§ 1071–1087-2, 1087a–1087j, 1087aa–1087ii (2012).

275. *See* Hunt, *supra* note 86, at 1302–04 (discussing enactment of nondischargeability provision in Education Amendments of 1976 and replacement of that provision with a substantially identical one in the Bankruptcy Reform Act of 1978). Because of the undue-hardship provision’s origin in the HEA, the provision arguably should be construed with the HEA under the whole-act rule. *See* SINGER & SINGER, *supra* note 271, § 47:2 (stating that the “whole-act” approach to statutory interpretation, under which “courts read together an entire act” is “probably the best approach”).

276. This conclusion is based on the author’s review of the 107 results of the following search in Westlaw’s federal cases database on May 16, 2019: “student loan” and “undue hardship” and (purpose /s “student loan” /s program). It also reflects the author’s impression from reading many student-loan bankruptcy cases over a period of time. Courts have on occasion stated—without offering evidence—that in general terms nondischargeability supports the federal student-loan program’s survival, without referring specifically to the program’s purposes. *See* *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 399–400 (4th Cir. 2005) (citing avoiding “fiscal doom” and “ensuring public support” as reasons for nondischargeability); *In re Williams*, 296 B.R. 298, 302 (S.D.N.Y. 2003) (finding Congress intended nondischargeability “to reduce bankruptcy defaults, and thereby advance the original purposes of student loan programs, *i.e.* to assure that students . . . would have . . . access to low interest rate loans”) (citing and quoting *Elmore v. Mass. Higher Educ. Assistance Corp.* (*In re Elmore*), 230 B.R. 22, 25 (Bankr. D. Conn. 1999)); *Doernte v. Educ. Credit Mgmt. Corp.* (*In re Doernte*), Bankr. No. 10-24280-JAD, 2017 WL 2312226, at *2 (Bankr. W.D. Pa. May 25, 2017); *Jones v. Educ. Credit Mgmt. Corp.* (*In re Jones*), 495 B.R. 674, 684 (Bankr. E.D. Pa. 2013). As noted, the influential *Brunner* decision appealed to its idea of the program’s purpose but did not cite any evidence of that purpose. *See* discussion *supra* note 4 and accompanying text.

277. *See supra* note 265 and cases cited therein. On the relatively rare occasions when courts have addressed legislative policies beyond those specific to the nondischargeability provision, they have discussed bankruptcy’s fresh-start policy rather than the policies of the student-loan programs. *See, e.g.*, *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 782 (8th Cir. 2009) (concluding that student-loan dischargeability reflects “an exception to the

part, the Department has deferred to the courts.²⁷⁸

But a proper interpretation of “undue hardship” is not just about the nondischargeability-specific goals of combating borrower opportunism and producing monetary recoveries for student-loan creditors, possibly balanced against the fresh-start policy. A proper interpretation of “undue hardship” is also about equality of access to higher education, giving the country the benefit of an educated population, enabling free choice of career, and benefiting students.²⁷⁹

In other words, a proper interpretation of “undue hardship” takes account not just of discharge-disfavoring statutory purposes, but also of discharge-favoring ones. A proper application of the provision denies discharge only where denial (1) actually helps achieve the underlying goals of nondischargeability and (2) does so to an extent that outweighs the extent to which denying discharge impedes the achievement of other statutory goals, such as those set forth in this article.

In sum, this article does not argue that the purposes of the student-loan programs provide a basis under existing law for reading nondischargeability out of the Bankruptcy Code altogether.²⁸⁰ The article does argue that the overarching purposes of student loans compel a more generous interpretation of “undue hardship” than the one that emerges from existing judicial analyses, which do not take account of these purposes. A companion paper develops a general alternative to the *Brunner* test based on this argument.²⁸¹ The remainder of this article argues that as both a doctrinal and a practical matter, dischargeability should be expanded in four specific ways that advance the overall goals of the student-loan programs without undermining the core purposes of the nondischargeability provision.

B. USING BANKRUPTCY TO ADVANCE CONGRESS’S STUDENT-LOAN OBJECTIVES

The work reviewed in Part III seems to stand for the proposition that student loans themselves are a deeply flawed way of achieving what Congress set out to accomplish. Means other than bankruptcy could be used to achieve the goals of the student-loan programs more effectively. These

‘fresh start’”); *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 364 (6th Cir. 2007) (holding that debtor could establish undue hardship without enrollment in IDR program because contrary conclusion “runs counter to the Bankruptcy Code’s aim in providing debtors a ‘fresh start’”).

278. See LYNN MAHAFFIE, U.S. DEPT. OF EDUC., OFFICE OF POSTSECONDARY EDUC., DCL ID: GEN 15-13, LETTER ON UNDUE HARDSHIP DISCHARGE OF TITLE IV LOANS IN BANKRUPTCY ADVERSARY PROCEEDINGS 3 (2015) [hereinafter DOE Letter] (“Congress has never defined ‘undue hardship’ in the Bankruptcy Code and has not delegated to the Department the authority to do so. Federal courts have established the legal standard for . . . ‘undue hardship.’”).

279. See discussion *supra* Part II.

280. The arguments in the article arguably do provide a rationale for congressional repeal of the undue-hardship requirement. See discussion *supra* Part IV.B.

281. See John Patrick Hunt, Student Loan Purpose and the *Brunner* Test (unpublished manuscript) (on file with author).

include increasing grants, limiting tuition, easing repayment through more generous IDR, screening programs and/or students before lending, and offering debt forgiveness programs outside of bankruptcy.

Full consideration of these alternatives is beyond the scope of this article. Part IV.B argues simply, without disparaging alternative approaches, that bankruptcy can help promote Congress's purposes and is currently the only game in town. The Department and the judiciary can offer bankruptcy-based relief, and the Department has shown some interest in doing so. By contrast, the other approaches just mentioned all require legislation, or at least action the Department has shown no inclination to take. Considering alternative approaches in turn makes the point.

One approach to addressing student debt problems would be to reduce the need for debt in the first place. However, maximum grants under the main federal grant program, the Pell program,²⁸² are set by Congress and are not discretionary for other actors in the system.²⁸³ On the cost side, the HEA does not provide for federal control of tuition and fees.²⁸⁴

Another approach would be to ease repayment through plans that allow lower payments. The existing IDR programs²⁸⁵ are designed to do just that. It appears that the Department actually could make IDR more generous without congressional action.²⁸⁶ However, without Congress, the Department cannot fix the possible tax liability for borrowers whose debts might one day be cancelled under the program²⁸⁷ or alter statutory provisions that allow for "negative amortization"—an increase in the bor-

282. Pell grants reportedly accounted for 72% of federal grant aid to undergraduates in 2015–2016. CASSANDRIA DORTCH, CONG. RESEARCH SERV., R45418, FEDERAL PELL GRANT PROGRAM OF THE HIGHER EDUCATION ACT: PRIMER 1 (2018).

283. The total maximum Pell grant is the sum of a discretionary maximum grant, set by Congress in the appropriations process, and a mandatory add-on, prescribed in the HEA. *Id.* at 5.

284. See Higher Education Act of 1965, Pub. L. No. 89-329, §§101–898, 79 Stat. 1219, 1219–70 (codified as amended at 20 U.S.C. §§ 1001–1161aa (2012)). The HEA does prescribe tuition in limited circumstances, such as requiring in-state tuition for servicemembers' families. See 20 U.S.C. § 1015d. It also provides for grant incentives to institutions that offer low tuition, contingent on appropriations. *Id.* § 1161m.

285. See, e.g., 156 CONG. REC. 4816 (2010) (statement of Sen. Harkin) (2007 IBR provisions were "targeted . . . to people who had the most difficult time repaying their loan"; 2010 IBR changes would "make college much more affordable for students even after they graduate"); *id.* at 4857 (statement of Sen. Cardin) (stating that proposed changes would "make[] it easier" for borrowers "to repay federal loans"). ICR likewise was designed to ease repayment. See 1993 OBRA Hearings, *supra* note 32, at 5 (statement of Sen. Pell) (stating that ICR "will help reduce defaults").

286. Section 1087e(d) is the statutory basis for the ICR, PAYE, and REPAYE plans. See Hunt, *supra* note 86, at 1313. Section 1087e(d)(1)(D) provides for "varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years." 20 U.S.C. § 1087e(d)(1)(D). The Department has exercised its discretion under this provision to establish differing repayment percentages and periods for different programs. See *Income Driven Plans*, *supra* note 227 (for undergraduate loans, providing maximum repayment of 20% of discretionary income over twenty-five years for ICR, and 10% of discretionary income over twenty years for PAYE and REPAYE). The Secretary seems to have comparable flexibility under the statutory authority for IBR. See 20 U.S.C. § 1098e(a)(3)(B), (b)(1), (e)(1).

287. See Hunt, *supra* note 86, at 1340–49 (discussing potential tax liability upon cancellation of loans under IDR and bankruptcy courts' handling of the issue).

rower's loan balance resulting from payments insufficient to cover accumulating interest.²⁸⁸ Bankruptcy does not suffer from these drawbacks.²⁸⁹ In any event, there is no indication that the Department plans to make IDR more generous.

The government could also ease repayment through debt forgiveness outside bankruptcy, and several forgiveness programs already exist.²⁹⁰ The most celebrated such program, PSLF,²⁹¹ has terms that are specified by statute, and only Congress could expand it.²⁹² Moreover, PSLF so far appears to be a failure for the vast majority of applicants, as only (almost exactly) 1% of applications for forgiveness have been successful as of the Department's most recent report.²⁹³ Most other federal loan-forgiveness programs appear quite small²⁹⁴ or are limited in the amount of balance forgiven.²⁹⁵ Presidential candidates have made proposals for more sweeping programs, but these apparently require congressional action²⁹⁶ and, in

288. See *id.* at 1339–40 (discussing possibility of negative amortization under IDR); see also *Swafford v. King (In re Swafford)*, 604 B.R. 46, 52–53 (Bankr. N.D. Iowa 2019) (acknowledging mental and emotional harm to debtor from negative amortization).

289. See 26 U.S.C. § 108(a)(1)(A) (2012) (providing that discharge in bankruptcy does not generate debt-forgiveness income). Insofar as Chapter 7 bankruptcies typically do not involve payment plans for unsecured debt such as student loans, the concept of negative amortization does not apply. See *Chapter 7—Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> [<https://perma.cc/Q9P6-HJC4>] (last visited Oct. 14, 2019) (noting that Chapter 7 involves liquidation of assets rather than creation of payment plans).

290. Curiously, the Department's website does not appear to feature a complete list of loan forgiveness programs. For an unofficial list, see Dori Zinn, *The Complete List of Loan Forgiveness Programs and Options*, STUDENT LOAN HERO (Jan. 2, 2019), <https://studentloanhero.com/featured/the-complete-list-of-student-loan-forgiveness-programs/> [<https://perma.cc/YM3X-XH7C>].

291. See, e.g., 153 CONG. REC. S11,245–52 (daily ed. Sept. 7, 2007) (statement of Sen. Brown) (stating that PSLF, among other aspects of legislation, will enable students to “be able to relieve themselves of the huge burden of debt they face”); *id.* S11,252 (statement of Sen. Feingold) (stating that PSLF will help students who “want to pursue careers in public service” but “unfortunate[ly] . . . are forced to consider their debt loads when deciding which jobs to take or pursue”).

292. See 20 U.S.C. § 1087e(m) (2012) (specifying conditions for PSLF).

293. See *Public Service Loan Forgiveness Data: June 2019 PSLF Report*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/fstudent/loan-forgiveness/pslf-data> [<https://perma.cc/44LK-N7F3>] (last visited Oct. 14, 2019). The report states that as of June 30, 2019, 110,729 PSLF applications had been received. *Id.* And 1,216 (1.00%) had been approved by the servicer; 100,835 (91.06%) had been rejected; and 8,677 (7.84%) were still in process. *Id.* PSLF discharges had been processed for only 845 applicants (0.93% of the 90,962 borrowers who had submitted applications). *Id.* An additional 720 requests had been approved and 681 discharges actually processed for applicants under the special Temporary Expanded Public Service Loan Forgiveness program. *Id.*

294. See, e.g., *Loan Repayment Assistance Program*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/loan-repayment-assistance-program> [<https://perma.cc/23M9-MGR6>] (last visited Oct. 14, 2019) (reporting that loan repayment program aided eighty people in 2018).

295. See *Teacher Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/pay-loans/forgiveness-cancellation/teacher> [<https://perma.cc/R8C9-PYY6>] (last visited Oct. 14, 2019) (reporting that maximum forgiveness under program is \$5,000, or \$17,500 for certain math, science, and special education teachers).

296. See, e.g., Rebecca Klar, *Warren Introduces Bill to Cancel Student Loan Debt for Millions*, HILL (July 23, 2019, 11:13 AM), <https://thehill.com/homenews/senate/454293-warren-introduces-bill-that-would-cancel-student-loan-debt-for-millions> [<https://perma.cc/>

any event, probably depend on the election of the proposing candidate.

A third approach to the student-debt problem, favored by some commentators, is to “screen” schools and courses of study—to refuse to lend, or to lend at higher rates, to fund disfavored schools or courses of study.²⁹⁷ Specifically, the proposal usually is to disfavor schools or courses of study whose graduates are less likely to make enough to repay the loans.²⁹⁸

The Department pursued this course for nondegree programs and programs at for-profit colleges when it adopted its “gainful employment rule,” a form of screening for lending.²⁹⁹ After a change in administration, the Department announced its intention to abandon the policy,³⁰⁰ highlighting the question of screening’s long-term political viability. Moreover, expanded screening probably requires congressional intervention. The statutory basis for the gainful employment rule would not apply to degree programs at public and nonprofit institutions.³⁰¹

P6QS-QHA7] (describing introduction of legislation to implement Senator Elizabeth Warren’s student debt relief proposal). Other candidates’ proposals call for legislation. *See* Farrington, *supra* note 139 (reviewing candidates’ positions as of April 2019); *see also* Allie Conti, *What Would It Take for the Next President to Cancel All Student Debt?*, VICE (Aug. 27, 2019, 10:22 AM) https://www.vice.com/en_us/article/a35ve5/what-it-would-take-for-the-next-president-to-cancel-all-student-debt [<https://perma.cc/EP8N-HCQ9>] (reporting that Senator Bernie Sanders and Senator Warren propose to accomplish their forgiveness plans through legislation, but describing argument of writer and activist Alan Collinge that the president can forgive direct federal student loans on the ground that “[t]he money for this was already appropriated when the loans were made”).

297. *See* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 625 (2013).

298. *See id.* (“[C]ertain majors . . . are much lower risk than others. . . . Risk-based pricing of student loans would encourage more college students to choose majors that would better prepare them for post-graduation employment opportunities.”).

299. The Department adopted its so-called “gainful employment rule” in 2014 after the courts had rejected an earlier version of the rule. *See generally* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014) (codified at 34 C.F.R. pt. 600, 668). The rule provided that programs subject to the gainful-employment requirement would lose eligibility for federal student-loan funds if certain ratios designed to measure students’ ability to repay loans fell below certain levels. *See id.* at 64,891.

300. On August 10, 2018, the Department announced a Notice of Proposed Rulemaking that would “rescind Gainful Employment (GE) regulations.” Press Release, U.S. Dep’t of Educ., U.S. Department of Education Proposes Overhaul of Gainful Employment Regulations (Aug. 10, 2018), <https://www.ed.gov/news/press-releases/us-department-education-proposes-overhaul-gainful-employment-regulations> [<https://perma.cc/739R-9UXC>]. As of December 2018, the Department’s efforts to rescind the regulations reportedly had stumbled due to a missed deadline, but the Department was not enforcing the regulations, citing difficulties getting information necessary to do so. Some observers were skeptical of the Department’s explanation. *See* Andrew Kreighbaum, *Agencies at Loggerheads Over Gainful-Employment Data*, INSIDE HIGHER ED. (Dec. 6, 2018), <https://www.insidehighered.com/news/2018/12/06/education-department-says-data-dispute-behind-failure-enforce-gainful-employment> [<https://perma.cc/2BDZ-N86X>].

301. Such programs are not subject to the requirement, applicable to nondegree programs and proprietary and vocational institutions, that their programs lead to “gainful employment.” *See* 20 U.S.C. §§ 1001(a)(4), 1001(b)(1), 1002(b)(1)(A)(i), 1002(c)(1)(A), 1087a(a) (2012). The Department has interpreted “gainful employment” in this context to mean “provid[ing] . . . training . . . that lead[s] to earnings that will allow students to pay back their student loan debts.” Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,890. Courts have upheld this interpretation. *See* Ass’n of Private Sector Colls. & Univs.

More fundamental for our discussion here, screening does not completely address the problems of nondischargeable debt. Even with a highly effective screening program, some educational investments will fail, and those student borrowers will need bankruptcy. And even if screening makes it highly likely that loans will be paid back, students who are averse to debt for nonfinancial reasons may still be deterred from higher education.³⁰² In addition, because screening works by discouraging the study of less remunerative fields, it in itself interferes with accomplishing Congress's goal of freedom of career choice.³⁰³

Bankruptcy relief can be expanded by courts and by the Department under current law without congressional intervention. Either courts or the Department could interpret "undue hardship" more generously,³⁰⁴ and the Department could be more lenient in consenting to bankruptcy discharge.³⁰⁵ The Department has indicated interest in the latter,³⁰⁶ in contrast to its silence about the possibility of expanding IDR. To be sure, statutory expansion of the availability of bankruptcy³⁰⁷ relief and broad-based student loan forgiveness³⁰⁸ could help prospective and existing bor-

v. *Duncan*, 110 F. Supp. 3d 176, 190 (D.D.C. 2015), *aff'd*, 640 Fed. App'x 5 (D.C. Cir. 2016).

302. For example, one possible cause of debt aversion is prior bad family experiences with credit. See *Boatman et al.*, *supra* note 124, at 3–4. To the extent such experiences tend to cause the prospective borrower to overestimate the risk of failure, nondischargeability plausibly contributes to debt aversion and increasing the chance of success may not address the problem.

303. See discussion *supra* Part II.B.3.

304. See *Hunt*, *supra* note 38.

305. See *id.*

306. See Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings, 83 Fed. Reg. 7460, 7461 (Feb. 21, 2018).

307. As of November 20, 2019, at least four bills to eliminate student-loan nondischargeability are reportedly pending in both houses of Congress. See Student Borrower Bankruptcy Relief Act of 2019, S. 1414, 116th Cong. § 2 (2019) (removing student-loan nondischargeability provision from Bankruptcy Code); Discharge Student Loans in Bankruptcy Act of 2019, H.R. 770, 116th Cong. § 2 (2019) (same); Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. § 301 (2019) (same); Student Loan Debt Relief Act of 2019, H.R. 3887, § 301 (2019) (same). Also, as of November 20, none of these bills have emerged from committee. See *S. 1414: Student Borrower Bankruptcy Relief Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s1414> [<https://perma.cc/8MHJ-BQQN>] (last visited Nov. 20, 2019) (tracking S. 1414); *H.R. 770-Discharge Student Loans in Bankruptcy Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/770/text> [<https://perma.cc/BH5L-Q6HG>] (last visited Nov. 20, 2019) (tracking H.R. 770); *S. 2235-Student Borrower Bankruptcy Relief Act of 2019*, GOVTRACK, <https://www.congress.gov/bill/116th-congress/senate-bill/2235?s=5&r=1> [<https://perma.cc/X89D-SGPJ>] (last visited Nov. 20, 2019) (tracking S. 2235); *H.R. 3887-Student Borrower Bankruptcy Relief Act of 2019*, GOVTRACK, <https://www.congress.gov/bill/116th-congress/house-bill/3887?s=4&r=2> [<https://perma.cc/6NN9-3VHJ>] (last visited Oct. 14, 2019) (tracking H.R. 3887); see also ABI COMMISSION REPORT, *supra* note 6, at 1, § 1.01(a) (recommending changes to Bankruptcy Code to make three categories of student loans dischargeable without a showing of undue-hardship: loans that have been in repayment for seven years; were not made, insured, or guaranteed by a governmental unit; or were not incurred for the debtor's own education); ABI COMMISSION REPORT, *supra* note 6, at 6 (stating that the reintroduction of dischargeability without undue hardship after seven years is "the centerpiece of the Commission's recommendation").

308. See discussion *supra* note 296 and accompanying text.

rowers dramatically. But particularly given the uncertainty that either will come to pass, it is worthwhile to discuss what courts and the Department can do now.

C. LIMITING INTERFERENCE WITH STUDENT-LOAN PROGRAM GOALS

Part IV.C presents four concrete suggestions for reducing the harm nondischargeability inflicts. First, dischargeability should be salient to reduce deterrence of education. Second, to reduce distortion of career choice, when debtors are working in fields for which their education has prepared them, discharge should not be denied on the ground that they should change jobs and make more money. Third, to combat debt overhang, discharge should be granted to debtors who are particularly likely to be discouraged by their debts; these might be debtors with high debt-income ratios. Fourth, to reduce the incidence of harmful student loans, discharge should be granted where student loans probably have harmed the debtor and the debtor has acted in good faith. The article proposes a test for likely harm.

Each suggestion is specifically tied to one negative effect of nondischargeability described in Part III. Although some of these suggestions, particularly the third and fourth, would significantly change the current application of bankruptcy law, it might be argued that a more general approach may also be desirable. This author agrees, and takes up in a companion piece how the undue-hardship test itself might be refashioned to take account of the overall purposes of the student-loan programs.³⁰⁹

1. *Deterrence of Education: Make Dischargeability Salient*

As discussed, the discharge of at least some educational loans would advance the purposes of the student-loan programs.³¹⁰ Official policy should encourage debtors who need bankruptcy relief to seek it and should inform prospective borrowers that such relief may be available if they need it. Scholars have previously argued for increasing public awareness of income-driven repayment,³¹¹ and the terms of education loans generally,³¹² and have called for publicizing recommended changes that would make discharge more available.³¹³ This article makes the same call for better information about borrowers' options, including bankruptcy.

Unfortunately, the incorrect notion that it is impossible to discharge

309. See Hunt, *supra* note 281.

310. See discussion *supra* Part III.

311. See Boatman & Evans, *supra* note 124, at 64 (suggesting such awareness could “enhance higher-education enrollment rates”).

312. See Laura W. Perna et al., *Understanding Student Debt: Implications for Federal Policy and Future Research*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 270, 275 (2017) (arguing that ensuring that students are well informed about student loans should be a priority).

313. See Jiménez et al., *supra* note 6, at 118–19 (recommending posting revised guidelines on Department website).

student loans in bankruptcy circulates widely,³¹⁴ and even official sources such as the Department's website do not do all they could to correct this idea. For instance, the website presents a table with various possible types of discharge and forgiveness with the notation "in rare cases" applied to bankruptcy discharge and only bankruptcy discharge.³¹⁵ It is true that bankruptcy relief is "rare," in the sense that only a tiny fraction of student loans are discharged in bankruptcy. But it is not true that bankruptcy relief is rarely granted when it is actually requested, as many academic studies have shown.³¹⁶ Users would be better served by a more complete disclosure.

The same recommendation applies to other statements on the Department's website³¹⁷ and in other Department publications.³¹⁸ The Department could also encourage the disclosure of more complete bankruptcy information at students' mandatory entrance and exit counseling sessions.³¹⁹

The Department could also increase bankruptcy salience by adopting clear, bright-line rules governing when it will consent to discharge and disseminating these rules broadly.³²⁰ Indeed, the interest in salience

314. See discussion *supra* Part III.A.1.

315. *Forgiveness, Cancellation, and Discharge*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation> [<https://perma.cc/2VU9-JYNB>] (last visited Oct. 14, 2019).

316. See Hunt, *supra* note 38 (surveying studies indicating rates of relief for student debtors ranging from 39% to 57%).

317. *Discharge in Bankruptcy*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/bankruptcy> [<https://perma.cc/2ERZ-YKSO>] (last visited Oct. 14, 2019) ("In some cases, you can have your federal student loan discharged after declaring bankruptcy. However, discharge in bankruptcy is not an automatic process.").

318. See FED. STUDENT AID, U.S. DEP'T OF EDUC., *FUNDING YOUR EDUCATION: THE GUIDE TO FEDERAL STUDENT AID, 2012-13*, at 12 (2011) ("Student loans aren't easily written off in bankruptcy."). The final statement is technically accurate, given the need to bring an adversary proceeding and establish undue hardship in order to get a discharge. However, the publication is arguably misleading. It does not let users know that discharge is not "rare" for debtors who actually seek it. Moreover, the publication states that "financial difficulty" is not a basis for cancellation, even though such difficulty is a key part of the undue-hardship analysis. *Id.*

319. The Department apparently does not currently provide for schools to provide complete bankruptcy information, at least at exit counseling. See FED. STUDENT AID, U.S. DEP'T OF EDUC., *DIRECT LOAN EXIT COUNSELING GUIDE 21* (2018) ("Federal loans are not generally included in debts eliminated under personal bankruptcy.").

320. See ABI COMMISSION REPORT, *supra* note 6, at 1 (proposing bright-line rules); Bruckner et al., *supra* note 6, at 6-7 (proposing bright-line rules); *id.* at 46-63 (explaining and defending bright-line rule proposal); Jiménez et al., *supra* note 6, at 115 (proposing bright-line rules). The paper by Bruckner, Gotberg, Jiménez, and Ondersma refines and elaborates on the proposal in the paper by Jiménez, Bruckner, Foohey, Gotberg, and Ondersma. Compare Jiménez et al., *supra* note 6, at 115, with Bruckner et al., *supra* note 6, at 6. The *ABI Commission Report* proposal overlaps with the proposal of Bruckner and co-authors, but is broader in some ways (e.g., it permits a poverty-based discharge based on income at 175%, rather than 150%, of the poverty level) and narrower in others (e.g., it requires seven years of low income, rather than just four, for discharge). Compare ABI COMMISSION REPORT, *supra* note 6, at 1, with Bruckner et al., *supra* note 6, at 6. For another proposal, see Hunt, *supra* note 38 (recommending adoption of bright-line rules generally).

might even justify adopting rules that are simpler than those that otherwise would be adopted.

This article presents evidence that lower-income, LatinX, and possibly Asian-American students are more likely to be debt-averse,³²¹ and that student debt is more likely to harm African-American, LatinX, and Native borrowers.³²² Given the greater probability of harm, it seems that nondischargeability is more likely to deter members of these groups from education. Accordingly, the Department should consider targeted outreach to these groups to increase bankruptcy's salience to them.³²³

Increasing salience does not in itself make discharge more generous, so it would not undermine the core purposes of conditional nondischargeability: combating borrower abuse and promoting financial recovery.³²⁴ Increasing salience should make bankruptcy more common, but the only debtors who will benefit are those who are suffering undue hardship. Having debtors endure undue hardship simply because they are not aware of bankruptcy does not serve the purposes of the nondischargeability provision.

2. *Distortion of Careers: Let Borrowers Work in Fields for Which They Have Been Trained*

Perhaps the clearest case of conflict between the goals of the student-loan programs and nondischargeability occurs when the borrower is successfully employed in a lower-paying field for which she has been trained and the court denies student-loan discharge because it believes that the borrower should find higher-paying work outside that field (the *Gerhardt* scenario).³²⁵ Here, the court is effectively telling the debtor not just to get a different job, but also not to use the education the student loans have financed.

In a case where the debtor is working in the field for which the debtor is trained and the court denies discharge because the debtor could make more money at another job in that field (the *Oyler* scenario),³²⁶ the conflict between nondischargeability and the purposes of the student-loan programs is slightly less stark because nondischargeability does not interfere with using the education at all, but nondischargeability still interferes with the borrower's freedom of career choice.

The policy conflict plays out here in individual bankruptcy cases: the court is condemning the choices of the debtor before it and in the process setting repayment above other goals of the student-loan programs. Judges create the problem, and judges can solve it. They should simply stop dis-

321. See discussion Part III.A.1.

322. See discussion Part III.D.

323. Cf. NAT. SCI. FOUND., NATIONAL SCIENCE FOUNDATION'S DIVERSITY AND INCLUSION STRATEGIC PLAN 2012–2016, at 9–10 (2011) (describing targeted outreach efforts at NSF).

324. See discussion *supra* Part IV.A.

325. See discussion *supra* Part III.B.2.

326. See discussion *supra* Part III.B.1.

regarding debtors' low incomes on the basis of second-guessing the debtors' career choices.

The concept of "the field for which one is trained" is not sharply defined in all respects. Some degrees—for example, in counseling,³²⁷ education,³²⁸ or musical performance³²⁹—are clearly fitted to certain occupations. Other fields of study, such as philosophy, may not be tied directly to particular occupations but may help students in a wide variety of fields of endeavor. Such cases are closer, but Congress's purposes are served by leniency regarding discharge whenever education is reasonably calculated to, or actually does, benefit the debtor in the debtor's current occupation.

It may be objected that protecting the debtor's choice to study and work in lower-paying fields encourages borrowers to pursue "worthless degrees." Professor Glater, among others, has criticized the money-first premise of this viewpoint on the merits.³³⁰ This author endorses that line of thinking. Members of Congress did not couch the expressions of support for education and educational choice presented in this article in purely monetary terms. At least as regards degree programs at public and nonprofit institutions,³³¹ the framers of the HEA did not say, "We want a population educated with degrees that pay off financially for the individuals who got the degrees." Instead, the record reveals an interest in education and access generally.³³² Indeed, the programs have been designed specifically to recognize the value of lower-paid but valuable work.³³³ To be sure, sometimes Congress has intended to promote particular areas of endeavor,³³⁴ but these were not defined in terms of a financial payoff.

Adopting this proposal runs no serious risk of encouraging abuse or materially reducing financial recovery. People like Jonathon Gerhardt

327. See, e.g., CAL. BUS. & PROF. CODE § 4980.36(b) (West 2019) (requiring a master's or doctoral degree in a specified field as a prerequisite to becoming a marriage, family, and child counselor in California).

328. See John Fensterwald, *Undergraduate Education Major, Banned for 56 Years, Returns*, EDSOURCE (Aug. 10, 2017), <https://edsources.org/2017/undergraduate-education-major-banned-for-56-years-returns/585830> [<https://perma.cc/N9GZ-4S7R>] (reporting that students pursuing education major can become teachers in four years, instead of five or six).

329. See, e.g., *Bachelor in Arts in Music Program Learning Objectives*, U.S. CAL. THORNTON SCH. MUSIC, https://music.usc.edu/files/2016/06/USCThornton_LearningObjectives_BA_Music.pdf [<https://perma.cc/T445-64QS>] (last visited Oct. 14, 2019) ("Upon completion of the Bachelor of Arts in Music program, students will: a. have the ability to perform in at least one major performance area or instrument at a professional entry level.").

330. See Jonathan D. Glater, *Law and the Conundrum of Higher Education Quality*, 51 U.C. DAVIS L. REV. 1211, 1253–54 (2018) ("Something is lost when the law endorses the view that higher education is a purely private good"; citing other scholars who have expressed similar views).

331. For nondegree programs and programs at private for-profit institutions, Congress has required that education prepare the student for gainful employment in a recognized occupation to be eligible for federal loans. See discussion *supra* Part IV.B.

332. See discussion *supra* Parts II.B.1, II.B.2.

333. See discussion *supra* Part II.B.3.

334. For example, the National Defense Education Act aimed at developing skills in technical fields and foreign languages. See discussion *supra* Part II.B.2.

and Cynthia Matthews-Hamad who are successfully using their training but not making enough money to pay off loans³³⁵ are not abusing the system; they are not like professionals who discharge their loans right on the cusp of enormous earnings.

On the subject of financial recovery, it is critical that such debtors would have to meet the relevant criteria for undue hardship to get a discharge; the only change would be that discharge would no longer be denied on the ground that “good faith” requires a job change. Under the prevailing *Brunner* test, for example, they would have to show that repayment would entail inability to maintain a minimal standard of living for a substantial portion of the repayment period.³³⁶ Such debtors seem unlikely to provide enough in the way of loan payments net of collection costs to outweigh the harm discharge denial inflicts through interfering with accomplishing the purposes of the loan programs.

3. Discouragement of Borrowers: Consider Debt-Income Ratio

As discussed, the idea that unmanageable debt discourages people from economic activity and from social participation more broadly is a premise of the American bankruptcy system.³³⁷ When student borrowers are so discouraged, unmanageable student loans deprive society of the benefit of the borrower’s education, distort the borrower’s career choices, and may be a source of harm to students. All three effects frustrate the purposes of the federal student-loan programs.

Given the importance of the debt-overhang premise, one might expect courts evaluating undue hardship to grant discharge more freely to borrowers who are more likely to be deterred from economic activity. However, the empirical evidence can be read to suggest essentially the opposite. Sicker,³³⁸ and perhaps older,³³⁹ debtors are more likely to get a

335. See discussion *supra* Part III.B.

336. See *supra* note 120 and accompanying text (identifying elements of *Brunner* test).

337. See discussion *supra* Part III.C.

338. See Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 518 (2012) (“Medical hardship is positively correlated with receipt of a discharge.”); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 216 (2009) [hereinafter Pardo & Lacey, *The Real Student-Loan Scandal*] (“[D]ebtor or debtor’s dependent suffering from a medical condition” is statistically-significantly associated with extent of debt discharged); Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 264, at 485 tbl.8 (finding the fraction of debtors granted discharge who were unhealthy (71.70%) was higher than fraction of debtors denied discharge who were unhealthy (53.68%); $p = 0.0051$). Age may also be a factor in holders’ willingness to compromise with student debtors. 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, 329 tbl.13 (2016) (reporting that in sample of settled cases from 2011 to 2014 in which reasons for settlement were expressed, age was explicitly mentioned as a reason for settlement in 22% of First Circuit cases and 24% of Third Circuit cases).

339. See Iuliano, *supra* note 338, at 516 fig.5 (showing that in nationwide sample of cases from 2007, reporting significantly higher percentage of debt discharged for debtors over sixty than for debtors under sixty); Taylor & Sheffner, *supra* note 338, at 326 tbl.11 & n.132 (2016) (noting in a sample of First Circuit decisions from 2005 to 2014 where debtor’s

student-loan discharge. Without making undue assumptions about disability and age, it at least seems plausible that such borrowers may be less likely to be able to work even after receiving a discharge of debt.

By contrast, consider borrowers with high debt levels. All else equal, high debt might seem more likely to be unmanageable and therefore to discourage borrowers from productive activity. Yet it appears that a high ratio of student debt to income does not lead to discharge.³⁴⁰ There is even an intriguing finding in one study that debtors who are denied discharge have *higher* debts than those who are granted discharge.³⁴¹

The point is not that old, sick debtors should not get discharges. It certainly seems likely that such debtors are likely to suffer more serious hardship than others if discharge is denied. Instead, the argument is that discharge should be more readily available than it currently is to debtors who are likely to be deterred from economic activity by their debts. These might be high-debt borrowers and could include young people.

One likely measure of susceptibility to debt overhang is the debt-income ratio. The Department has taken note of research showing that the debt-income ratio is associated with the borrower's degree of loan-related "burden, hardship, and regret."³⁴² It has determined, on the basis of academic studies³⁴³ and its own analysis of data³⁴⁴ that the debt-income ratio is a reasonable measure of whether student debt is manageable,³⁴⁵ and

age could be discerned, debtor's age was fifty-seven in cases where age was cited to debtor's benefit and forty-four in other cases). On the other hand, a study of student-loan discharge proceedings in the Western District of Washington from 2002 to 2006 found no statistically significant relationship between debtor age and percentage of debt discharged, although it apparently did find a relationship that was not significant. *See* Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 338, at 217 tbl.4; *see also* Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 264, at 482 (reporting no statistically significant difference in the age of debtors to whom discharge was granted and those to whom discharge was denied).

340. *See* Pardo, *supra* note 6, at 1144, 1159, 1186 (reporting, based on nationwide sample of 395 discharge proceedings filed in 2011 and 2012, that "no statistically significant relationship" exists between debtor success and any financial characteristic of debtors examined in the study (including educational-debt-to-income ratio) and that debtors who succeeded in bankruptcy litigation had higher median and lower mean educational-debt-to-income ratios than debtors who did not succeed); Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 338, at 215 (reporting that debt-to-income ratio, like other financial characteristics examined, "is not statistically significantly associated with the extent of discharge obtained by the debtor"); Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 264, at 483-84 (finding no statistically significant difference in debt-to-income ratio between debtors who received discharge and debtors who did not).

341. *See* Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 264, at 484 tbl.7 (stating that median educational debt (presumably in 2003 dollars) was \$28,740 for debtors granted discharge and \$34,240 for debtors denied discharge; $p = 0.29$). Perhaps we should not make too much of this finding, which was not statistically significant and appears in an older study that examined only reported decisions.

342. Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,914 (Oct. 31, 2014) (codified at 34 C.F.R. pt. 600 & 668).

343. *See id.* at 64,921 & nn.119-22.

344. *See id.* at 64,920.

345. *See id.* at 64,914.

the courts have sustained this determination.³⁴⁶ Empirical research on credit card debt,³⁴⁷ which is easier to discharge than student debt,³⁴⁸ has linked high debt-income ratios to worse health³⁴⁹ and to anxiety.³⁵⁰

It thus appears probable that borrowers with high debt-income ratios become discouraged from working and investing, as well as from social participation. The Department might consider a high debt-income ratio as a factor supporting consent to discharge, or even creating a rebuttable presumption³⁵¹ of consent to discharge when the ratio exceeds a prescribed level.³⁵² Courts might consider taking account of the debt-income ratio in similar ways in contested cases.

This article proposes using the debt-income ratio in the dischargeability analysis only as a single factor or to create a rebuttable presumption. Because of this limited use of the concept, considering the ratio is unlikely to interfere significantly with the purposes of the limitation on dischargeability.³⁵³

The debt-income ratio used in isolation admittedly could enable the kind of abuse that motivated Congress to enact nondischargeability. A recent graduate with a currently low income could discharge debts and then enjoy a higher income free of the obligation to repay.³⁵⁴ However,

346. See *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 191 (D.D.C. 2015) (rejecting contention that Department's use of debt-income ratio as a measure of loan manageability was arbitrary and capricious), *aff'd*, 640 F. App'x 5 (D.C. Cir. 2016).

347. Patricia Drentea, *Age, Debt and Anxiety*, 41 J. HEALTH & SOC. BEHAV. 437, 441 (2000); Patricia Drentea & Paul J. Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 521 (2000).

348. See 11 U.S.C. § 523(a)(8) (2018) (providing undue-hardship requirement only for education-related debts).

349. Drentea & Lavrakas, *supra* note 347, at 527. Another study, using a different sample and different statistical techniques, attempted to determine the direction of causation and found that "health status may play a more important role in explaining why some households are under financial strain than vice versa." Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 S. ECON. J. 873, 875 (2005).

350. Drentea, *supra* note 347, at 445.

351. Cf. Bruckner et al., *supra* note 6, at 37 (calling for rebuttable presumption of undue hardship when certain objectively defined criteria are met).

352. If full discharge were thought to give a windfall to high-debt borrowers, the Department could, in cases where the debt is federal, compromise such debts to bring them down to acceptable debt-to-income levels. In other cases, bankruptcy courts could achieve the same result by granting partial discharge, at least in some jurisdictions. See, e.g., *Saxman v. Educ. Credit Mgmt. BJR Corp.* (*In re Saxman*), 325 F.3d 1168, 1174 (9th Cir. 2003) (holding that Bankruptcy Code permits partial discharge of student-loan debt); *Tenn. Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433, 439 (6th Cir. 1998) (same). Another approach to the issue would be to require some prescribed period of time before discharge.

353. See Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 707–08 (1984) (describing varying effects of presumptions based on strength of policies underlying them); Timothy R. Holbrook, *Patents, Presumptions, and Public Notice*, 86 IND. L.J. 779, 814 (2011) (nothing in the patent context, "The lessons of the Supreme Court have shown that . . . the use of rebuttable presumptions [is] an appropriate way to balance competing policy concerns.").

354. For congressional disapproval of such behavior, see 124 CONG. REC. 1793 (1978) (statement of Rep. Erlenborn) ("Having pledged that future earning power, if, shortly af-

this article contemplates that a creditor would be able to overcome the debtor's high debt-income ratio if the creditor could demonstrate that the debtor would earn more in the future.

The proposal also is unlikely to materially harm creditor recovery. Scholars have noted that debtors are unlikely to repay, at least in full, when debt-income ratios are high.³⁵⁵ Especially when collection costs are taken into account, discharge of much of this debt probably has no real cost to creditors. However, as with the possibility of abuse, under the proposal, creditors would be permitted to try to rebut the presumption by showing that the current debt-income ratio does not present a fair picture of likely future earnings.

4. *Harm to Borrowers: Allow Discharge of Debts That Made Borrowers Worse Off*

As discussed, Congress intended student loans to benefit students, not harm them.³⁵⁶ But in fact, many borrowers are probably worse off because they pursued debt-financed education.³⁵⁷ Denying such students discharge frustrates Congress's purpose in creating the student-loan programs.

Curiously, the prevailing tests for bankruptcy discharge, the *Brunner* and totality-of-the-circumstances tests, do not expressly take account of whether student loans helped or harmed the debtor.³⁵⁸ It was not always this way. An early leading decision on student-loan bankruptcy, *Pennsylvania Higher Education Assistance Agency v. Johnson (In re Johnson)*,³⁵⁹ advanced an analytical framework including a "policy test,"

ter graduation and before having an opportunity to get assets to repay the debt, [the graduate] seeks to discharge that obligation, I say that is tantamount to fraud.").

355. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 338, at 208 (asserting that the typical debtor in one study, which found a mean debt-to-income ratio of 4.7, "did not have a reasonable prospect of repaying her student loans").

356. See discussion *supra* Part II.B.4.

357. See discussion *supra* Part III.D.

358. The most widely used test, the *Brunner* test, considers whether the debtor would be unable to maintain a minimal standard of living for a significant portion of the repayment period while repaying the loans and whether the debtor made a good faith effort to repay. See *supra* notes 119–121 and accompanying text (discussing elements and influence of *Brunner* test). Some courts that have adopted the *Brunner* test have expressly rejected consideration of whether the debtor actually derived a benefit from the student loans. *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) ("Such an inquiry conflicts with the basic concept of government-backed student loans."); see also Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 305 (3d Cir. 1995) (agreeing with *Roberson*).

The less widely used test, the totality-of-the-circumstances test, permits consideration of "the unique facts and circumstances that surround the particular bankruptcy." *Fern v. FedLoan Servicing (In re Fern)*, 563 B.R. 1, 3 (B.A.P. 8th Cir. 2017). It thus would seem to permit consideration of whether the debtor benefited from the loan if the court deemed the issue relevant. It does not appear, however, that courts employing the totality-of-the-circumstances test generally do consider whether the loans were helpful or harmful. See *id.* at 4 (listing factors considered in applying totality-of-the-circumstances test and not listing question whether loan benefited the borrower).

359. No. 77-2033TT, 1979 U.S. Dist. LEXIS 11428 (E.D. Pa. June 27, 1979).

which asked whether the loans financially benefited the borrower.³⁶⁰ Courts regularly applied this framework for some time.³⁶¹

To be sure, the *Johnson* test has now been displaced by the *Brunner* and totality-of-the-circumstances tests,³⁶² which are followed in almost all circuits.³⁶³ Most of the appellate decisions adopting the current tests did so without mentioning *Johnson's* policy test.

As for the two appellate courts that expressly rejected *Johnson* in favor of *Brunner*, they did not consider nondischargeability in light of the overall purposes of the student-loan program as this article recommends. Instead, they relied on the unsupported assertion that the government was not an “insurer” of student success,³⁶⁴ so that the risk of failure falls on the student. The use of the word “insurer” in this context is somewhat inaccurate, given that the debtor must go through bankruptcy, liquidate nonexempt property,³⁶⁵ and suffer other consequences to get a discharge.³⁶⁶ More fundamentally, the courts were wrong to assume it was self-evident that Congress was indifferent to the fate of unlucky borrow-

360. Under *Johnson's* somewhat convoluted analysis, if the debtor could not afford to pay the student loans but the inability was the result of the debtor's own negligence or irresponsibility, then the “policy test” would determine the outcome. *Id.* at *60–61. Under the policy test, if the debtor's dominant purpose in filing bankruptcy was not the discharge of student loans, then the debtor would get a discharge if the loans did not provide a financial benefit and would not get a discharge if the loans did provide a financial benefit. *Id.*

361. Except where otherwise noted, the following cases applied the *Johnson* test. In the interest of space, bankruptcy court decisions applying the *Johnson* test from 1979 through 1995 are omitted. See *Morris v. United States (In re Morris)*, No. 99-05944-TOM-7, 2000 Bankr. LEXIS 1643, at *18-19 (Bankr. N.D. Ala. Apr. 5, 2000) (granting discharge where debtor “has not benefitted from the computer science degree he gained as a result of receiving the student loans”); *McCormick v. Educ. Credit Mgmt. Corp. (In re McCormick)*, No. 99-00636-TOM-7, 2000 Bankr. LEXIS 1645, at *14 (Bankr. N.D. Ala. Jan. 4, 2000); *Roe v. Law Unit (In re Roe)*, 226 B.R. 258, 269 (Bankr. N.D. Ala. 1998); *Miller v. Benton State Bank (In re Miller)*, No. 96-11061 S, 1997 Bankr. LEXIS 377, at *2 (Bankr. W.D. Ark. Feb. 19, 1997) (stating “courts generally employ” *Johnson* test); *Holtorf v. Ill. Student Assistance Comm'n (In re Holtorf)*, 204 B.R. 567, 572 (Bankr. S.D. Cal. 1997) (finding it unnecessary to choose between *Johnson* and *Brunner* tests because outcome was same under either); *Taylor v. Ill. Student Assistance Comm'n (In re Taylor)*, 198 B.R. 700, 702 (Bankr. N.D. Ohio 1996); *Robinson v. U.S. Dep't of Educ. (In re Robinson)*, 193 B.R. 967, 969–70 (Bankr. N.D. Ala. 1996); *Howell v. Educ. Res. Inst., Inc. (In re Howell)*, BK 95-70202-CMS-7, 1996 Bankr. LEXIS 1935, at *9, *16 (Bankr. N.D. Ala. Jan. 5, 1996) (granting partial discharge where debtor clearly did not benefit from student loans, having returned to previous employment with the Postal Service after graduating law school); *Vaughn v. Ill. State Scholarship Comm'n*, 151 B.R. 481, 486 (C.D. Ill. 1993) (finding that bankruptcy court should have followed *Johnson* test); *In re Roberson*, 138 B.R. 885, 888 (N.D. Ill. 1992), *rev'd*, 999 F.2d 1132 (7th Cir. 1993) (“[T]he *Johnson* analysis is the appropriate analytical standard to follow.”).

362. See *Faish*, 72 F.3d at 306 (rejecting *Johnson* test in favor of *Brunner* test); *Roberson*, 999 F.2d at 1137 (same).

363. See DOE Letter, *supra* note 278, at 16 (listing nine circuits that have adopted *Brunner* test (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh) and one that has adopted the totality-of-the-circumstances test (the Eighth)).

364. *Faish*, 72 F.3d at 305; *Roberson*, 999 F.2d at 1136.

365. See 6 COLLIER ON BANKRUPTCY ¶ 700.01 (Lawrence E. King et al. eds., 16th ed. rev. 2019).

366. For example, it may be harder for the debtor to get credit after bankruptcy. See POND, PERSONAL FINANCIAL PLANNING HANDBOOK ¶ 5.09[4] (2d ed. 2019).

ers. As this article has shown,³⁶⁷ Congress's purpose was to help students, not to harm them. Taking Congress's intent to benefit students into account, as a proper analysis would, suggests that courts were wrong to abandon the policy test and that it should be restored in some form.

Whether loans harmed a debtor is not always obvious. The inquiry is subjective, involving both financial and nonfinancial considerations. The following is one possible conservative way of implementing the debtor-harm standard.

If a course of study is designed to lead to particular employment, then the debtor could be presumed harmed if unable with reasonable effort to find a job in the field in a reasonable time. A debtor who found a job in the relevant field would be presumed unharmed.

If the course of study is not designed to prepare for a particular career, a test designed around net-economic benefit would be reasonable. It might be presumed that the education and loans created a net harm when the borrower's income, less loan payments,³⁶⁸ is less than the median for a person of the same age in the same geographic area whose education is the same as the borrower's was before the borrower undertook the debt-financed education in question.³⁶⁹ For example, the holder of an undergraduate degree in philosophy would be presumed harmed if and only if the debtor's income were less than that of the median high-school graduate of the same age living in that area.

Recognizing that applying a debtor-harm standard may be a significant shift from current practice in most courts, the proposal above is deliberately cautious. For example, the fact that a debtor is working in the field for which the debtor was educated may indicate that the education provided a benefit, but it does not necessarily establish that the education and loans together provided a net benefit. Presuming the debtor was not harmed in this instance is conservative. The same-age-median-income test does not take account of the harm that may arise from loss of seniority arising from taking time off for school, so it too is a conservative approach to net harm.

Different actors could take different approaches to implementing the debtor-harm standard in light of current law. A court of appeals sitting en

367. See discussion *supra* Part II.B.4.

368. In cases where the debtor does or can reduce payments using IDR, use of payments on the standard repayment plan is arguably appropriate because IDR extends the repayment period, may not actually result in loan cancellation, may impose tax liabilities if loans are cancelled, and allows negative amortization of the loans during repayment. See ABI COMMISSION REPORT, *supra* note 6, at 12 (recommending use of the "contractual terms of the loan itself," rather than IDR plan terms, in evaluating hardship); Hunt, *supra* note 86, at 1329 tbl.1 (listing potential drawbacks of IDR).

369. The Census Department's Current Population Survey collects data on earnings, age, education, and location. See *Current Population Survey: Technical Documentation: Questionnaires*, CENSUS.GOV, <https://www.census.gov/programs-surveys/cps/technical-documentation/questionnaires.html> [<https://perma.cc/CQ3Q-VLQY>] (last visited Oct. 14, 2019).

banc³⁷⁰ or the Department³⁷¹ would not be bound by the *Brunner* or totality-of-the-circumstances test and could simply decide that debtor harm constitutes undue hardship, perhaps with an additional requirement that the debtor act in good faith.

Most bankruptcy courts, district courts, and appellate panels currently must follow the *Brunner* test for undue hardship,³⁷² which does not expressly call for consideration of debtor harm. It is the author's sense that most bankruptcy courts do not consider debtor harm in applying the *Brunner* standard,³⁷³ and at least three appellate courts (the Third,³⁷⁴ Sixth,³⁷⁵ and Seventh Circuits³⁷⁶) have expressly rejected considering the issue.

In other jurisdictions, however, the debtor-harm standard potentially can be reconciled with *Brunner*. The *Brunner* test asks whether repayment would likely render the debtor unable to maintain a “minimal standard of living” for a significant portion of the repayment period and whether the debtor acted in good faith.³⁷⁷ A minimal standard of living could be understood to be a standard of living at least as high as the borrower would have enjoyed absent the loans.³⁷⁸ This approach does not

370. See Catherine T. Struve, *When Hearing or Rehearing En Banc May Be Ordered*, in 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3981.1 (4th ed. 2018) (“[O]ne reason to grant en banc consideration is to overrule circuit precedent.”); Lawrence B. Solum, *Stare Decisis in United States Courts*, in 18 MOORE'S FEDERAL PRACTICE § 134.02 (3d ed. 2019) (“[A] circuit court panel's decision may be overruled by the court sitting en banc.”) (collecting cases).

371. The Department's interpretation of undue hardship is important because the Department's current interpretation of its regulations, although not completely clear, probably is that holders of federal student loans “should consent” to discharge when undue hardship is present. See DOE Letter, *supra* note 278, at 10; Hunt, *supra* note 38 (explaining ambiguity in DOE Letter and suggesting that “should consent” is controlling).

372. See DOE Letter, *supra* note 278, at 16 (describing adoption of *Brunner* test in most circuits).

373. See, e.g., *Salyer v. Sallie Mae Servicing Corp.* (*In re Salyer*), No. 05-14253, 2006 Bankr. LEXIS 2050, at *17–18 (Bankr. M.D. La. Aug. 31, 2006) (“A debtor's failure to . . . benefit financially from a financed education is not a separate mitigating consideration in deciding whether a student loan obligation is dischargeable.”). *But see Swafford v. King* (*In re Swafford*), 604 B.R. 46, 52–53 (Bankr. N.D. Iowa 2019) (considering mental and emotional harm to debtor from mounting debt).

374. See Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 305 (3d Cir. 1995).

375. See *Rice v. United States* (*In re Rice*), 78 F.3d 1144, 1150 n.6 (6th Cir. 1996). *Rice v. United States* (*In re Rice*) involved HEAL loans, which are dischargeable only on a showing of “unconscionab[ility],” 42 U.S.C. § 292f(g)(2) (2012), which has been described as a higher standard than undue hardship. *Id.* at 1149.

376. See, e.g., *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993).

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

378. As many courts have observed, the concept of a “minimal standard of living” allows for considerable flexibility. See, e.g., *Halatek v. William D. Ford Fed. Direct Loan Program* (*In re Halatek*), 592 B.R. 86, 98 (Bankr. E.D.N.C. 2018) (quoting *Johnson v. Access Group* (*In re Johnson*), 400 B.R. 167, 173 (Bankr. M.D. Pa. 2009)) (“A minimal standard of living—is not a fixed measure, and the concept is not defined by bright lines.”); *Doernte v. Educ. Credit Mgmt. Corp.* (*In re Doernte*), No. 10-24280-JAD, 2017 Bankr. LEXIS 1407, at *10 (Bankr. W.D. Pa. May 25, 2017) (using the same quote); *Jones v. Educ. Credit Mgmt. Corp.* (*In re Jones*), 495 B.R. 674, 685 (Bankr. E.D. Pa. 2013) (using the same

preclude considering the nonfinancial benefits of education and harms of debt, as “standard of living” can be interpreted to encompass such matters.³⁷⁹ In applying this concept of a minimal standard of living, courts could use the presumptions suggested above or adopt other approaches. Courts unwilling to allow debtor harm to satisfy the minimal-standard-of-living element of *Brunner* could at a minimum consider debtor harm as a factor in evaluating whether the debtor acted in good faith, as some courts already do.³⁸⁰

Allowing discharge based on debtor harm does not promote abuse of the system. The abusers Congress was concerned with were those who were likely to benefit from loans and did not want to repay,³⁸¹ not those who suffered harm from their loans.

Discharge based on debtor harm has a more delicate relationship with protecting creditor financial recovery, the other reason for conditional nondischargeability of student loans. A debtor may be harmed by student loans but still enjoy considerable ability to repay, perhaps because of success in a field unrelated to the loan-financed education. Thus, adopting debtor harm as a basis for discharge does entail some risk to creditor recovery.

Nevertheless, a central argument of this article is that nondischargeability’s purposes do not always and everywhere trump other purposes of the student-loan programs.³⁸² Given that those who are harmed by student loans are probably less likely on average to be able to repay than those who are helped, courts and the Department could reasonably decide that the purpose of not harming borrowers outweighs the purpose of promoting recovery. Even if decision-makers are not inclined to go that far, they should give some weight to borrower harm. For example, they could allow harmed borrowers under a certain income level to get a

quote); *Roundtree-Crawley v. Educ. Credit Mgmt. Corp.* (*In re Crawley*), 460 B.R. 421, 436 (Bankr. E.D. Pa. 2011).

379. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (“The [Fair Labor Standards Act of 1938] seeks to prohibit ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’”) (quoting 29 U.S.C. § 202(a) (2012)); *Reed v. PST Vans*, No. 97-5097, 1998 U.S. App. LEXIS 17928, at *12 (6th Cir. July 31, 1998) (defining “standard of living” in terms of maintaining “such a condition of health and well-being that [one can] maintain [one’s] capacity to enjoy life’s activities”); see also G.A. Res. 217 (III) A, art. 25, Universal Declaration of Human Rights (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.”).

380. See, e.g., *Fields v. Sallie Mae Servs. Corp.* (*In re Fields*), 286 Fed. App’x 246, 249–50 (6th Cir. 2007) (citing and quoting *Flores v. U.S. Dept. of Educ.* (*In re Flores*), 282 B.R. 847, 856 (Bankr. N.D. Ohio 2002)) (stating that the benefit from loans is one of six factors relevant to good faith). Interestingly, the Sixth Circuit expressly rejected consideration of whether the debtor received a benefit in construing 42 U.S.C. § 292f(g), a provision analogous to 11 U.S.C. § 523(a)(8) that requires a showing of “unconscionability” for discharge of certain student loans in the healthcare field. See *Rice*, 78 F.3d at 1150 n.6.

381. See *Hunt*, *supra* note 86, at 1301–07; *Pardo & Lacey, Undue Hardship in the Bankruptcy Courts*, *supra* note 264, at 423–24.

382. See discussion *supra* Part IV.A.

discharge or allow harmed borrowers more than *Brunner's* "minimal" standard of living.³⁸³

V. CONCLUSION

Student-loan nondischargeability can interfere with education, distort careers, discourage borrowers from economic and social participation, and make student loans harmful. These effects thwart Congress's goals for the student-loan programs: providing equal access to higher education, creating an educated population, facilitating free career choice, and benefiting students. This article suggests concrete steps to remedy nondischargeability's negative effects: making dischargeability salient; ending penalization in bankruptcy of borrowers who work in fields for which they have been educated; granting discharge to debtors who are particularly likely to be discouraged, who may be debtors with high debt-income ratios; and granting discharge to debtors whose student loans are a harm rather than benefit, such as debtors who have not been able to find jobs in the fields for which they were trained despite good faith effort. These specific proposals should help confine nondischargeability to its proper place in the statutory scheme and achieve greater fidelity to Congress's overall design.

383. *See supra* note 120 and accompanying text (setting forth elements of *Brunner* test).

