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Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965

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FEDERAL FINANCING OF HIGHER
EDUCATION AT A CROSSROADS: THE
EVOLUTION OF THE STUDENT LOAN DEBT
CRISIS AND THE REAUTHORIZATION OF THE
HIGHER EDUCATION ACT OF 1965

*Camilla E. Watson**

2019 MICH. ST. L. REV. 883

ABSTRACT

Currently, there are 44.7 million Americans holding student loan debt collectively totaling over \$1.5 trillion. This massive debt has a profound effect, not only on the lives of the debtors but also on the national economy because it prevents the debtors from buying homes and cars and creating new businesses. This debt is also speculated to be a likely trigger for the next housing bubble because student loans, like the subprime mortgage loans underlying the 2008 financial crisis, are securitized and sold to investors. But many of those with student loans struggle to find jobs that will enable them to pay off their debt. In some cases, they leave school without graduating because they perceive their debt as too overwhelming. When that happens, their lack of a degree exacerbates their struggle to find decent jobs. Moreover, fear of undertaking substantial debt leads some individuals to forego higher education altogether, thereby condemning them to a lifetime of low-paying jobs. This Article traces the development of federal student loans and examines the numerous problems comprising the student loan debt crisis, among them the high cost of postsecondary education, the crisis-level amount of debt undertaken by students, the difficulties of repayment, and the fraud and abuse perpetrated by proprietary institutions and predatory lenders. It attributes these problems to Congress, which it argues has at times both acted, and failed to act, due to misjudgments that at least on occasion have bordered on an animus to students in need. This Article also critiques proposed legislation to reform federal funding of higher

* Ernest P. Rogers, Professor of Law, University of Georgia School of Law. I am indebted to Margaret V. Sachs and Alan Watson for comments on an earlier draft of this Article. I also am indebted to T.J. Striipe and Hamed Roodposhti for technical and editorial assistance. Any errors or omissions are my own.

education and questions whether the mistakes of the past will soon be repeated in the pending reauthorization of the Higher Education Act of 1965.

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INTRODUCTION

In today’s global economy, education and access to education are more important than ever before, not only for individual workers

but also for the national economy.¹ But nearly three-quarters of a century after the enactment of the original GI Bill,² five decades after the initial establishment of a federal student loan program,³ and more than four decades after the creation of a national basic grant program for low-income students,⁴ “the central commitment to federal support for higher education and the [mechanics] of [that] support are under attack.”⁵ This attack has been fomented, in part, by the level of outstanding student loan debt that has reached such crisis proportions⁶

1. Education facilitates social inclusion and mobility, improves socioeconomic outcomes, and increases productivity, which in turn lead to greater tax revenues, lower social burdens on the government, and greater social contributions. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], EDUCATION AT A GLANCE 2017: OECD INDICATORS, 76, 118 (2017), <https://www.oecd-ilibrary.org/education/education-at-a-glance-2017eag-2017-en> [<https://perma.cc/7XC9-TZUN>] (last visited Oct. 28, 2019). As then Treasury Secretary, Timothy Geithner, stated,

The moral case for doing a better job of giving Americans the opportunity to succeed is very compelling. The economic case is just as strong. If more Americans are educated, more will be employed, their collective earnings will be greater, and the overall productivity of the American workforce will be higher.

U.S. DEP’T OF TREASURY & U.S. DEP’T OF EDUC., THE ECONOMICS OF HIGHER EDUCATION 13 (2012). This would mean higher tax revenues, greater consumption, and reduced reliance on financial support from the government. See Anne Johnson & Tobin Van Ostern, *It’s Our Interest: The Need to Reduce Student Loan Interest Rates*, CTR. FOR AM. PROGRESS (Feb. 13, 2013, 9:47 AM), <https://www.americanprogress.org/issues/education/reports/2013/02/13/53061/its-our-interest-the-need-to-reduce-student-loan-interest-rates> [<https://perma.cc/6S6A-K7A6>].

2. See discussion *infra* notes 25–27 and accompanying text.

3. See discussion *infra* notes 48–50 and accompanying text.

4. See *infra* note 71.

5. Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, FINANCING POSTSECONDARY EDUCATION: THE FEDERAL ROLE (October 1995), <https://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html> [<https://perma.cc/8NUC-286X>] (last visited Oct. 28, 2019); see, e.g., Roger Yu, *Millions of Student Loans Could Be Headed for a Shakeup in Coming Months*, USA TODAY (July 5, 2017, 7:04 AM), <https://www.usatoday.com/story/money/2017/07/05/proposals-change-student-loan-rules-could-upend-industry/99594768> [<https://perma.cc/R6HE-TU8A>].

6. See, e.g., Randi Weingarten, *Public Service Debt Relief is Broken*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/public-service-loans-education.html> [<https://perma.cc/CY77-CSCM>] (noting that as of summer 2018, student loan debt has reached \$1.5 trillion); see also Zack Friedman, *Student Loan Debt in 2017: A \$1.3 Trillion Crisis*, FORBES (Feb. 21, 2017, 7:45 AM), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#665c0b0f5dab> [<https://perma.cc/E4K2-UA8H>]; Mark Kantrowitz, *Why the Student Loan Crisis Is Even Worse Than People Think*, MONEY (Jan. 11, 2016),

that it serves as a disincentive for many to pursue higher education.⁷ For those already mired in this debt, the burden affects their physical and mental health, as well as their important life decisions, such as whether to open a business, buy a house, or start a family.⁸

Most federal funding for higher education is authorized and regulated by the Higher Education Act of 1965 (the HEA), which is subject to reauthorization, usually occurring every five to seven years.⁹ The last reauthorization was in 2008, however, so the next one is long overdue.¹⁰ Before the 2018 elections, Congress considered a reauthorization of the HEA,¹¹ but the proposed legislation showed no signs of bipartisan cooperation.¹² This failure to reach an agreement was counterproductive because a reauthorization has the potential to radically affect current and future borrowers, which in turn also has the potential to affect the future American workforce and

<https://www.time.com/money/4168510/why-student-loan-crisis-is-worse-than-people-think> [<https://perma.cc/R98X-HLLH>].

7. See Neil Swidey, *The College Debt Crisis Is Even Worse Than You Think*, BOS. GLOBE (May 18, 2016, 9:02 AM), <https://www.bostonglobe.com/magazine/2016/05/18/hopes-dreams-debt/fr60cKakwUlGok0jTlONTN/story.html> [<https://perma.cc/M3WS-SJNX>] (stating that the numbers no longer add up to pursue a bachelor's degree).

8. See, e.g., David Jolley, *Student Debt Is Killing Entrepreneurship*, QUARTZ AT WORK (June 22, 2018), <https://quartz.com/work/1311712/student-debt-is-killing-entrepreneurship>; Bill Fay, *The Emotional Effects of Debt*, DEBT.ORG. (May 1, 2017), <https://www.debt.org/advice/emotional-effects> [<https://perma.cc/DGV6-FG4F>]; see also Cat Alford, *3 Major Reasons Why Student Loan Debt Is Preventing Millennials from Having Kids*, STUDENT LOAN HERO (Dec. 21, 2015), <https://studentloanhero.com/featured/student-loan-debt-preventing-millennials-having-kids/> [<https://perma.cc/443E-B8PT>]; *Borrowers Shift to Student Loan Debt Impacting Home Ownership*, FINANCE SOLUTIONS (June 13, 2017), <https://finance.solutions.org/borrowers-shift-to-student-loan-debt-impacting-home-ownership> [<https://perma.cc/67B6-JJTZ>].

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

10. See *Higher Education Act*, AM. ASS'N OF COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS, <https://www.aacrao.org/advocacy/issues/higher-education-act> (last visited Oct. 28, 2019).

11. See *infra* Part III (discussing Congress' interest in re-authorizing the HEA).

12. See Jared Polis, *A Call for Bipartisanship in Higher Education*, INSIDE HIGHER ED. (July 25, 2018), <https://www.insidehighered.com/views/2018/07/25/aim-higher-act-offers-opportunity-bipartisan-support-students-and-their-families> [<https://perma.cc/CGD4-5BUY>] (noting bipartisan "games" being played by chairwoman, Virginia Foxx, and Republican members of the House Committee on Education and the Workforce in shutting Democrats, as well as some Republican members of the committee, out of the process).

consequently the national economy.¹³ Since Congress will likely consider a reauthorization of the HEA once again in the near future, now is an opportune time to examine federal policies for higher education to understand how they have evolved over time, what they have accomplished, why student loan debt has reached such epic proportions, and what, if anything, can or should be done about it.

While an investment in education is a crucial investment in the future, this Article maintains that in the past, the federal government has made poor choices in funding higher education. These choices have been made partly from inactions, partly from mistakes stemming from good intentions, and partly from an enmity to “free rides” for students.¹⁴ Regardless of the rationale, the result has been that the federal government has treated student borrowers unfairly in multiple ways and, at present, all indications are that this unfair treatment will continue, if not worsen.¹⁵ If so, it would be counterproductive because it ultimately could have devastating effects, both on society and on the economy.

Part I of this Article traces the evolution and expansion of student loans and the consequent growth of student loan debt;¹⁶ Part II discusses the mistakes made by the federal government during the evolution of its funding for higher education;¹⁷ and Part III discusses the pending legislation (from both sides of the political aisle) and critiques the likely effect of each on the current broken system of funding higher education.¹⁸

13. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 1.

14. See *infra* Part II (discussing prior mistakes in funding higher education).

15. See Yu, *supra* note 5; *infra* Subsection I.C.6 (detailing Betsy DeVos’ actions in favor of proprietary institutions); *infra* Section III.A (discussing PROSPER bill and its attempt to enact Trump’s higher education agenda); see also Ryan Brown, *Trump DeVos to Eliminate Public Service Loan Forgiveness*, STUDENT DEBT RELIEF, <https://www.studentdebtrelief.us/news/trump-devos-to-eliminate-public-service-loan-forgiveness> [<https://perma.cc/RCH7-V9JU>] (last visited Oct. 28, 2019).

16. See *infra* Part I (detailing the evolution of federal student loans).

17. See *infra* Part II (discussing prior mistakes made in federal funding of higher education). In addition to student loans offered by the federal government, there are also loans offered by private lenders, states, and educational institutions. However, the largest lender is the federal government. See Courtney Miller, *How Uncle Sam Became the Largest Student Lender*, NERD WALLET (Dec. 21, 2015, 5:46 AM), <https://www.nerdwallet.com/blog/studies/uncle-sam-biggest-student-lender> [<https://perma.cc/G3TR-PA8B>].

18. See *infra* Part III (discussing pending legislation to re-authorize the HEA).

I. THE EVOLUTION OF FEDERAL STUDENT LOANS

While it has been termed a “fundamental interest,”¹⁹ education is not a guaranteed right under the U.S. Constitution.²⁰ Indeed, until the 1960s, it was regarded primarily as the responsibility of the state and local governments.²¹ But because of its importance, the federal government assumed a significant role in education from very early on.²² At first that role encompassed a narrow, coherent rationale: to promote the building of schools through land grants and to assimilate into society emancipated slaves and, later, those who had served the

19. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1972) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); *Serrano v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971).

20. See *Federal Education Policy and the States, 1945-2009: A Brief Synopsis*, in STATES' IMPACT ON FED. EDUC. POL'Y PROJECT, N.Y. STATE ARCHIVES 5 (Jan. 2006, rev. Nov. 2009) [hereinafter *A Brief Synopsis*] (noting that education has been regarded as one of the “unenumerated powers reserved ‘to the states . . . or to the people’” under the Tenth Amendment). While the U.S. Constitution makes no explicit mention of education, all state constitutions guarantee their citizens the right to education. See *id.*

21. *Overview: The Federal Role in Education*, U.S. DEP'T OF EDUC. (last modified May 25, 2017), <http://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/N3HP-VZTG>] (“It is States and communities, as well as public and private organizations of all kinds, that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation. The structure of education finance in America reflects this predominant State and local role.”).

22. *A Brief Synopsis*, *supra* note 20, at 5 (explaining that in 1785 and 1787, Congress enacted the Northwest Ordinances, reserving 1/36th of the land allocated to each western township “for the maintenance of public schools within the said township.”). The Morrill Land Grant Acts of 1862 and 1890 extended land grants to states for institutions of higher education. See generally Pub. L. No. 37-130, 12 Stat. 503 (1862); 26 Stat. 417 (1890). After the end of the Civil War, the federal government appropriated money to the Freedman’s Bureau to help assimilate emancipated slaves into their new lives by, among other things, expanding educational opportunities. See *A Brief Synopsis*, *supra* note 20, at 5.

country during wartime.²³ But eventually, its role expanded far beyond that rationale.²⁴

A. The Initial Post-WWII Federal Role in Higher Education

The Servicemen's Readjustment Act of 1944, better known as the GI Bill, provided a myriad of benefits for veterans returning home from World War II.²⁵ Among these benefits were payments of living expenses and tuition to attend high school, college, or vocational/technical school, as well as financial incentives to purchase a residence.²⁶ The GI Bill has been regarded as a great social and economic success because it provided an education to many veterans, thereby stimulating the economy and more than paying for itself through increased federal income tax revenues and new home sales.²⁷ But the original GI Bill, which expired in 1956, was ad hoc legislation to help veterans readjust after the war. Education continued to be regarded as the primary responsibility of the states and, indeed, until the 1950s, the states resisted direct involvement by the federal

23. See *A Brief Synopsis*, *supra* note 20, at 5. There was other education legislation as well. See Smith-Hughes National Vocational Education Act of 1917, Pub. L. No. 64-347, 39 Stat. 929 (promoting vocational education and training for those interested in agriculture); National Civilian Vocational Rehabilitation Act of 1920 (the Smith-Fess Act), Pub. L. No. 66-21936, 41 Stat. 735 (repealed 1973, and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973)) (providing vocational rehabilitation for workers disabled on the job and increased appropriations for the handicapped in the 1920s and 1930s); Social Security Act of 1935, § 531, Pub. L. No. 74-271, 49 Stat. 620 (authorizing funding for a vocational rehabilitation program). The National Youth Administration (NYA) and Works Progress Administration (WPA) were agencies created under FDR's New Deal in 1935 to provide job training and skills development to young people and unemployed men and women. There were also several acts to provide school lunches and proper nourishment to school children. See, e.g., Richard B. Russell National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946). The Lanham Act, Pub. L. No. 76-862, 54 Stat. 1125 (1940), authorized the construction of infrastructure for the war effort. Under this Act, childcare facilities and school buildings were built, maintained, and operated in communities across the country so that mothers could work toward the war effort.

24. See discussion *supra* note 23.

25. Pub. L. No. 78-346, 58 Stat. 284.

26. See *id.* at tit. II.

27. See Servicemen's Readjustment Act (1944), S.1767, <https://www.ourdocuments.gov/doc.php?flash=false&doc=76>. Between 1940 and 1950, the number of postsecondary degrees awarded by U.S. colleges and universities more than doubled. *Id.* The Bill's contribution to human capital was a major factor in the long-term economic growth that the United States enjoyed for the next generation. *Id.*

government.²⁸ But the occurrence of two events during the Eisenhower Administration in the late 1950s fundamentally changed the way that education was regarded and kick-started a much broader federal role in education at all levels.²⁹ During the Johnson Administration, the federal government further expanded that role.³⁰

Eisenhower and Johnson, although from different political parties, were both keenly attuned to education, albeit for different reasons. Both men also were in the right place at the right time to significantly influence education policy. Legislation enacted during their administrations not only expanded federal involvement in education but also ensured that the federal government would remain involved for generations to come.

1. *The Eisenhower Administration (1953–1961)*

When Eisenhower ran for office, he was then president of Columbia University, having accepted the position to “promote [the] basic concepts of education in a democracy.”³¹ When he took office as President of the United States in 1953, the country was in a period of relative peace and economic prosperity that continued for most of his presidency.³² This enabled Eisenhower, a moderate Republican, to focus on domestic policy, in particular building and strengthening the

28. See *A Brief Synopsis*, *supra* note 20, at 7.

29. See *infra* Subsection I.A.1 (discussing the Eisenhower Administration).

30. See *infra* Subsection I.A.2 (discussing the Johnson Administration).

31. STEPHEN E. AMBROSE, *EISENHOWER, VOLUME ONE: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT, 1890-1952* 471 (1983).

32. However, there were three recessions during Eisenhower’s presidency: 1953–1954, 1957–1958, and 1960–1961. The first was attributable to the inflationary period following the Korean War, which began on June 27, 1950, and ended in July 1953, six months after Eisenhower took office. This recession was described as “relatively mild and brief.” JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS* 431 (1968). The second was a more significant, world-wide recession attributable primarily to higher interest rates, which in turn led to a decline in housing construction and new car sales. Also, the Eisenhower Administration had cut the budget of the Department of Defense in 1957, leading to a drop in new orders of equipment and a decline in the expansion of manufacturing facilities. Because of the cut, this recession was known as “the Eisenhower Recession.” The third was caused by the Federal Reserve’s raising of interest rates, which slowed the economy. See DAN BARUFALDI, *A Review of Past Recessions*, Investopedia, <https://www.investopedia.com/articles/economics/08/past-recessions.asp> [<https://perma.cc/WP7U-MH94>] (last visited Oct. 28, 2019). This may have been a contributing factor to John F. Kennedy’s 1960 presidential victory.

country's infrastructure.³³ Shortly after taking office, he oversaw the creation of the cabinet-level Department of Health, Education, and Welfare (HEW), established primarily to address the critical need for additional classrooms and teachers to accommodate the burgeoning baby boom.³⁴ The considerable strain placed on local school districts by an additional four million children entering school each year was forcing these districts to turn to the federal government for help in constructing new classrooms and providing funding for additional teachers.³⁵ Although Eisenhower was amenable to providing this help, the federal government had a major obstacle to overcome before such aid could be authorized.

In 1954, the U.S. Supreme Court decided *Brown v. Board of Education of Topeka, Kansas*, a seminal case in which it unanimously held that segregated schools did not provide equal educational opportunities; therefore, the public schools had to be desegregated.³⁶ In accordance with *Brown*, the Administration could not authorize federal funds to build segregated schools.³⁷ The topic of school construction then became a contentious political issue that stymied Eisenhower from making much headway in providing aid for education to the states.³⁸

33. Eisenhower's Administration saw the enactment of the National Defense Education Act and the Atomic Energy Act as well as the creation of the National and Aeronautics Space Administration (NASA) and the Interstate Highway System. His Administration also expanded Social Security and continued the New Deal programs. Because of his domestic programs, Eisenhower is widely regarded as one of the country's ten best Presidents. *See, e.g.,* Karen Tumulty, *Lincoln, Washington and Roosevelt Remain History's Best Presidents in Survey*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/politics/lincoln-washington-and-roosevelts-remain-historys-best-presidents-in-survey/2017/02/16/42f0270a-f45f-11e6-8d72-263470bf040_story.html [<https://perma.cc/VHW2-XK6G>] (ranking Eisenhower in top five). When Eisenhower took office, both houses of Congress were controlled by the Republicans. That ended in the 1955 elections, however, when the Democrats took control of both houses and held them until 1983.

34. *See A Brief Synopsis, supra* note 20, at 8. Eisenhower's focus was on primary and secondary education, although in 1954, Congress enacted § 117 of the tax code, which excludes from gross income the value of qualified scholarships and fellowships. I.R.C. § 117 (1954). This exclusion remains in the tax code today. *See* I.R.C. §§ 117(a), (b)(1) (2018).

35. *A Brief Synopsis, supra* note 20, at 8.

36. *See* 347 U.S. 483, 495–96 (1954).

37. *See id.*

38. Eisenhower proposed a \$1.6 billion package of federal aid for school construction in 1955. But there was fundamental disagreement among members of Congress over how to allocate the money. The northern members were adamant that the money be used "to upgrade the quality of southern schools—and, at the same time,

In 1957, however, two events occurring within a month of each other marked that year as a pivotal one for federal aid to education. The first event was the desegregation crisis in Little Rock, Arkansas, in September.³⁹ This pitted President Eisenhower against Arkansas Governor Orval Faubus in a dramatic stand-off to enroll nine black students in Little Rock's formerly all-white Central High School.⁴⁰ The stand-off ended when Eisenhower called in the 101st Airborne division to protect the students and enforce the law.⁴¹ The incident was a defining moment in the civil rights movement because it "cast the federal government as the ultimate protector of racial equality and civil rights."⁴² It also shifted the role of "guaranteeing equal educational opportunity to all students" from the states to the federal government.⁴³

The second event was the Soviet Union's launch of *Sputnik*, "the world's first orbiting satellite," in October.⁴⁴ This led to an unprecedented infusion of federal funds into the public schools under the "emergency" National Defense Education Act (NDEA), enacted in 1958, in the interests of national defense and international economic competition.⁴⁵ Under the NDEA, particular emphasis was placed on science, mathematics, engineering, and foreign languages.⁴⁶ Title IV of the Act established the graduate fellowship program, which awarded fellowships to a select number of graduate students who professed an interest in teaching at the postsecondary level.⁴⁷ Title II established the National Defense Student Loan Program,⁴⁸ the first

to require desegregation." Since the southern Democrats controlled Congress and were vehemently opposed to desegregation, the President's bill failed to pass. *See A Brief Synopsis*, *supra* note 20, at 10.

39. *See id.*

40. *See id.*

41. *Id.*

42. *See id.* at 10; *see* DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK: A MEMOIR* 219–25 (1962).

43. *A Brief Synopsis*, *supra* note 20, at 11.

44. *Id.*

45. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, 1581–82 (1958).

46. *See generally* §§ 301–305. In an effort to maintain the dichotomy between the state and local governments on the one hand and the federal government on the other, the Act expressly forbade federal control of education. *See* § 102, 72 Stat. at 1582.

47. *See* § 403, 72 Stat. at 1591.

48. *See generally* §§ 201–208. This Act appropriated \$47,500,000 for the fiscal year ending June 30, 1959, \$75,000,000 for the fiscal year ending June 30, 1960, \$82,500,000 for the

federal loan program for low-income students and the precursor to the Perkins Loan Program.⁴⁹ It was also the first direct student loan program in which the federal government appropriated funds from the U.S. Treasury to educational institutions for low-interest loans to needy students.⁵⁰ Initially, the bill provided for scholarships rather than loans, but some members of Congress thought it sent the wrong message to give students a “free ride” at the expense of taxpayers.⁵¹

2. *The Johnson Administration (1963–1969)*

Lyndon Johnson had a particular interest in education, having attended Southwest Texas State Teachers’ College in San Marcos, Texas, where he had interrupted his education to earn money by teaching poor Mexican children in a segregated school.⁵² He later said this experience had a profound influence on him when he realized that a college education was foreclosed to these children because they were too poor to afford any further education.⁵³ Thus, they essentially were doomed to a life of poverty.

fiscal year ending June 30, 1961, \$90,000,000 for the fiscal year ending June 30, 1962, and such sums for the fiscal year ending June 30, 1963, and each of the three succeeding fiscal years as may be necessary to enable students who have received a loan for any school year ending prior to July 1, 1962, to continue or complete their education.

§ 201, 72 Stat. at 1583. Title II also provided loan forgiveness of 10% per year of full-time service, up to 50% of the loan, for teachers in public elementary or secondary schools. § 205(b)(3), 72 Stat. at 1585.

49. See *infra* notes 91, 15960, 2923 and accompanying text.

50. See Pub. L. No. 85-864, § 201, 72 Stat. at 1583. The educational institutions then loaned the money to full-time students. *Id.*

51. See Timothy J. Conlan, 6 THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, EVOLUTION OF A PROBLEMATIC PARTNERSHIP: THE FEDS AND HIGHER EDUCATION 18 (1981). A controversial provision in the Act was Title X, § 1001(f), which provided that in order to receive funds under the Act, students were required to execute an affidavit stating that they were not members of and did not support any group that taught or believed in the overthrow of the Government by force or violence or by any other illegal means. Pub. L. No. 85-864, § 1001(f). It further required students to execute an oath of allegiance to the U.S. Government. *Id.* Many schools objected to this and refused to participate in the program. See *Controversy of National Defense Education Act*, K12 ACADEMICS, <https://www.k12academics.com/Federal%20Education%20Legislation/National%20Defense%20Education%20Act/c%20ontroversy-national-defense-education-act>. This provision was deleted from the Act in 1962. *Id.*

52. See PAT MURDOCK, T. CAY ROWE & SEAN BARNES, CONNECTIONS: LYNDON B. JOHNSON IN SAN MARCOS 17 (2009).

53. See *id.*

Within the first month after taking office, Johnson shepherded through Congress the Vocational Education Act⁵⁴ in fulfillment of Kennedy's promise to the American Vocational Association, which had supported his bid for the presidency, and the Higher Education Facilities Act of 1963,⁵⁵ to accommodate the baby boomers entering college and graduate programs.⁵⁶ Both Acts authorized greater federal expenditures for higher education.⁵⁷ They were followed shortly by the landmark Civil Rights Act and the Economic Opportunity Act of 1964, which established the college work-study program for needy students, the first program of its kind.⁵⁸ Both were important pieces of anti-discrimination legislation and the cornerstone of Johnson's "Great Society" agenda.⁵⁹

An important part of that agenda, with its "War on Poverty," was a proposal for massive federal aid to education to help disadvantaged

54. See generally Vocational Education Act of 1963, Pub. L. No. 88-210, 77 Stat. 403 (1963).

55. See generally Higher Education Facilities Act of 1963, Pub. L. No. 88-204, 77 Stat. 363 (1963).

56. 77 Stat. at 363. The preamble to this legislation states:

The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities.

Id. at 363-64.

57. See Higher Education Facilities Act, 77 Stat. at 363 (authorizing "assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation, or improvement of needed academic and related facilities in undergraduate and graduate institutions"); see generally Vocational Education Act, 77 Stat. 403 (amending the Smith-Hughes Act of 1917, Pub. L. No. 64-347, 39 Stat. 929 (1917) to authorize a large increase in federal funding for vocational education to emphasize agriculture and home economics, in particular).

58. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964). The Economic Opportunity Act also established the Job Corps and the Office of Economic Opportunity, which later launched the Head Start program. See Economic Opportunity Act, §§ 101-10, 78 Stat. 508-11; §§ 601-09, 78 Stat. 528-32.

59. See Lyndon Johnson's "Great Society", U.S. HISTORY, <https://www.ushistory.org/us/56e.asp> [https://perma.cc/3QAC-NG6S] (last visited Oct. 28, 2019).

students at the primary and secondary levels and to strengthen colleges and make higher education more affordable.⁶⁰ The Elementary and Secondary Education Act of 1965 (ESEA) marked the most comprehensive federal education legislation ever enacted by Congress.⁶¹ It also marked the beginning of the federal government's extensive involvement in education because prior to this Act, education and its funding had been controlled almost exclusively by the state and local governments. The Act sought to equalize educational opportunities through desegregation and through a redistribution of resources to students who had been deprived or discriminated against.⁶² Studies during this period showed a direct correlation among poverty, low academic achievement, and high dropout rates, which in turn resulted in a vicious cycle of continued poverty and unemployment.⁶³

In July 1965, Congress passed the Social Security Amendments Act,⁶⁴ which expanded child dependents' benefits to include full-time

60. See Lyndon B. Johnson, *Special Message to Congress: Toward Full Educational Opportunity*, THE AM. PRESIDENCY PROJECT (Jan. 13, 1965), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-toward-full-educational-opportunity> [<https://perma.cc/2764-S8D7>].

61. See generally Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). Johnson, a former teacher, employed great political skill in getting the legislation enacted. One of four presidents to have served in the Vice-Presidential position, as well as in both houses of Congress, Johnson was an astute observer of the political scene and knew how the game was played. He realized that if federal funds were given only to public schools, there would be an outcry from Catholic schools. But if the funds also were given to private schools as well as public schools, there would be an outcry from the National Education Association (NEA) and from liberals, who objected to federal aid to religious schools. Johnson finally decided that packaging his proposal as educational aid to poor children, rather than aid directly to educational institutions, would garner the strongest political support. He was correct because the ESEA was enacted with bipartisan support less than three months after it was introduced, although that support was not strong because four-fifths of the Republican members of the House voted against it. See generally GARETH DAVIES, *SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN* (2007).

62. See 79 Stat. at 27, 36, 47 (providing financial assistance to local education agencies in "areas affected by federal activity," grants for the acquisition of "school library resources, textbooks and other instructional materials," and to "strengthen state departments of education").

63. See Robert Kiener, *Are New Policies Needed to Keep More Teens in School?*, CQ RESEARCHER (June 13, 2014) <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2014061300> [<https://perma.cc/X9ZA-HUNU>] (discussing efforts by Presidents Kennedy and Johnson to alleviate poverty).

64. Pub. L. No. 89-97, 79 Stat. 286 (1965). This was an extension of the Social Security Amendments Act of 1956, which provided benefits to dependent

students up to age twenty-two,⁶⁵ in recognition of the fact that full-time students often are dependent on their parents for support beyond age 18.⁶⁶ By the end of that year, more than 205,000 students had received these benefits.⁶⁷

Seven months after the ESEA was signed into law, Johnson signed complementary legislation, the Higher Education Act of 1965 (HEA).⁶⁸ The HEA provided financial assistance for teacher preparation and training programs and low-interest loans with loan forgiveness for teachers who chose to serve in areas of national need.⁶⁹ In response to concerns over the rising costs of college and the relatively low rate of college enrollment by recent high school graduates,⁷⁰ the HEA sought to encourage college enrollment by making post-secondary education more affordable for low- and middle-income individuals. To accomplish this goal, it authorized the appropriation of \$804 million for scholarships, grants,⁷¹ and low

children of disabled or deceased beneficiaries or of those who were eligible for Social Security benefits. It also provided benefits to disabled children of a person eligible for or receiving Social Security benefits or a deceased eligible person, provided the disability arose before the child turned age 18. 79 Stat. at 370–73.

65. 79 Stat. at 371.

66. See SOC. SEC. ADMIN., *Research Note #11: The History of Social Security “Student” Benefits* (Jan. 2001), <https://www.ssa.gov/history/studentbenefit.html> [<https://perma.cc/XB85-ET5C>].

67. *Id.*

68. Pub. L. No. 89-329, 79 Stat. 1219. The Act initially was authorized for five years, through 1970, but it has been reauthorized eight times (in 1968, 1972, 1976, 1980, 1986, 1992, 1998, 2008) to amend programs and change language and policies.

69. See generally *id.* (authorizing appropriation of funds for enhancement of libraries in Title II, authorizing aid for developing institutions that had not yet met the minimum requirements for accreditation in Title III, providing for student assistance, such as Educational Opportunity Grants (now Pell Grants) and merit-based scholarships in Title IV, authorizing aid for teacher quality enhancement in Title V, and authorizing funding to improve undergraduate programs in Title VI).

70. See NAT’L CTR. ON EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2017 tbl.302.10 (53d ed. 2019) [hereinafter NCES] (showing in 1965, almost 51% of recent high school graduates had enrolled in either two-year or four-year institutions of higher education by October of the year following their graduation). In raw numbers, around 1.4 million out of 2.7 million graduating high school students in 1965 had enrolled in higher education. *Id.*

71. §§ 402–09, 79 Stat. at 1232–36. These were called Educational Opportunity Grants, the precursor to Pell grants. See *Student Loan History*, NEW AMERICA, <https://www.newamerica.org/education-policy/policy-explainers/higher-ed-workforce/federal-student-aid/federal-student-loans/federal-student-loan-history> (last visited Oct. 28, 2019); see also Robert L. Capt, *Analysis of the Higher Education Act Reauthorizations: Financial Aid Policy Influencing College Access and Choice*, U.S. DEPT. OF EDUC., ED. RESOURCES INFO. CTR.

interest loans (the precursor of Stafford loans)⁷² and an extension of the work-study program,⁷³ all to be administered by the Commissioner of Education.⁷⁴ This marked an important transition from federal support for educational institutions to support for individual student aid.

Another transition was that the student loans authorized by the HEA were not direct loans from the U.S. Treasury, as they had been under the NDEA, but instead were loans made by private lenders.⁷⁵ To encourage participation by these lenders, the HEA anticipated that the loans would be guaranteed by the states, with a relatively small amount of seed money from the federal government.⁷⁶ Not only did the federal government hope to save money by encouraging the states to assume their share of fiscal responsibility, but also budget rules at that time required direct loans to be posted as current losses, even

72. §§ 421–45, 79 Stat. at 1236–49. Without funding from the federal government, students would find it difficult to obtain loans because they generally have limited credit histories, few earnings (if any), and no collateral, and they would be unable to begin repayment until they have finished school. *See* JASON D. DELISLE, *PRIVATE IN NAME ONLY: LESSONS FROM THE DEFUNCT GUARANTEED STUDENT LOAN PROGRAM 3* (2017).

73. §§ 441–42, 79 Stat. at 1249–51. The HEA was reauthorized in 1968 at the end of Johnson’s term in office. This reauthorization extended guaranteed student loans through 1971. *See generally* Higher Education Amendments Act of 1968, Pub. L. No. 90-575, 82 Stat. 1014. It also required the Secretary of the Department of Health, Education, and Welfare to submit a report to Congress prior to March 1, 1970, on whether there were any practices of lending institutions that discriminated against particular classes or categories of students. *See id.*

74. *See generally* Pub. L. No. 89-329, 79 Stat. 1219. To appease the state and local governments, the Act prohibited federal control of education. *See* § 804, 79 Stat. at 1270.

75. *See* § 421, 79 Stat. at 1236.

76. *See* §§ 421–35. The states were to establish “guaranty agencies” with the federal money plus their own money to insure against default, death, or disability of the borrower and to pay the subsidized interest on federal direct loans to low-income students. *See* §§ 421, 428, 430; *see also* DELISLE, *supra* note 72, at 3. The Act excluded proprietary schools from receiving funds under the loan guarantee program. *See* 79 Stat. at 1248. Instead, they received funding under a smaller program that provided loans to vocational schools. This program was merged with the federal loan guarantee program under the 1968 reauthorization, giving proprietary schools much broader access to federally guaranteed loans. *See* Spiros Protopsaltis & Libby Masiuk, *Protecting Students and Taxpayers: Why the Trump Administration Should Heed History of Bipartisan Efforts*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 30, 2017), <https://www.cbpp.org/research/federal-budget/protecting-students-and-taxpayers> [<https://perma.cc/2A6K-GSAD>].

though the loans were to be repaid later with interest.⁷⁷ Guaranteed loans, on the other hand, did not post as current losses because the liability for the guarantee would not be realized until some years later and thus there was no immediate outflow of funds.⁷⁸ This meant that direct loans would be recorded as losses rather than loans, while guaranteed loans would not be recorded as liabilities at all, even though some would become liabilities later.⁷⁹ At the time, there was concern among economists that “the government was making financial commitments without accounting for the ultimate costs.”⁸⁰

The state guaranteed loan program did not work as anticipated, however, because some states refused to participate and others found that demands for loans far outpaced both the available capital funding and their insurance funds.⁸¹ In order to encourage lenders to participate in the program, Congress provided for the guarantee of up to 80% of losses suffered by states’ guaranty agencies.⁸² Thus, the federal government assumed an even greater role in funding higher education.⁸³ As an added incentive to private lenders and to keep student loan interest rates low, Congress later authorized the payment of a “special allowance” to lenders to compensate them for loss against increases in student loan interest rates.⁸⁴

77. See Clare McCann, *Fair Value Accounting*, EDCENTRAL, www.edcentral.org/encyclopedia/fair-value-accounting (last visited Oct. 28, 2019) (explaining the concept of “cash basis accounting”).

78. See DELISLE, *supra* note 72, at 4.

79. See *id.*

80. See *Student Loan History*, *supra* note 71.

81. See DELISLE, *supra* note 72, at 4.

82. See Higher Education Amendments Act of 1968, Pub. L. No. 90-575, 82 Stat. 1014 (1968); *Action on Higher Education Bills Deferred to 1968*, CQ ALMANAC (1967).

83. See DELISLE, *supra* note 72, at 4 (explaining this provision was a reinsurance policy to reimburse the states’ insurance funds against loss). This provision also meant that states would assume responsibility for 20% of the losses, relegating the state “guaranty agencies to a risk-sharing role rather than one in which they fully backed loans.” *Id.*

84. See generally Emergency Insured Student Loan Act of 1969, Pub. L. No. 91-95, 83 Stat. 141 (1969). The interest rates were set by the government, and in order to avoid doing the unpopular thing and raising the student loan rate when the market rate increased, the government would simply compensate the lenders to the extent of the difference between the student loan rate and the higher market rate. See DELISLE, *supra* note 72, at 4.

B. Accelerating the Government's Funding Role

1. *The Nixon Administration (1969–1974)*

The relative affluence and growth of the 1950s and 1960s devolved into a period of unrest, marked by distrust and dissatisfaction with the government over two contentious issues: the war in Vietnam and school busing to achieve racial equality in the schools.⁸⁵ Military spending and other requirements of the war effort, combined with domestic spending, had produced budget deficits that fueled inflation. There had been a prolonged period of stagflation (high inflation and unemployment combined with a sluggish economy) followed by a recession. This led to the economic crisis of the 1970s,⁸⁶ which caused Congress to question for the first time whether the unprecedented amounts being spent on education were worth the cost.⁸⁷

As a President, Richard Nixon has been vilified for his role in the Watergate scandal, but he had an ambitious education agenda that would further expand the federal role in education. Although the second reauthorization of the HEA in 1972 was weaker than the legislation Nixon initially proposed, it contained several significant

85. See e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5 (1971). While busing was the hot issue, there were also other contentious issues relating to education. One was de facto segregation in the North, a sore point among Southerners. See, e.g., *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 435–36 (1968). Another was that courts continued to struggle with the meaning of the term “equal education opportunities.” See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1241 (Cal. 1971) (discussing property taxes and equal education).

86. See *Vietnam War and the Economy*, HIST. CENT., www.historycentral.com/sixty/Economics/Vietnam.html [https://perma.cc/NLR8-MV2K] (last visited Oct. 28, 2019). The Vietnam War affected the U.S. economy in several ways. See *id.* First, the war effort produced a strain on the nation's production capacities, since factories that had been producing consumer goods were requisitioned to produce items for the military. See *id.* Funds were flowing overseas with few funds returning to the United States. See *id.* This created an inequality in the balance of payments, leading to a weakening of the dollar. See *id.* Second, government spending on the war effort combined with domestic spending was causing budget deficits that led to inflation. See *id.* Third, consumer confidence was low because of dissatisfaction with the government and unrest over the war. See *id.* Fourth, there was an increase in interest rates that restricted the available capital for both businesses and consumers. See *id.*

87. See *A Brief Synopsis*, *supra* note 20, at 24–26, 40–44 (resulting in the advent of federal mandates to document the effectiveness of federal education expenditures and academic achievement).

provisions.⁸⁸ First, it extended the guaranteed student loan program for four years, through June 30, 1975, and increased the amount of the available loan.⁸⁹ Second, as a further incentive for private lenders, it also created the Student Loan Marketing Association (Sallie Mae) as a government-sponsored enterprise to serve as a “secondary market and warehousing facility” for guaranteed student loans and to provide liquidity for those loans.⁹⁰ Third, it created the National Institute of Education and established a new category of low-interest loans to needy students, the Federal Direct Student Loan Program, in partnership with the schools.⁹¹ Although the funds for this program came directly from the U.S. Treasury, educational institutions also made capital contributions.⁹² Fourth, it provided loan forgiveness for those who chose to enter certain areas of public service,⁹³ and fifth, it

88. See generally Education Amendments Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972). Nixon had asked for an expansion of federal aid to students enrolled in post-secondary institutions so that eligible students would be able to receive enough federal assistance to “make up the difference between his college costs and what his family is able to contribute.” Richard Nixon, *Statement on Signing the Education Amendments Act of 1972*, AM. PRESIDENCY PROJECT (June 23, 1972), <https://www.presidency.ucsb.edu/documents/statement-signing-the-education-amendments-1972> [<https://perma.cc/L875-CTB2>] (last visited Oct. 28, 2019).

89. § 132. The available loan increased by \$1,000 from \$1,500 to \$2,500. § 132(a).

90. § 133 (adding new § 439 to the HEA). A government sponsored enterprise (GSE) is a hybrid between a government agency and a private company “established to enhance the flow of credit to specific sectors of the American economy.” See also *Government-Sponsored Enterprise Definition*, INVESTOPEEDIA, <https://www.investopedia.com/terms/g/gse.asp> (last visited Oct. 28, 2019) [<https://perma.cc/Y7GQ-CL3F>]. While GSE’s are not subsidized by the government, there is an “implicit guarantee” that the government will not allow such entities to fail or default on debt. *Id.* This gives GSEs significant advantages in the capital markets. See *id.*

91. See § 137, 86 Stat. at 272–77; § 301, 86 Stat. at 326–34 (amending Tit. IV of Pub. L. No. 90-247, 81 Stat. 783). The purpose of the Institute was to seek to improve education, including career education, in the United States through (A) helping to solve or to alleviate the problems of, and achieve the objectives of American education; (B) advancing the practice of education, as an art, science, and profession; (C) the strengthening of the scientific and technological foundations of education; and (D) building an effective educational research and development system. § 405(b)(2), 86 Stat. at 329.

92. 86 Stat. at 273–81 (adding new Part E to the HEA). The educational institutions were required to contribute one-ninth the amount of the federal contribution. § 463(a)(2)(B), 86 Stat. at 274.

93. § 465, 86 Stat. at 277–78. This included those teaching in elementary or secondary schools with a majority of low-income students, those teaching

established two new need-based grants, as well as remedial programs for disadvantaged students.⁹⁴

In retrospect, the two most significant aspects of the 1972 reauthorization were the decisions to provide loans to students, rather than support to educational institutions, and to authorize federal funds for proprietary (i.e., for-profit) schools.⁹⁵ There had been concern expressed over the authorization of funds for proprietary schools.⁹⁶ In a prescient remark, the Senate Health, Education, Labor, and Pensions Committee Report on the legislation expressed a reservation about allowing federal funding for such institutions for fear they might recruit students through “sophisticated advertising and unfulfillable promises” and that they might make misrepresentations about their quality of education.⁹⁷ But at that time, the number of students enrolled in such institutions was negligible,⁹⁸ so the concern was disregarded.

The higher education community urged Congress to enact “formula-based, enrollment-driven federal aid to institutions” instead of aid to students.⁹⁹ But instead, Congress decided the most effective way to remove barriers to education for lower-income students was

handicapped students, and those who had served in the military in dangerous areas. *Id.* It also provided grants for law school clinical programs. § 191.

94. 86 Stat. at 251–58. The two new grants were under the Incentive Grant Program and the Federal Supplemental Educational Opportunity Grant Program. *See* §§ 415A–415D; §§ 413A–413D. The Student Incentive grants were to be administered by the states, which also provided partial funding. §§ 415A–415D. The program provided for a one-time grant of up to \$1,500 to be awarded on the basis of substantial financial need to undergraduates enrolled on a full-time basis. § 415A. The Supplemental Educational Opportunity grants were to be awarded to those enrolled in undergraduate programs who demonstrated evidence of “academic or creative promise and capability of maintaining good standing in this course of study” plus exceptional need. § 413C. These were in addition to the basic Educational Opportunity grant. *See* §§ 413A–413D. The amount of the Supplemental grant was the lesser of \$1,500 or one-half of the total amount of financial aid awarded by the institution to the student. § 413B. The maximum amount of the Educational Opportunity grant (also referred to as the basic grant) in 1972 was \$1,400 for a full-time student, less the expected family contribution. § 411, 86 Stat. at 248–49.

95. *See* §1057(a), 86 Stat. at 320.

96. *See* S. REP. NO. 92-346, at 51 (1971).

97. *Id.* As a consequence of the reauthorization, the number of students enrolled in proprietary schools more than doubled between 1970 and 1975, while total college enrollment during this period increased only slightly over 31%. *See* NCES, *supra* note 70, at tbl.302.10.

98. *See id.* (explaining that despite the dramatic enrollment increase, only around 0.4% of students were enrolled in proprietary institutions in 1975 and this represented about 2% of all students enrolled in private institutions during this period).

99. Gladieux, *supra* note 5.

through aid to students, rather than to institutions.¹⁰⁰ This was a pivotal point in federal financing of higher education because it established student loans, rather than institutional support, as the centerpiece of federal aid for higher education.¹⁰¹

In 1973, the year after the HEA was reauthorized, there was an oil embargo. Although it lasted only a year, it had devastating effects on the economy, causing unemployment to reach its highest level since the Great Depression.¹⁰² Because of this economic downturn, states cut funding to higher education while schools were facing increased energy costs.¹⁰³ This forced schools to raise their tuition rates out of necessity.¹⁰⁴

100. *See id.* An underlying argument was that providing aid to students, rather than educational institutions, would be a means of ensuring higher quality education because students would “[vote] with their feet,” moving their aid to institutions that better met their needs, leaving the other institutions to flounder. *Id.* This theory was debunked later, but by then the die was cast. *See id.* According to Lawrence E. Gladieux,

[t]he notion that having students vote with their feet would somehow assure quality in the postsecondary education marketplace was a dubious proposition from the start. More than a quarter century later, it is clear that the marketplace rationale begged important questions of institutional quality and accountability, as well as consumer information, awareness, and protection.

Id.; Matthew B. Fuller, *A History of Financial Aid to Students*, 44 J. STUDENT FIN. AID 40, 54 (2014), <https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=1078&context=jsfa> (“[S]cholars have generally acknowledged that the 1972 reauthorization cemented the ‘basic charter of today’s federal student aid system’ with students as the intermediaries of funds between the federal government and institutions.”).

101. *See Fuller, supra* note 100, at 42–43.

102. *See* David B. Sicilia, *A Brief History of U.S. Unemployment*, WASH. POST (Nov. 5, 2011), www.washingtonpost.com/wp-srv/special/business/us-unemployment-rate-history [<https://perma.cc/UA5D-XZE8>] (explaining unemployment reached a record high of over 8% during the 1970s). The maximum marginal tax rate during the Nixon/Ford Administrations was 70%. TAX FOUND., *U.S. Federal Individual Income Tax Rates History, 1862-2013 (Nominal and Inflation Adjusted Brackets)* (Oct. 17, 2013), <https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets> [<https://perma.cc/CSE3-EXD4>].

103. *See* JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION, A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* 383 (4th ed. 2004).

104. *See id.* at 383–84.

2. *The Ford Administration (1974–1977)*

In 1974, Richard Nixon resigned from office in the wake of impeachment proceedings in the House and declining political support. At that time, there was growing concern over the predatory practices of proprietary schools and the increasing number of defaults on student loans, the majority of which were attributable to these schools.¹⁰⁵ Shortly after Gerald Ford took office to serve the remainder of Nixon's second term, Congress extended the GI Bill benefits to Vietnam veterans.¹⁰⁶ This Act prohibited federal funding to any institution that "utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation."¹⁰⁷ Shortly after the enactment of that legislation, the Department of Health, Education, and Welfare proposed new transparency regulations requiring vocational schools to disclose to prospective students the employment prospects in their fields of study and the projected salaries in those fields.¹⁰⁸ They also required these schools to provide a "fair and equitable refund" to students who decided not to attend after enrolling.¹⁰⁹

In 1976, there was a third reauthorization of the HEA, which extended the guaranteed student loan program through September 30, 1981.¹¹⁰ As an incentive to encourage states to establish student loan guarantee programs, the federal government undertook to guarantee

105. See David Whitman, *Vietnam Vets and a New Student Loan Program Bring New College Scams*, CENTURY FOUND. 4–7 (Feb. 13, 2017), <https://tcf.org/content/report/Vietnam-vets-new-student-loan-program-bring-new-college-scams>.

106. See generally Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub L. No. 93-508, 88 Stat. 1578 (describing assistance available to Vietnam veterans).

107. § 212, 88 Stat. at 1586 (amending 38 U.S.C. §1796).

108. See Whitman, *supra* note 105, at 11–12. These regulations also subjected to additional scrutiny any school that enrolled more than 60% of students who were reliant on federal loans or that had a 10% or greater default rate or a 20% or greater withdrawal rate. *Id.* at 12.

109. *Id.* at 11.

110. See Education Amendments Act of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2081 (1976) (amending § 424 of the Higher Education Act of 1965). This limitation applied to new loans. See § 127, 90 Stat. at 2103–04 (amending Part B of Tit. IV of the HEA). However, loans could continue to be issued until September 30, 1985, to enable students who had already obtained guaranteed loans to complete or continue their education. See § 127, 90 Stat. at 2103–04.

100% of the loans.¹¹¹ Perhaps to protect the fisc to some extent, or perhaps to require students to pay for their “free ride,” there was a new provision that limited the ability of students to discharge insured loans in bankruptcy.¹¹² Under this provision, student loans were not eligible for discharge until after five years of repayment or upon a showing of undue hardship.¹¹³

Later, in 1976, Congress enacted the Veterans’ Education and Employment Assistance Act, which provided that a school would be ineligible to receive funds under the GI Bill if more than 85% of the students at that school received financial aid from the school, the Veterans’ Administration, or any other federal source.¹¹⁴ Afterward, there was a decline in student loan default rates.¹¹⁵

3. *The Carter Administration (1977–1981)*

When Jimmy Carter took office in 1977, the country was in a period of economic stagflation that had lingered at the end of the Vietnam War.¹¹⁶ In addition, media attention was focused on a report that SAT scores had steadily declined over the past fourteen years.¹¹⁷ The combination of these factors caused the public to demand greater

111. See § 127, 90 Stat. at 2099.

112. See § 127, 90 Stat. at 2141.

113. See *id.* The term “undue hardship” was undefined under the legislation, and over the next ten to twelve years, courts struggled to define the term. § 127, 90 Stat. at 2141. The result was that discharging a student loan debt in bankruptcy involved a lengthy, expensive legal process with a difficult burden of proving undue hardship. See B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 91–92 (2002).

114. See Veterans’ Education and Employment Assistance Act of 1976, Pub. L. No. 94-502, § 205, 90 Stat. 2383, 2387 (1976). This provision was challenged as a violation of Due Process but was upheld by the U.S. Supreme Court in *Cleland v. National College of Business*, 435 U.S. 213, 221–22 (1978).

115. See Whitman, *supra* note 105, at 12.

116. See *A Brief Synopsis*, *supra* note 20, at 40.

117. See *id.* at 41 (stating although a panel of experts from the College Board theorized that the decline was attributable to a greater number of minority and female test-takers, this theory was later debunked). At the same time, others theorized that because of the growth of compensatory education in the 1960s as a substitute for racial integration, the average high school dropout rate had fallen and thus a greater number of low-achieving students remained in school. See *id.* This fact plus the redirection of resources to compensatory, bilingual, and special education and away from high-achieving, college-bound students was the real cause of the decline in SAT scores. See *id.*

accountability and efficiency in government spending.¹¹⁸ This led to state cuts in funding for education, producing a concomitant rise in tuition.¹¹⁹ Middle-income families, feeling the squeeze, began to complain that the federal government was neglecting them.¹²⁰ Also during this time, there were proposals for tuition tax credits.¹²¹ To address the concerns of the middle class and to quash the proposals for tax credits, the Carter Administration and congressional Democrats responded by enacting the Middle Income Student Assistance Act of 1978.¹²² This Act eliminated the income restrictions on guaranteed student loans, allowing any student, regardless of income level, to obtain them.¹²³ Thus, the federal focus shifted from lower-income students to middle-income students, resulting in a dramatic increase in the volume of student loans.¹²⁴

Also in 1978, Congress enacted the Bankruptcy Reform Act,¹²⁵ codifying into the Bankruptcy Code the provision enacted in 1976 that provided a five-year exception to discharge for guaranteed student

118. See *id.* at 40–41.

119. See *id.* at 44.

120. See Gladieux, *supra* note 5.

121. See *id.*

122. See generally Middle Income Student Assistance Act of 1978, Pub. L. No. 95-566, 92 Stat. 2402 (1978) (codified in scattered sections of 20 U.S.C. and 42 U.S.C.) (amending the Higher Education Act of 1965).

123. See generally 92 Stat. 2402 (explaining the Act also expanded eligibility for Educational Opportunity grants to allow an additional 1.5 million students from middle-income families to qualify). Under this expansion, families with incomes up to \$250,000 were eligible for the grants. In determining the amount of expected family contribution (EFC), the Act provided that no more than 10.5% of a family's discretionary income could be considered. § 2, 92 Stat. at 2402; Gerhard Peters & John T. Wooley, *Jimmy Carter: Educational Amendments of 1978 and the Middle Income Student Assistance Act Remarks at the Billing Signing Ceremony.*, AM. PRESIDENCY PROJECT (Nov. 1, 1978), www.presidency.ucsb.edu/ws/?pid=30087 [<https://perma.cc/X6HL-BLCT>].

124. See *Impact of Admin. 's Proposed Fiscal Year 1983 Budget on Student Fin. Aid & Higher Educ. Programs: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Labor H.R.*, 97th Cong. 2, 596–97 (1982) (statement of Alice M. Rivlin, Director). Ms. Rivlin noted,

Between 1978 and 1981, total available aid grew by 70 percent to \$14.7 billion. Almost half of all aid in 1981 was in the form of loans, up one-quarter from 1978. The growth of the GSL program also meant that roughly 20 percent of all aid in 1981 went to students from families with incomes over \$30,000, whereas little aid had gone to comparable students before 1978.

Id. at 597.

125. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549 (1978).

loans.¹²⁶ This exception applied only to government loans made by nonprofit schools.¹²⁷ The ostensible rationale for the exception was that it was necessary to ensure the viability of the student loan system.¹²⁸ But there are reports that this action was based on anecdotal evidence of students obtaining a “free” education by declaring bankruptcy without making any payments on their loans and without demonstrating undue hardship.¹²⁹ In 1977, however, only 0.3% of student loans had been discharged in bankruptcy,¹³⁰ certainly not enough to cause any concern over the viability of the student loan system. Given the small number of discharges, this concern could have been addressed better through financial counseling and litigation, rather than through legislation.¹³¹

Despite the complaints and controversies over funding for education that Carter faced, he was successful in establishing the Department of Education in 1979.¹³² The purpose of the new department was to focus the nation’s attention on education, make federal education programs more responsive and accountable, streamline the administration of federal aid to education, save tax dollars by eliminating current “bureaucratic layers,” and ensure that

126. See *supra* notes 112–113 and accompanying text. This was codified at 11 U.S.C. § 523(a)(8).

127. See § 523, 92 Stat. at 2591.

128. See Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229, 232 (2015).

129. See, e.g., *id.*; see also Rafael Pardo & Michelle R. Lacy, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 180 (2009). One source states that this change was in response to a “handful of doctors and lawyers who attempted to fraudulently file for bankruptcy after graduation.” Jennifer Wadia, *Student Loan Bankruptcy Reform*, STUDENT DEBT RELIEF, <https://www.studentdebtrelease.us/news/student-loan-bankruptcy-reform> [https://perma.cc/N7CX-3TPP] (last visited Oct. 28, 2019). Instead of applying laws then in effect to a handful of ostensible wrongdoers, Congress chose to deny bankruptcy protection to most student loan borrowers for a minimum of five years after graduation. See *id.*

130. See Steven Palmer, *The History of Student Loans and Bankruptcy Discharge* (Oct. 1, 2015), <https://www.linkedin.com/pulse/history-student-loans-bankruptcy-discharge-steven-palmer> [https://perma.cc/A3CY-NYQT].

131. See Timothy D. Naegele, *The Guaranteed Student Loan Program: Do Lenders’ Risks Exceed Their Rewards?*, 34 HASTINGS L.J. 599, 602 (1983) (explaining that although Congress may have been too quick to codify the exception to discharge for student loans, the depressed economy of the late 1970s led to a much higher than anticipated student loan default rate).

132. See Department of Education Organization Act of 1979, Pub. L. No. 96-88, §§ 102–103, 93 Stat. 669 (1979). The following year, the Department was elevated to a cabinet level department.

local communities retained control of their schools and educational programs.¹³³

But during the Carter Administration, the restrictions on proprietary schools were greatly weakened, allowing them to again proliferate amidst allegations of fraud, misrepresentation, and deception. The Middle Income Student Assistance Act provided that proprietary schools could admit students without a high school diploma and those students would remain eligible for federal student loans.¹³⁴ The following year, a federal court struck down the 1974 regulation requiring proprietary/vocational schools to refrain from engaging in unfair and abusive practices.¹³⁵ The policy of the Ford Administration, to subject to additional scrutiny schools enrolling more than 60% of students with federal loans, those with a 10% or greater default rate, or those with a 20% or greater withdrawal rate,¹³⁶ was eliminated under new Department of Education guidelines.¹³⁷ From 1979 to 1980, enrollment in proprietary schools experienced one of the largest jumps in their history because of the proliferation in accreditation of these schools.¹³⁸

133. *Jimmy Carter: Department of Education Organization Act Statement on Signing S. 210 into Law.*, AM. PRESIDENCY PROJECT (Oct. 17, 1979), <http://www.presidency.ucsb.edu/ws/index.php?pid=31543> [<https://perma.cc/G6KJ-ADVG>].

134. *See generally* Middle Income Student Assistance Act of 1978, Pub. L. No. 95-566, 92 Stat. 2402 (1978) (allowing proprietary schools to admit students without a high school diploma and allowing those students to remain eligible for federal student loans). At this time, the Democrats controlled both houses of Congress, as well as the White House. Ironically, they were staunchly in favor of proprietary schools because these schools offered educational opportunities to nontraditional and lower-income students; Republicans were staunchly opposed to such schools. *See* David Whitman, *The Closing of the Republican Mind on For-Profit Colleges*, ATLANTIC (Mar. 27, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-closing-of-the-republican-mind-on-for-profit-colleges/520803> [<https://perma.cc/BX2R-4KNC>]. Later, these parties would switch views. *See id.*

135. *See supra* notes 105–108 and accompanying text; *see also* Katherine Gibbs Sch. v. FTC, 612 F.2d 658, 658–59 (2d Cir. 1979) (striking regulation on grounds of lack of specificity).

136. *See* discussion *supra* note 108; *see* David Whitman, *The Reagan Administration's Campaign to Rein in Predatory For-Profit Colleges*, CENTURY FOUND. (Feb. 13, 2017), <https://www.tcf.org/content/report/reagan-administrations-campaign-rein-predatory-profit-colleges>.

137. *Id.*

138. *See* NCES, *supra* note 70, at 403 (showing a 56.56% increase in enrollment).

In 1980, the HEA was again reauthorized.¹³⁹ This legislation provided new loans to parents of undergraduate students called PLUS loans (Parent Loans for Undergraduate Students)¹⁴⁰ and provided a six-month grace period after graduation before commencement of repayment of guaranteed student loans.¹⁴¹ An important, although “little-noticed,” provision of this reauthorization tied federal loan subsidies for lenders to Treasury bill rates, changing the previous system in which rates were set by government officials, subject to a cap.¹⁴² This increased the amount that lenders could receive on guaranteed student loans and caused an explosion in lender participation and consequently in student loan volume.¹⁴³

This expansion in the availability of student loans led to a stronger political base, which probably protected the anti-poverty education programs from what could have been more severe cutbacks during the Reagan era.¹⁴⁴ But there was also an average increase of 31% in tuition from 1977 to 1981.¹⁴⁵

C. Changing Direction in Federal Funding

1. *The Reagan Administration (1981–1989)*

Ronald Reagan ran for President on a platform of abolishing the Department of Education, calling it “President Carter’s new bureaucratic boondoggle.”¹⁴⁶ As part of his “New Federalism” agenda to reduce the size of the government by “reduc[ing] the federal budget

139. See generally Education Amendments Act of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (1980) (reauthorizing the HEA).

140. See § 419, 94 Stat. at 1424–25.

141. See § 444(c), 94 Stat. at 1441 (amending § 464(c)(2)(A) of the HEA).

142. See § 420(a), 94 Stat. at 1425–26 (amending § 438 of the HEA); see also ROWENA OLEGARIO, *THE ENGINE OF ENTERPRISE: CREDIT IN AMERICA 198–99* (2016).

143. See OLEGARIO, *supra* note 142, at 199.

144. See *id.*

145. NCES, *supra* note 70, at 579–81. This was an increase of 22% at public in-state institutions and 33% at private institutions. *Id.*

146. Neal McCluskey, *Cutting Federal Aid for K-12 Education, Downsizing the Federal Government* (Apr. 21, 2016), <https://www.downsizinggovernment.org/education/k-12-education-subsidies>; see also Valerie Strauss, *Ronald Reagan’s Impact on Education Today*, WASH. POST (Feb. 6, 2011), <http://www.voices.washingtonpost.com/answer-sheet/school/school-turnaroundsreform/how-ronald-reagan-affected-tod.html>. Reagan’s other ideas for reforming education included mandatory school prayer and tuition tax credits for private schools. *Id.*

deficit, . . . attack[ing] inflation, . . . cut[ting] taxes,¹⁴⁷ and . . . decentraliz[ing] as well as deregulat[ing] a wide range of federal social welfare programs,”¹⁴⁸ Reagan cut funding to education in his first year in office by more than 15% (which amounted to around \$1 billion).¹⁴⁹ He also oversaw the Postsecondary Student Assistance Amendments Act of 1981,¹⁵⁰ which rolled back some of the strides in higher education President Carter had made. This Act implemented a student loan origination fee, repealed the six-month loan repayment grace period, increased the annual repayment amount, repealed the increased guaranteed loan amounts for independent students, and increased the PLUS loan interest rate, although it expanded eligibility under the PLUS program to include independent undergraduate students and graduate/professional students.¹⁵¹

The following year, Congress enacted the Student Financial Assistance Technical Amendments Act of 1982,¹⁵² which again amended the Higher Education Act of 1965. This Act restricted the amount of the Pell Grant that a student could receive in the academic year 1983–1984; revised the need-based criteria for supplemental educational opportunity grants, work-study grants, and direct loans;

147. Reagan wasted no time implementing his supply-side economics to stimulate the economy. See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 101, 95 Stat. 172, 176 (1981). He lowered the income tax rates from a maximum of 70% to 50%, where they remained for the next six years until he lowered them again in 1987 to a maximum rate of 38.5% in a complete overhaul of the tax code. Tax Reform Act of 1986, Pub. L. No. 99-514, § 101(h)(2), 100 Stat. 2098–99 (1986). At the beginning of 1983, unemployment reached a high of 10.8%, the highest since the Great Depression, but it had fallen to half that by the time Reagan left office. Sicilia, *supra* note 102.

148. *A Brief Synopsis*, *supra* note 20, at 45. At that time, the Democrats controlled the House, but the Republicans controlled the Senate.

149. *Id.* He argued that many of the programs had not warranted their expense and that students should be paying a larger share of their own costs. See Gene I. Maeroff, *After 20 Years, Educational Programs Are a Solid Legacy of Great Society*, N.Y. TIMES (Sept. 30, 1985), <https://www.nytimes.com/1985/09/30/us/after-20-years-educational-programs-are-a-solid-legacy-of-great-society.html> [https://perma.cc/39YZ-PJG8].

150. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 531–40, 95 Stat. 357 (1981). This was part of Title V of the Omnibus Budget Reconciliation Act of 1981. See §§ 531–40.

151. See §§ 534–37, 95 Stat. at 454–57.

152. See generally Student Financial Assistance Technical Amendments Act of 1982, Pub. L. No. 97-301, 96 Stat. 1400 (1982) (amending the HEA).

and terminated the authority of Sallie Mae to consolidate student loans as of August 1, 1983.¹⁵³

By 1984, there was growing concern over the student loan default rate.¹⁵⁴ So that year, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act, which included private student loans within the exception to bankruptcy discharge.¹⁵⁵ Two years later, there was a more student-friendly reauthorization of the HEA.¹⁵⁶ Under this legislation, the Supplemental Loan to Students (SLS) program was created to extend loans to graduate, professional, and independent students;¹⁵⁷ authorize student loan consolidation;¹⁵⁸ and increase the loan limits for all guaranteed student loans.¹⁵⁹ Also under this legislation, National Direct Student Loans were renamed Perkins Loans.¹⁶⁰ But amid continuing concern over the large number of defaults, the legislation provided that any student in default would be ineligible for any subsequent government-guaranteed student loan.¹⁶¹

153. See § 2, 96 Stat. at 1400; §§ 10–11, 96 Stat. at 1403–04; § 14, 96 Stat. at 1405.

154. See *Student Loan Default Rate Soars in '85: Officials Forecast \$1-Billion Problem, Worse Years to Come*, L.A. TIMES (Aug. 29, 1985) [hereinafter *Student Loan Default Rate Soars*], <https://www.articles.latimes.com/1985-08-29/news/mn-237251default-rate> [<https://perma.cc/J6JA-3KAL>].

155. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 456, 98 Stat. 376 (1984); see also *supra* notes 112–113, 125–126 and accompanying texts.

156. See generally Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986) (reauthorizing the HEA). This reauthorization bill was sponsored by Senator Robert Stafford of Vermont.

157. See § 428A, 100 Stat. at 1384–86.

158. See § 428C, 100 Stat. at 1388–91. This applied to Federal Family Education Loans (FFEL) under the Act.

159. See § 425, 100 Stat. at 1359. The limit was increased from \$2,500 for all years of undergraduate study and \$5,000 for graduate students, to \$2,625 for freshmen and sophomores, \$4,000 for juniors and seniors, and \$7,500 for graduate students. § 425, 100 Stat. at 1359. In this 99th Congress, the Democrats were in the majority in the House, but the Republicans were in the majority in the Senate. See HISTORY, ART & ARCHIVES, *Congressional Profiles*, U.S. HOUSE OF REPS., <https://history.house.gov/Congressional-Overview/Profiles/99th> [<https://perma.cc/TCN2-CXY4>] (last visited Oct. 28, 2019).

160. See § 461(a), 100 Stat. at 1439. The following year, in 1987, the guaranteed student loan program was renamed the Stafford Loan Program in honor of Vermont Democrat Robert Stafford, a long-time supporter of education. See Higher Education Act of 1965, Pub. L. No. 100-369, § 8, 102 Stat. 835, 837.

161. See Pub. L. No. 99-498, § 484(a), 100 Stat. 1480.

Secretary of Education William Bennett had been sounding the alarm for some time over the rising student loan default rates.¹⁶² In late 1987, he proposed regulations to terminate federal funding of schools with a default rate greater than 50% and to investigate schools with a default rate greater than 20% by the end of 1990.¹⁶³ The Democrats, along with representatives of proprietary schools, objected that the regulations disproportionately affected proprietary schools, which in turn enrolled many underprivileged, lower-income students.¹⁶⁴ But some leading Democrats, such as Senator Edward M. Kennedy, changed their views after the release of a Department of Education (DOE) study documenting fraud, misrepresentation, and student loan abuses at proprietary schools.¹⁶⁵ However, the majority of Democrats remained staunchly opposed to the restrictions on proprietary schools,¹⁶⁶ and with a presidential election looming, Bennett's proposal was never implemented.

By the end of Reagan's term in office, not only had the issue of student loan defaults not been adequately addressed, but the cutbacks in education funding had taken their toll on higher education. Over Reagan's two terms, college tuition and fees increased by approximately 82%.¹⁶⁷

2. *The George H.W. Bush Administration (1989–1993)*

Bush began his presidency by proclaiming himself the "education president."¹⁶⁸ But during his time in office, the Democrats controlled both houses of Congress, and Bush found it difficult to overcome the political and ideological differences. Thus, his major education initiatives were never enacted.

162. In 1985, approximately one-third of federal funding for the guaranteed student loan program went toward servicing defaults. It was projected that by 1987 almost half of the funding would go toward paying the defaults. See Whitman, *supra* note 105.

163. *Id.*

164. See *id.* The Democrats accused the Republicans of having "their heads buried in the sand." *Id.*

165. See *id.* at 4.

166. See *id.* at 5; see discussion *supra* note 134.

167. See NCES, *supra* note 70, at 579. This affected student enrollment because while general enrollment in degree-granting institutions increased a little over 9% during Reagan's two terms in office, the percentage of students attending college part-time increased only 1% and enrollment in two-year programs increased only 0.5%. *Id.* at 403. Students who were likely to have attended part-time or enrolled in two-year programs were also likely to have been lower-income students.

168. See *A Brief Synopsis*, *supra* note 20, at 54.

The most momentous policy changes in federal funding for higher education during the Bush Administration occurred during 1990 and 1992. In 1990, there was a change in the federal budget rules accounting for student loans that addressed the concern expressed by economists in the 1960s.¹⁶⁹ No longer would outstanding student loans be recorded as deferred liabilities. Instead, by 1992, all government loan programs, whether guaranteed or direct, would be required to account for their full long-term expenses and income with a “subsidy cost” that would reflect the amount of money the government would need to cover the true cost of the loans.¹⁷⁰

This put direct loans and guaranteed loans on a more equal footing, which shifted the focus of congressional policy discussions directly to the cost of the loans. Studies showed that direct loans would cost the government far less than guaranteed loans and would be easier to administer.¹⁷¹

The year 1990 also proved to be an inauspicious one for proprietary schools. Their student loan default rates reached an all-time high of 41%, and there was widespread media coverage of fraud and abuse at these schools, as well as reports of school closures that left hapless students stranded and taxpayers stuck with the bill.¹⁷² To compound these problems, the largest guarantor of student loans, the Higher Education Assistance Foundation, suddenly collapsed under the weight of soaring defaults.¹⁷³ The following year, the Senate

169. See *supra* notes 77–80 and accompanying text.

170. See discussion *infra* notes 52937–542 and accompanying text. See generally Federal Credit Reform Act of 1990, Pub L. No. 101-508, 104 Stat. 1388.

171. See Deborah Lucas & Damien Moore, *Guaranteed Versus Direct Lending: The Case of Student Loans*, NAT’L. BUREAU OF ECON. RES. (Feb. 2010). It was estimated that direct loans would save the government around \$2 billion a year because the government would no longer pay subsidies to lenders and administration fees to state guaranty agencies. See DELISLE, *supra* note 72, at 7–9. Colleges also were finding the guaranteed loan program cumbersome because they were having to deal with private lenders, guaranty agencies and the Department of Education. See *id.*

172. See generally David Whitman, *When President George H. W. Bush “Cracked Down” on Abuses at For-Profit Colleges*, CENTURY FOUND. (Mar. 9, 2017), <https://tcf.org/content/report/president-george-h-w-bush-cracked-abuses-profit-colleges>. Although the Bush Administration proposed “teachout” regulations to allow students to complete their studies in the wake of school closures, these regulations were never finalized. See *id.* In fact, student loan defaults in general reached an all-time high of 22.4% in 1990. U.S. DEP’T OF EDUC., *FY 2011 2-Year National Student Loan Default Rates*, FED. STUDENT AID, <https://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> [<https://perma.cc/7FTG-FJQB>] (last visited Oct. 28, 2019).

173. See Whitman, *supra* note 172, at 6. This cost taxpayers \$212 million. *Id.*

Subcommittee on Investigations held bipartisan hearings on problems relating to the guaranteed student loan program, in which multiple witnesses testified to abuses and fraud at proprietary schools.¹⁷⁴ The result was a crackdown on these schools under the Omnibus Budget Reconciliation Act of 1990.¹⁷⁵ This Act provided that any school with a cohort default rate equal to or greater than 35% in 1991 and 1992 would be ineligible for federal funds.¹⁷⁶ Thereafter, the cohort percentage threshold would be reduced to 30%.¹⁷⁷ The Act further provided that any student admitted to a proprietary school without a high school diploma would be ineligible for a student loan unless that student passed an independently administered examination.¹⁷⁸

In 1992, there was another reauthorization of the HEA,¹⁷⁹ sponsored by Senator Claiborne Pell. In the discussions leading up to the enactment, some members of Congress urged a better balance between grants and loans by increasing the amount appropriated to grants and reducing reliance on student loans.¹⁸⁰ However, the reauthorization drifted in the opposite direction. This Act created a direct loan pilot program,¹⁸¹ which made it easier for students to obtain loans. But at the same time, Congress also made it easier for lenders to collect on those loans by eliminating the statute of limitations on collection of federal student loans, thus putting them on a par with

174. See ABUSES IN FEDERAL STUDENT AID PROGRAMS, S. REP. NO. 102-58, at 2 (1991).

175. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

176. § 3004. A cohort default rate is the rate of students at a particular institution who default in a given year on their federal student loans. See Michael Itzkowitz, *Why the Cohort Default Rate Is Insufficient*, THIRD WAY (Nov. 7, 2017), <https://www.thirdway.org/report/why-the-cohort-default-rate-is-insufficient> [<https://perma.cc/B5DV-76ZW>]. It has been argued that this measure of eligibility (or continued eligibility) for federal funds is inadequate. See *id.*

177. § 3004.

178. § 3005.

179. See generally Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (reauthorizing the HEA). This Act contained some new, innovative programs, such as grants to college students who tutored secondary school students, particularly in predominately low-income communities; grants to “Hispanic-serving institutions,” defined as those institutions with an enrollment of at least 60% full-time Hispanic students; Presidential Access scholarships for low-income students who demonstrated academic achievement; and a national student savings program to encourage families to save for their children’s education. §§ 316, 406A, 106 Stat. at 473, 497. In addition, the Act extended and expanded the Pell Grant Program. § 401, 106 Stat. at 479–82.

180. See Gladieux, *supra* note 5.

181. See § 452, 106 Stat. at 569–76 (amending Part D of Tit. IV of the HEA).

fraud and further reflecting a congressional enmity toward student borrowers.¹⁸² The 1992 reauthorization also eliminated PLUS loan limits,¹⁸³ introduced new unsubsidized Stafford loans unrestricted by need,¹⁸⁴ and decreased the expected family contribution for need-based aid,¹⁸⁵ thus increasing the eligibility of lower-income students.

But there was no corresponding increase in funding to support the expansion in eligibility.¹⁸⁶ In the two years following the 1992 reauthorization, student loan volume increased by 50%.¹⁸⁷ This resulted in a marked shift in federal focus from lower-income students to middle-income students but with fewer available aid dollars per student.¹⁸⁸

As part of a “Program Integrity Triad,” aimed primarily at proprietary schools, the 1992 reauthorization of the HEA created a new state postsecondary review program in partnership with the states.¹⁸⁹ Under this program, each state would designate its own postsecondary review entity (SPRE) to conduct reviews of institutions that met certain requirements, such as a student loan default rate of 25% or greater, or a default rate of 20% or greater at institutions where more than two-thirds of the students received federal aid or where two-thirds or more of the institution’s expenditures were derived from federal funds.¹⁹⁰ These reviews were to be funded by the federal government.¹⁹¹ Upon review, the SPREs were to consider several factors, including the relationship of the courses or programs to useful employment in the state and the relationship of the school’s tuition and fees to the remuneration that students could reasonably expect to receive.¹⁹² The program was delayed, however, because of strong criticism by education administrators.¹⁹³ In an effort to prevent fraud

182. See Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, § 3, 106 Stat. 123, 124 (1991).

183. See § 418, 106 Stat. at 531–32 (amending § 428B of the HEA).

184. See § 422, 106 Stat. at 535–36 (adding new § 428H to HEA).

185. See §§ 473–77, 106 Stat. at 586–602 (amending Part F of Title IV of the HEA).

186. See *id.*

187. See Jacqueline E. King, *Federal Student Loan Debt: 1993 to 2004*, AM. COUNCIL ON EDUC. ISSUE BRIEF, 1 (June 2005).

188. See *id.*

189. Higher Education Amendments Act of 1992, Pub. L. No. 102-325, § 494C, 106 Stat. 638 (1992) (adding new subsection H, § 494C(b)).

190. § 494C, 106 Stat. at 638.

191. See § 494B, 106 Stat. at 637 (adding new § 494B).

192. See § 494C, 106 Stat. at 639 (adding new § 494C(d)).

193. See Gladieux, *supra* note 5; see also Thomas Harnisch et al., *State-Federal Partnerships in Postsecondary Education: Enhancing State Authorization:*

and abuse at proprietary schools, the 1992 Act also provided an “85-15” rule¹⁹⁴ under which proprietary institutions were required to derive at least 15% of their revenues from sources other than federal student loans in order to become or remain eligible to receive federal funds.¹⁹⁵ This was probably the last time there was a truly bipartisan effort to curb abuses at proprietary institutions.

During most of Bush’s presidency, the economy was lackluster,¹⁹⁶ although federal spending on education increased by 25%.¹⁹⁷ But during this period, college tuition increased overall by nearly 20%.¹⁹⁸ Not surprisingly, there was a widening of the enrollment gap between lower-income and higher-income students.¹⁹⁹ There was also increasing competition between traditional schools and proprietary schools for federal student aid dollars.²⁰⁰ It was suggested that Congress might establish separate funding for the two types of schools, but that was vigorously opposed by proprietary school associations, as well as by key Democratic committee members in the

The Need for Action by States as Stewards of Higher Education Performance, EDUC. COMM’N OF THE STATES 7–8 (2016). Although the program originally had been directed toward proprietary institutions, the bill was amended to extend this oversight to all educational institutions. *See id.* This resulted in strong pushback on the legislation, primarily from the private nonprofit sector, because it gave states broad authority over the administration of these institutions. *See id.* at 8.

194. *See* Higher Education Amendment of 1992, Pub. L. No. 102-325, § 481(d), 106 Stat. 611 (1992) (amending 20 U.S.C. § 1088); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3005, 104 Stat. 1388, 1388-27–28 (1990). Similar language was found in 38 U.S.C. § 3680A(d)(1) (using language under the Veterans’ Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320 (1992) and under the Veterans’ Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 667, §226 (1952)).

195. § 481(d), 106 Stat. at 611.

196. There was a recession from 1990 to 1991, in which unemployment remained stagnant. *See* Sicilia, *supra* note 102.

197. *See A Brief Synopsis*, *supra* note 20, at 64. “In unadjusted dollars, federal aid to education had increased from \$5.3 billion in 1965 to \$23.3 billion in 1975 to \$40.0 billion in 1985 to \$71.7 billion in 1995.” *Id.*

198. *See* NCES, *supra* note 70, at 579. The Higher Education Amendments Act of 1992 provided for the establishment of a national commission to study the costs of higher education. *See* §1441, 106 Stat. at 827–831.

199. *See* NCES, *supra* note 70, at 395. In 1989, 48.1% of low-income recent high-school graduates enrolled in college, compared to 55.4% of middle-income graduates and 70.7% of graduates from high-income families. *Id.* In the fall of 1992, 40.9% of low-income recent graduates enrolled in college, compared to 57.0% of middle-income students and 79.0% of high-income graduates. *Id.* However, the fall of 1993 marked the first time that more than 50% of low-income recent high-school graduates enrolled in college. *Id.*

200. *See* Whitman, *supra* note 172, at 12.

House and Senate.²⁰¹ Afterward, enrollment in proprietary institutions slowed, so that by the end of Bush's term in office, it had increased only 0.37%.²⁰²

3. *The Clinton Administration (1993–2001)*

By 1992, when Clinton was elected President, the effects of the Reagan-era cuts in federal education spending were evident. Although college enrollment had been steadily increasing since the 1950s, the high-school dropout rate among sixteen- to twenty-four-year-old students in 1990 was slightly over 12%,²⁰³ with a higher rate among African Americans, Hispanics, and Native American, Alaska Natives.²⁰⁴ Test scores were falling, curricula were weak, and standards were low.²⁰⁵ Less than 80% of the nation's most economically disadvantaged schools received Title I funds.²⁰⁶ There was grossly inadequate investment in technology²⁰⁷ and in recruitment and training of teachers.²⁰⁸ Class sizes were large and buildings were crumbling.²⁰⁹ The costs of higher education had spiraled, and less than half of low-income high-school graduates continued on to college.²¹⁰

201. *See id.*

202. NCES, *supra* note 70, at 403. During Reagan's two terms in office, enrollment in proprietary schools increased over 25%, although these schools enrolled only 1.5% of total student enrollment. *Id.* Interestingly, from 1989 to 1990, proprietary enrollment dropped 0.7%, while from 1990 to 1992, it increased 0.7%. *Id.*

203. U.S. Dep't of Educ., *The Condition of Education 2012*, INSTITUTE OF EDUC. SCIS. 82 (2012).

204. *See id.* The rate was highest among Hispanics (32%) and then Blacks (13%). The lowest dropout rate was among Asian/Pacific Islanders. *Id.*

205. *See The Clinton Presidency: Expanding Education Opportunity*, WHITE HOUSE, <https://clintonwhitehouse5.archives.gov/WH/Accomplishments/eightyears-05.html> [<https://perma.cc/94DH-RD9T>] (last visited Oct. 28, 2019) (explaining that in 1990, only 38% of those who graduated from high school had taken a core curriculum of four years of English and three years each of math, science, and social studies).

206. *Id.* Title I funds were created to aid schools with the highest poverty rates. *See id.*

207. *See id.* Only the most affluent schools had access to computers. *See id.* In 1993, approximately 3% of classrooms had internet-connected computers. *Id.* By 1994, only 35% of public schools had such access. *Id.*

208. *Id.* (explaining that in 1992, fewer than 80% of English and Math teachers had a college major or minor in their teaching field and in 1995 only 282 teachers nationwide were National Board certified).

209. *See id.*

210. *Id.* In 1993, for the first time, enrollment by recent high school graduates in the lower income bracket reached 50%. NCES, *supra* note 70, at tbl.302.30.

Clinton's presidential campaign against Bush focused on a stronger federal role in education, and once elected he set out to deliver on that promise. During his first term, he focused chiefly on primary and secondary education. But in 1993, Congress enacted the Student Loan Reform Act,²¹¹ which expanded the 1992 direct loan pilot program and replaced the guaranteed Federal Family Education Loans (FFEL) with direct loans made by the federal government through the Department of Education.²¹² Studies showed that the FFEL loans benefitted private lenders at the expense of students and that direct loans were easier for schools to administer and much cheaper for students and taxpayers.²¹³ This Act also reduced both borrower interest rates and the loan origination fee and added flexible repayment plans with income-contingent payments spread over a period of twenty-five years.²¹⁴

In 1994, the Republicans won control of both houses of Congress for the first time in forty years. Private lenders, many of whom had contributed to Republican campaigns, began to complain loudly about the direct loan program.²¹⁵ The new congressional leadership vowed

However, the enrollment rate thereafter dropped below 50%, and for the next three years the average enrollment rate by low-income students was around 43%. *Id.*

211. See Omnibus Budget Reconciliation Act of 1993, Pub L. No. 103-66, § 4011, 107 Stat. 312, 341 (1993).

212. § 4041.

213. See Lucas & Moore, *supra* note 171. Under the Bush pilot program, 5% of schools would participate in direct lending. Clinton's plan extended that to 60% of schools over a five-year period. *Id.* The government paid substantial amounts to private lenders for interest subsidies and costs attributable to defaults. See *id.* It also paid substantial amounts to state and nonprofit guaranty agencies for a variety of services, including counseling to schools, students, and lenders. Students usually paid a loan origination fee on private loans, plus the interest rates on those loans were much higher than on government sponsored loans. *Id.*; see U.S. Dep't of Educ., FISCAL YEAR 2011 BUDGET REQUEST, STUDENT LOANS OVERVIEW, at T-4.

214. See §§ 4043, 4101-02. The Act directed that at least 60% of federal student loans would be transformed into direct loans over a five-year period. § 4021. However, income-contingent repayments applied only to government loans. See Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 33 (2007). If a student borrowed from a private lender, the student would be required to make both income-contingent payments to the government and non-income-contingent payments to the private lender. See *id.*

215. See, e.g., Joe Belew, *New Direct Student Loan Program Can't Live Up to Its Claims*, N.Y. TIMES (Sept. 25, 1994), www.nytimes.com/1994/09/25/opinion/1-new-direct-student-loan-program-can-t-live-up-to-its-claims-350346.html?mcubz=1 [<https://perma.cc/U4KN-BUS2>] (referencing an opinion by the President of the Consumer Bankers' Association); see also Matthew Spalding, *Time to End Costly*

to eliminate the program but found this to be more difficult than anticipated because hundreds of colleges were then participating, and they had embraced the less cumbersome process of direct lending.²¹⁶ So instead, the Republicans attacked the legislation by criticizing the administration of the program.²¹⁷ This led to an interdiction against the DOE to prevent it from encouraging or requiring schools to participate in the program.²¹⁸ The result was that the DOE was effectively muzzled while guaranteed lenders were allowed to use their substantial resources to lure colleges, sometimes by unscrupulous means, into the FFEL program.²¹⁹ Consequently, the direct loan program began to wither.

In 1996, Sallie Mae was granted permission to privatize²²⁰ to allow it to become more competitive in a changing student loan market and economic environment.²²¹ Because Sallie Mae was no longer constrained by its narrowly defined charter, after its reorganization the amount of federally insured student loans more than doubled over the

Direct Student Loans, HERITAGE FOUND. (Sept. 20, 1995), www.heritage.org/node/20706/print-display [<https://perma.cc/XE46-NK3V>].

216. See *Education Policy: Student Loan History*, NEW AMERICA, <https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history> (last visited Dec. 4, 2019).

217. See Spalding, *supra* note 215, at 4.

218. See DELISLE, *supra* note 72, at 8.

219. See Megan Barnett, Julian E. Barnes & Danielle Knight, *Big Money on Campus: How Taxpayers Are Getting Scammed by Student Loans*, U.S. NEWS & WORLD REP. (Oct. 27, 2003), <http://ire.org/resource-center/stories/20900/4>. The FFEL program was the guaranty program that originated under the HEA in 1965, originally intended to be a partnership between the federal and state governments. See *supra* notes 75–76 and accompanying text. Later, it included Stafford loans, both subsidized and unsubsidized, PLUS loans, and consolidated loans. Direct loans are issued under the William D. Ford Direct Loan Program. See *Direct Loans vs. the FFEL Program*, FINAID, www.finaid.org/loans/dl-vs-ffel.phtml [<https://perma.cc/KQ3K-KCPW>] (last visited Oct. 28, 2019).

220. See Student Loan Marketing Association Reorganization Act of 1996, Pub. L. No. 104-208, Tit. VI, 110 Stat. 3009, 3009–275. Although the legislation was enacted in 1996, Sallie Mae did not become a private company until 2004 because of the complexities of relinquishing its status as a government sponsored enterprise. See U.S. DEP'T OF TREASURY, LESSONS LEARNED FROM THE PRIVATIZATION OF SALLIE MAE 10–12 (2006).

221. See Michael J. Lea, *Privatizing a Government Sponsored Enterprise: Lessons from the Sallie Mae Experience*, NETWORKS FIN. INST., Apr. 2006, at 2–5. While the decline in Sallie Mae's market shares attributable to the direct loan program was the principal reason for the privatization, Lea identifies other reasons as well. See *generally id.* (identifying reasons for Sallie Mae's privatization).

next ten years.²²² At the same time, the Debt Collection Improvement Act of 1996²²³ provided that Social Security benefits could be offset to repay defaulted federal education loans, both direct and guaranteed.²²⁴

In the period from 1993 to 1997, during Clinton's first term in office, college tuition increased over 9%²²⁵ and, not surprisingly, enrollment during this period was almost flat.²²⁶ So during his second term, Clinton sought to shift funding from direct support through grants, loans, and work-study assistance to indirect funding through the tax code.²²⁷ Portrayed as a tax cut, Republicans rallied around the shift, and the Taxpayer Relief Act of 1997²²⁸ was passed with bipartisan support.²²⁹ This Act added five new tax incentives²³⁰ and

222. *Id.* at 8. The amount invested in the government insured student loan market went from \$24 billion in federal fiscal year (FFY) 1994 to \$52 billion in FFY 2003. *Id.*

223. *See* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321-358.

224. § 31001, 110 Stat. at 1321-60.

225. *See* NCES, *supra* note 70, at tbl.330.10.

226. *Id.* The average annual increase in enrollment during Clinton's first term was only 0.465%. *Id.*

227. There were, however, other education acts passed during Clinton's second term. *See* Carl D. Perkins Vocational and Technical Education Act of 1984, Pub. L. No. 98-524, 98 Stat. 2435, 2437 (1984) (providing federal funding at the secondary and post-secondary levels to promote vocational education); *see also* Higher Education Act of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1581-82 (1998) (addressing Pell grants, the FFEL Program, federal work-study programs, the William D. Ford Federal Direct Loan program, Perkins loans, and need analysis).

228. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1998).

229. *See* Marc J. Gerson, *Technically Speaking: The Art of Tax Technical Corrections*, TAX NOTES 927, 927, 932 (Mar. 5, 2007) (noting this Act was passed at the eleventh hour in August 1997, shortly before Congress was to recess.)

230. § 1. The new incentives were the Hope and Lifetime Learning credits under I.R.C. section 25A; a deduction for interest paid on student loans under new I.R.C. section 221; penalty-free withdrawals from IRAs for purposes of education, I.R.C. section 72(t); and savings for education trust accounts under I.R.C. section 530. §§ 201-03, 213. The Hope and Lifetime Learning credits were estimated to cost \$31.6 billion over five years and \$76 billion over ten years. Patrick Fleener, *Bottom Line on the Taxpayer Relief Act of 1997*, TAX FOUND.: SPECIAL REP., Sept. 1997, at 1, 2. The total cost of the new education savings accounts and the expanded IRAs was estimated to be \$7.1 billion for the first five years and \$30.6 billion over the next five years. *Brief Description of and Comments on the 1997 Tax Act*, CITIZENS FOR TAX JUST. (Aug. 18, 1997), <https://www.ctj.org/brief-description-of-and-comments-on-the-1997-tax-act> [<https://perma.cc/PD9A-EKA2>]. Citizens for Tax Justice was very critical of the Act, calling it "a disaster for the goal of fair, simple and adequate taxation." *Id.*

modified others²³¹ to encourage college attendance at an estimated cost to the federal government of \$95 billion over five years and \$275 billion over ten years,²³² although skeptics disputed these amounts as being much higher.²³³ The Act became effective on January 1, 1998.²³⁴

Later in 1998, the HEA was again reauthorized.²³⁵ This Act reduced Stafford loan interest rates by about 0.8%,²³⁶ provided loan forgiveness for those who taught at the primary or secondary levels in low-income schools, and provided unsubsidized Stafford loans for any student.²³⁷ But it struck the provision allowing education loans to be discharged in bankruptcy after seven years in repayment,²³⁸ essentially making education loans nondischargeable.²³⁹ It also suspended

231. See § 1. Qualified tuition programs under I.R.C. section 529(e) were treated as tax-free investments. § 211. The exclusion for employer-provided educational assistance under I.R.C. section 127 was extended through 2000. § 221. Student loan forgiveness was excluded under certain designated circumstances under I.R.C. section 108(f). § 225.

232. Fleenor, *supra* note 230, at 1.

233. See CITIZENS FOR TAX JUST., *supra* note 230. One estimate was \$400 billion over 10 years. *Id.*

234. See § 1.

235. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998). This Act also increased and extended Pell Grants through fiscal year 2004, extended the Academic Achievement Incentive Scholarship Program for low-income students, and authorized appropriations for Federal Supplemental Education Opportunity grants through 1999. §§ 401, 404, 406.

236. See Press Release, Office of the Press Sec'y, The Higher Educ. Amendments of 1998: Five Victories for the Clinton-Gore Admin. (Oct. 7, 1998), <https://govinfo.library.unt.edu/npr/library/news/100798.html> [<https://perma.cc/X4QN-6ZF5>]. Borrowers were given four months to refinance their loans at the new rate, although the Administration had proposed extending the refinancing period longer. See *id.* It was estimated that the four-month extension would save the average student borrower around \$700 over a ten-year period. *Id.*

237. §§ 423(a), 424. Subsidized Stafford loans are based on need, and with these loans the government pays the interest while the student is in school and during periods of deferment. See Elyssa Kirkham, *Everything You Need to Know About Federal Stafford Loans*, STUDENT LOAN HERO (Feb. 28, 2018), <https://www.studentloanhero.com/featured/what-is-a-federal-stafford-loan> [<https://perma.cc/CCE4-UQWT>] Unsubsidized Stafford loans accrue interest as soon as the loan is taken out. See *id.*

238. See § 971, 112 Stat. at 1837.

239. See Louis DeNicola, *The Truth About Student Loan Bankruptcy Discharge*, U.S. NEWS & WORLD REP., (May 2, 2018, 12:00 PM), <https://loans.usnews.com/the-truth-about-student-loan-bankruptcy-discharge> [<https://perma.cc/M5Z9-DL88>]. This applies to federal student loans, student loans funded by a nonprofit organization, such as a school, and qualified educational loans. See *id.* Qualified educational loans are those used to attend a qualified educational institution. See *id.* This is a Title IV-certified school. See *id.* In addition, the loan must

eligibility for any grant, loan, or work-study assistance for those convicted of any drug related offenses.²⁴⁰ Further, it loosened the eligibility restriction on proprietary institutions by providing that they must not derive more than 90% (rather than 85%) of their revenues from Title IV funds.²⁴¹ With the more positive climate for proprietary institutions, enrollment in these institutions increased 90% during Clinton's two terms in office.²⁴²

In addition, the Act increased the length of time from 180 days to 270 days before a delinquent borrower was declared in default, and it eliminated any college with a default rate of 25% or greater for three consecutive years (or 40% or more in a single year) from participating in any federal student loan programs.²⁴³ This, plus the slash in interest rates, produced a steady decline in the national student loan default rates.²⁴⁴ However, college tuition continued to rise.²⁴⁵

4. *The George W. Bush Administration (2001–2009)*

In George W. Bush's first term as President, the country was in the midst of a recession that had begun at the end of the Clinton Administration. In order to boost the economy, Bush proposed a series

be spent on a qualified educational expense such as tuition, fees, books, room and board, and educational supplies. *See id.* The student must be attending on at least a half-time basis. *See id.* If these requirements are not met, the loan may not be considered a qualified educational loan and thus may be eligible for discharge in bankruptcy. *See id.*

240. § 483(f). For a possession offense, this suspension would last from the date of the conviction until one year from that date for a first offense, two years from the date of conviction for a second offense, and indefinite suspension for a third offense. *Id.* In the case of a conviction for the sale of a controlled substance, the suspension period would run from the date of conviction until two years from that date and would be indefinite for any subsequent conviction. *Id.*

241. *See* § 102(b), 112 Stat. at 1588; *see also supra* notes 194–195 and accompanying text.

242. *See* NCES, *supra* note 70, at tbl.303.10. The portion of the total student population enrolled in proprietary institutions nearly doubled during this period, jumping from 7.3% to 14.2%.

243. § 429.

244. U.S. DEP'T OF EDUC., *National Student Loan Two-Year Default Rates*, FED. STUDENT AID, <https://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> [https://perma.cc/3K89-R4ZS] (last visited Oct. 28, 2019). The student loan default rate in 1997 was 8.8% (down from a high of 22.4% in 1990) then fell to 5.4% in 2001, 4.5% in 2003, and 4.6% in 2005 (down from 5.1% in 2004), after which the rate began to steadily increase. *Id.*

245. *See* NCES, *supra* note 70, at tbl.330.10 (demonstrating that college tuition during Clinton's second term increased by about 13% in current dollars).

of tax cuts and incentives that were enacted as the Economic Growth and Tax Relief Reconciliation Act of 2001,²⁴⁶ also known as “the Bush tax cuts.”²⁴⁷ Among its myriad provisions was the elimination of the sixty-month limit on the deduction of student loan interest and an increase in eligibility for the deduction.²⁴⁸ Also in 2001, in conformity with the Debt Collection Improvement Act of 1996, the DOE began offsetting up to 15% of Social Security, disability, and retirement benefits to repay defaulted federal education loans.²⁴⁹

In 2002, Congress reauthorized the HEA and changed all education loan interest rates from variable to fixed for new federal loans issued after July 1, 2006.²⁵⁰ Congress passed the legislation in late 2001, and it was enacted in February 2002.²⁵¹ The timing was significant because the terrorist attacks of September 11, 2001, had both short- and long-term negative effects on the economy. These attacks extended the 2001 recession, led to the wars in Afghanistan

246. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

247. Pub. L. No. 107-16, tits. I, II, III, and V (reduced income tax rates, eliminated the marriage penalty, increased the earned income tax credit, and repealed the estate and generation skipping taxes). It also increased the maximum annual contribution to educational savings accounts (renamed Coverdell accounts) from \$500 to \$2,000, allowed eligible educational institutions to maintain qualified tuition programs, and extended the exclusion for employer-provided educational assistance to cover graduate level courses. *Id.* at tit. IV. It further extended an income exclusion to amounts received under certain scholarships. *Id.* Section 117(c) of the I.R.C. provides that any amounts received under an excludable scholarship or fellowship that “represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction” shall be included in income and subject to tax. I.R.C. § 117(c) (2008). The 2001 Act provided an exception to such amounts received under a National Health Service Corps Scholarship Program or Armed Forces Health Professions Scholarship and Financial Assistance program. Pub. L. No. 107-16, 115 Stat. at 64 (amending I.R.C. § 117(c)(2)).

248. § 412, 115 Stat. at 63–64. The income limitation was increased from a low of \$40,000 for single taxpayers and \$80,000 for married taxpayers filing jointly to \$50,000 for single taxpayers and \$100,000 for joint filers. *Id.* The high end of the limitation (at which the taxpayer would be ineligible to deduct student loan interest) was increased from \$50,000 for single filers and \$100,000 for joint filers to \$65,000 for single filers and \$130,000 for joint filers. § 412(b), 115 Stat. at 64.

249. *See supra* notes 223–224 and accompanying text.

250. *See* Higher Education Act of 1965, Pub. L. No. 107-139, 116 Stat. 8 (amended 2002). These rates were 6.8% on Stafford loans (both subsidized and unsubsidized), 7.9% on PLUS loans, and 8.25% on consolidated loans. *Id.*

251. *See id.*

and Iraq, and deepened the national debt.²⁵² The Federal Reserve cut interest rates several times in an effort to boost the economy.²⁵³ The end result was that the variable rates on student loans in effect before 2006 were consistently lower than the fixed rate that became effective in 2006.²⁵⁴ In fact, student loan variable interest rates reached a historic low in 2005.²⁵⁵

When the fixed rates became effective, Democrats blamed Republicans for the unfairness of the interest rate differential, and they launched a campaign promising to cut the rates by half.²⁵⁶ But they failed to deliver on this promise.²⁵⁷ Instead, they cut only the subsidized Stafford rate to six-percent for four years, after which the rate would revert to the fixed rate of 6.8%.²⁵⁸

At the end of 2005, Congress cut \$12.6 billion from student financial aid under the Deficit Reduction Act,²⁵⁹ which was enacted to control mandatory federal spending.²⁶⁰ While this Act increased the limits of FFEL loans (although it did not increase the cumulative limit),²⁶¹ made PLUS loans available to graduate and professional

252. See Kimberly Amadeo, *How the 9/11 Attacks Affect the Economy Today*, THE BALANCE (Jan. 17, 2017), <https://www.thebalance.com/how-the-9-11-attacks-still-affect-the-economy-today-3305536> [<https://perma.cc/KM25-BFSW>]; see also Ed Grabianowski, *What Was the Economic Impact of September 11?*, HOW STUFF WORKS, www.money.howstuffworks.com/september-11-economic-impact.html (last visited Oct. 28, 2019) [<https://perma.cc/L777-A2NE>].

253. See Casey Bond, *How the September 11 Attacks Destroyed U.S. Interest Rates*, GO BANKING RATES (Sept. 11, 2013), <https://gobankingrates.com/personal-finance/september-11-attacks-destroyed-u-s-interest-rates> [<https://perma.cc/5VU7-ALWS>].

254. See Stephen Vanderpool, *Timeline: The History of Federal Student Loan Interest Rates*, NERDWALLET (May 22, 2012), <https://www.nerdwallet.com/blog/loans/student-loans/federal-student-loan-interest-rate-timeline-events> [<https://perma.cc/E955-3RYN>].

255. The rate was 2.88% for an in-school lock-in on consolidated loans with a cap of 8.25%. An early repayment status loophole allowed current students to consolidate their loans. See *Interest Rate Loophole*, FINAID, www.finaid.org/loans/loophole.phtml [<https://perma.cc/X9NX-D6T7>] (last visited Oct. 28, 2019).

256. See Vanderpool, *supra* note 254.

257. See *id.*

258. *Id.* If the variable rate had been in effect, that rate would have been 2.5%. *Id.*

259. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

260. See 2005 Reauthorization: Deficit Reduction Act, FINAID, www.finaid.org/educators/reauthorization20051219s1932.txt [<https://perma.cc/79AY-YWR7>] (last visited Oct. 28, 2019).

261. § 8005.

students,²⁶² and permitted consolidation of FFEL and direct loans to take advantage of income-contingent repayment plans,²⁶³ it also raised the fixed interest rate of PLUS loans and repealed consolidation of loans while students remained in school.²⁶⁴

Also in 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act,²⁶⁵ which provided an exception from discharge for “qualified education loans.”²⁶⁶ This included most federal and private student loans.²⁶⁷ The added security of complete bankruptcy protection for private lenders, along with an unlimited statute of limitations, was not passed along to borrowers, however, by a reduction in the cost of the loans.²⁶⁸

By 2007, the Democrats had regained control of both houses of Congress. Later that year, the College Cost Reduction and Access Act of 2007²⁶⁹ was enacted. This Act halved the interest rate over a four-year period on FFEL loans and subsidized Stafford loans,²⁷⁰ provided loan forgiveness for public service employees,²⁷¹ authorized income-

262. *Id.*

263. § 8009, 120 Stat. at 163–64.

264. §§ 8006, 8009, 120 Stat. at 159–60, 163–64. It also lowered loan origination fees from 4% to 1%, but only for Stafford loans, and eliminated the ability of schools to originate PLUS and consolidation loans. Stafford loans also could not be originated at the school level, so these loans had to be made by other lenders. § 8011, 120 Stat. at 165.

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

266. § 220, 119 Stat. at 59 (amending 11 U.S.C. § 523(a)(8)). The term “qualified education loan” is defined in 26 U.S.C. § 221(d)(1) of the Internal Revenue Code of 1986 to include any debt incurred “solely to pay qualified higher education expenses” of the borrower, the borrower’s spouse, or any dependent of the borrower at the time the debt is incurred. I.R.C. § 221(d)(1). Qualified education loans also include debt used to refinance qualified education loans. *See id.* Qualified higher education expenses include the cost of attendance at a college or university that is eligible for Title IV federal student aid, minus scholarships, employer-paid tuition assistance, and other education tax benefits. *See id.* The regulations at 26 C.F.R. 1.221-1 indicate that qualified education loans do not include mixed-use loans, such as credit card debt. 26 C.F.R. § 1.221-1 (2018).

267. § 220, 119 Stat. at 59.

268. *See* Xiaoling Ang & Dalié Jiménez, *Private Student Loans and BAPCPA: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans*, EDUC. POL’Y INITIATIVE (Sept. 29, 2013).

269. College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007).

270. § 201, 121 Stat. at 790–91. This was a ratable reduction from 6.8% in 2006–2008 to 3.4% in 2011–2012. *Id.*

271. § 401, 121 Stat. at 800–01.

based repayment,²⁷² and increased support for working students by increasing the income protection allowance for both dependent and independent students.²⁷³ A simplified means test, under which the expected family contribution (EFC) threshold was increased from \$20,000 to \$30,000 in 2009–2010,²⁷⁴ added some much needed simplification to the federal student loan application form.²⁷⁵

The bill was funded from money saved by cutting payments to private lenders and guarantee agencies under the FFEL program.²⁷⁶ In 2006, direct loans represented a relatively small portion of federally guaranteed loans,²⁷⁷ but that changed with the global financial crisis that began in 2008. This crisis produced a credit freeze during which many private educational lenders had difficulty covering their student loan obligations.²⁷⁸ Since these loans were guaranteed by the federal government, Congress was forced to act to avert a crisis in the FFEL program.²⁷⁹ Under the Ensuring Continued Access to Student Loans Act of 2008,²⁸⁰ the DOE was temporarily authorized to purchase unsubsidized Stafford and PLUS loans disbursed from October 1, 1993, to September 30, 2009.²⁸¹ It ultimately financed approximately 88% of FFEL loans made in 2008–2009.²⁸² This resulted in a hybrid

272. § 203, 121 Stat. at 792.

273. 121 Stat. at 801–04. The income protection allowance is the amount a student may earn and remain eligible for financial aid. *See id.* The allowance was almost doubled for dependent students from 2009–2010 to 2012–2013. § 601, 121 Stat. at 801. For independent students without dependents other than a spouse, where both were enrolled, the increase was less dramatic—\$7,000 from 2009–2010 to \$9,330 from 2012–2013. *Id.* For married students where only one of the spouses was enrolled, the increase was \$11,220 from 2009–2010 to \$14,960 from 2012–2013. § 601, 121 Stat. at 802. There was a sharper increase for married students with one or more dependents, with the increase contingent on the number of dependents. § 601, 121 Stat. at 802–03.

274. § 602, 121 Stat. at 804–05.

275. *See id.* Also, lender subsidy rates on PLUS loans were made more competitive through a pilot auction, effective July 1, 2009. § 701, 121 Stat. at 808.

276. §§ 301–05, 121 Stat. at 796–800; *see also supra* notes 211–214 and accompanying text.

277. *See* SFGATE, *Feds Take Over Student Loan Program from Banks* (Mar. 30, 2010, 4:00 AM), www.sfgate.com/business/networth/article/Feds-take-over-student-loan-program-from-banks-3193888.php [<https://perma.cc/LYN2-3CWN>]. In specific, they represented about 20% of federally guaranteed loans. *Id.*

278. *See* DELISLE, *supra* note 72, at 9.

279. *See id.*

280. Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, 122 Stat. 740.

281. § 459A, 122 Stat. at 746–48.

282. CONG. BUDGET OFF., *COSTS AND POL'Y OPTIONS FOR FED. STUDENT LOAN PROGRAMS*, VIII (2010).

program in which the federal government supplied capital to private lenders.²⁸³ The Act also increased the limits (both annual and aggregate) on unsubsidized Stafford loans, allowed parents to defer repayment on PLUS loans while students were in school, and provided a repayment grace period of up to six months after students left school.²⁸⁴

In 2007, Governor Andrew Cuomo of New York launched an investigation into unethical practices of some of the largest student loan lenders.²⁸⁵ He discovered that these lenders were engaging in deceptive practices, such as selling student loans to third parties without the borrowers' knowledge, so that the benefits the borrowers had been promised by the original lender were no longer honored.²⁸⁶ Also, some lenders established call centers in which students or parents thought they were calling a school's financial aid office but were actually directed straight to the lender.²⁸⁷ The largest of these lenders, Sallie Mae (now SLM Corporation), settled by agreeing to a code of ethics proposed by Cuomo and by paying a fine of \$2 million to a fund to help educate students and parents about the student loan industry.²⁸⁸

In 2008, the HEA was again reauthorized to make college costs more transparent by requiring participating colleges to prominently disclose their costs and by requiring the DOE to display on its website a list of the 5% most expensive and the 10% least expensive colleges.²⁸⁹ It also provided loan forgiveness for civil legal assistance

283. See *Education Policy: Student Loan History*, *supra* note 216. Ironically, the federal government was assuming the role that the then-privatized Sallie Mae had filled when it was a government sponsored enterprise.

284. See §§ 2–4, 122 Stat. at 740, 740–43.

285. See Amanda Ernst, *Sallie Mae Settles Student Loan Kickback Charges*, LAW360 (Apr. 11, 2007), <https://www.law360.com/articles/22415/sallie-mae-settles-student-loan-kickback-charges> [<https://perma.cc/UKL5-GUGF>].

286. See *id.*

287. See *id.*

288. *Id.* Citibank, another student loan lender under investigation, also agreed to Cuomo's code of ethics. *Id.* Cuomo was scathing on the poor job that the DOE and federal regulators had done in overseeing these lenders. See Marcy Gordon, *NY AG Faults Oversight of College Loans*, WASH. POST (June 6, 2007, 9:04 PM), www.washingtonpost.com/wp-dyn/content/article/2007/06/06/AR2007060601818_pf.html [<https://perma.cc/Q3BA-XZYY>]. These regulators are the Federal Trade Commission, the Treasury Department's Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. *Id.*

289. Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078, 3099 (2008).

attorneys,²⁹⁰ teachers employed by educational service agencies,²⁹¹ and in cases of disability or death of the borrower.²⁹² It extended the Perkins Loan Program as a campus-based aid program,²⁹³ implemented a program to promote early awareness of eligibility for federal aid,²⁹⁴ and increased the reporting requirements of postsecondary institutions by requiring them to report the repayment status of student loans to consumer credit agencies.²⁹⁵

Because of the sudden closure of some proprietary schools, the Act further required institutions to prepare “teach out” plans to provide for the “equitable treatment of students” in the event that the institution should cease to exist before all students had completed their degrees.²⁹⁶ It also provided that any proprietary institution that failed to meet the 90/10 rule²⁹⁷ for two consecutive institutional fiscal years would be ineligible to participate in federal aid programs for at least two more consecutive fiscal years, until it demonstrated compliance with the eligibility and certification requirements.²⁹⁸ However, during the two fiscal years following the year of disqualification, the disqualification could be made provisional.²⁹⁹

During Bush’s eight years in office, there was a 57% general increase in college tuition,³⁰⁰ although there was a significant increase in overall college enrollment by recent high school graduates.³⁰¹ This enrollment increase, particularly for lower- and middle-income students, was attributable to two factors: (1) the financial crisis of 2008, in which many recent high school graduates had difficulty finding work and opted to use federal aid to enroll in postsecondary

290. § 431, 122 Stat. at 3242. These are attorneys employed by nonprofit organizations that provide free legal assistance to the underprivileged. *Id.*

291. § 429, 122 Stat. at 3236.

292. § 437, 122 Stat. at 3257–58.

293. § 466, 122 Stat. at 3269.

294. § 490, 122 Stat. at 3305–07.

295. § 432, 122 Stat. at 3245–46.

296. § 493, 122 Stat. at 3316.

297. § 493, 122 Stat. at 3308 (amending § 487(a)(24) of the Higher Education Act of 1965 and providing that proprietary schools may receive no more than 90% of their funding from Title IV federal student aid); *see also supra* note 241 and accompanying text.

298. § 493, 122 Stat. at 3312.

299. *Id.*

300. *See* NCES, *supra* note 70, at tbl.330.10. This was in current dollars (2001–2009). *Id.*

301. *Id.* at tbl.302.30 This was an 8.3% increase from 2001, with an increase of 10% for both low- and middle-income students. *Id.*

institutions,³⁰² and (2) an increase in eligibility and size of Pell grants.³⁰³ These factors caused enrollment in proprietary institutions to increase 178% during Bush's two terms in office.³⁰⁴

5. *The Obama Administration (2009–2017)*

During the first two years of Barack Obama's presidency, the Democrats controlled both houses of Congress. The steep recession of 2008 continued, and this focused the new administration's attention initially on economic recovery as well as health care reform.³⁰⁵ But in 2010, the Health Care and Education Reconciliation Act, passed along party lines, eliminated the FFEL program and provided that all new federal education loans would be made through the Direct Loan program.³⁰⁶ Under this program, there would be a change from private lending back to 100% federal lending. Since this eliminated private banks as "middlemen," the federal government estimated that it would save about \$68 billion over eleven years.³⁰⁷

This Act also cut the monthly income-based student loan repayment by one-third³⁰⁸ and accelerated loan forgiveness from twenty-five years to twenty years for borrowers of new federal loans

302. See, e.g., Bridget Terry Long, *The Financial Crisis and College Enrollment: How Have Students and Their Families Responded?*, NAT'L BUREAU OF ECON. RES., at 229–31 (2015); see also Clifton B. Parker, *The Great Recession Spurred Student Interest in Higher Education*, *Stanford Expert Says*, STANFORD NEWS (Mar. 6, 2015), <https://news.stanford.edu/2015/03/06/higher-ed-hoxby-030615> [<https://perma.cc/YP9T-M2HG>].

303. See *Pell Grant Funding and History*, NEW AMERICA, <https://www.newamerica.org/education-policy/policy-explainers/higher-ed-workforce/federal-student-aid/federal-pell-grants/pell-grant-funding> [<https://perma.cc/UVR9-JPB9>] (last visited Oct. 28, 2019).

304. See NCES, *supra* note 70, at tbl.303.10. The percentage of students enrolled in proprietary institutions more than doubled from 3.3% in 2001, during Bush's first year in office, to 7.7% during his last year. See *id.*

305. See generally Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (noting the passage of this bill focused on health care).

306. § 2201, 124 Stat. at 1074–75.

307. See Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES (Mar. 30, 2010), www.nytimes.com/2010/03/31/us/politics/31obama.html?mcubz=1 [<https://perma.cc/G2B2-UBJL>]. Much of this savings was redirected to the Pell program, making the increased maximum amount of the grant permanent. § 2101, 124 Stat. at 1071.

308. § 2213, 124 Stat. at 1081. This repayment went from 15% of discretionary income to 10% of discretionary income. *Id.*

made on or after July 1, 2014.³⁰⁹ However, none of these programs addressed private student loans, which constituted approximately \$168 billion or 20% of total student loan debt.³¹⁰

But the 2008 recession, combined with the increase in federal spending, precipitated a decrease in state spending for education, causing tuition and fees to continue to rise.³¹¹ In 2010, for the first time total outstanding student loan debt exceeded credit card debt.³¹²

In fall 2010, the Republicans won the majority of seats in the House, while the Democrats continued to control the Senate. This marked the beginning of a period of political polarization and gridlock that continued throughout the remainder of the Obama Administration.

The following year, the Budget Control Act of 2011³¹³ was passed after a bitter partisan battle. This Act ended the debt-ceiling crisis that was threatening to result in a sovereign default.³¹⁴ In addition to the balanced budget provisions, this Act increased funding for Pell grants,³¹⁵ but it also provided that graduate and professional students would no longer be eligible for subsidized Stafford loans.³¹⁶ Further, it eliminated repayment incentives effective July 1, 2012,³¹⁷ and

309. *Id.*

310. See Mark Kantrowitz, *Total College Debt Now Exceeds Total Credit Card Debt*, FASTWEB (Aug. 11, 2010), <https://www.fastweb.com/financial-aid/articles/total-college-debt-now-exceeds-total-credit-card-debt> [<https://perma.cc/N8FP-PQ33>].

311. See, e.g., Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 25, 2016), <https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting> [<https://perma.cc/UJR5-8DP5>]; see also Lauren Camera, *States Are Slacking on Higher Ed Spending*, U.S. News & World Rep. (Jan. 7, 2016, 6:01 AM), <https://www.usnews.com/news/articles/2016/01/07/states-spending-less-today-on-higher-education-than-before-recession> [<https://perma.cc/A9PM-FN46>].

312. See Jennifer Wadia, *Rising Tuition Costs and the History of Student Loans*, STUDENT DEBT RELIEF (May 14, 2019), <https://www.studentdebtrelease.us/news/rising-tuition-costs-and-the-history-of-student-loans> [<https://perma.cc/ZET2-HPT8>]. Total student debt in 2010 was \$830 billion, while total credit card debt was \$825 billion. See *id.*; see also Kantrowitz, *supra* note 310.

313. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 239 (2011).

314. See Suzy Khimm, *The Sequester, Explained*, WASH. POST (Sept. 14, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/09/14/the-sequester-explained/?utm_term=.58678d85406d [<https://perma.cc/YAT2-D5QA>].

315. § 501, 125 Stat. at 266.

316. § 502.

317. § 503, 125 Stat. at 266–67.

implemented sequestration, a system of automatic cuts to the federal budget of \$1.2 trillion over ten years, plus additional caps on spending if Congress should fail to agree on a budget.³¹⁸ This meant that if Congress failed to pass a budget, \$109.3 billion would be cut from the federal budget each year until 2021.³¹⁹

In 2011, outstanding federal student loan debt for the first time exceeded auto loan debt.³²⁰ The following year, total outstanding student loan debt (both federal and private) exceeded one trillion dollars.³²¹

In fall 2012, the President and Congress failed to agree on a budget, triggering sequestration, which ultimately led to an increase in fees on Stafford and PLUS loans.³²²

The Consolidated Appropriations Act of 2012 eliminated subsidized interest on Stafford loans during the six-month grace period for new loans made from July 1, 2012, to June 30, 2014.³²³ In mid-2012, however, interest rates on subsidized student loans threatened to double. To prevent that, Congress enacted the Moving Ahead For Progress in the 21st Century Act, which extended for an additional year the 3.4% interest rate on subsidized Stafford loans to undergraduate students.³²⁴

Proprietary schools did not fare well under the Obama Administration. The General Accountability Office (GAO) had issued a report in 2009 concluding that students at proprietary schools were

318. §251, 125 Stat. at 241–45.

319. See Grant A. Driessen & Marc Labonte, *The Budget Control Act of 2011 as Amended: Budgetary Effects*, CONG. RESEARCH SERV. 4 (2015). There would be an equal cut from defense and non-defense spending. *Id.* This would amount to a total reduction of \$2 trillion over the nine-year period. *Id.* at 1.

320. See Kantrowitz, *supra* note 6.

321. See Stacy Cowley & Jessica Silver-Greenberg, *DeVos Halts Obama-Era Plan to Revamp Student Loan Management*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/business/dealbook/education-department-federal-student-loan-program.html> [<https://perma.cc/NY3X-9B58>]; *A Record One-In-Five Households Now Owe Student Loan Debt*, PEW RES. CT. (Sept. 26, 2012), <https://www.pewsocialtrends.org/2012/09/26/a-record-one-in-five-households-now-owe-student-loan-debt>.

322. See *History of Student Loans*, EDVISORS, <https://www.edvisors.com/college-loans/federal/history> [<https://perma.cc/SN6L-98UG>] (last visited Oct. 28, 2019).

323. See Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, tit. III, 125 Stat. 786, 1101 (2012).

324. See Moving Ahead for Progress in the 21st Century Act of 2012, Pub. L. No. 112-141, § 100301 126 Stat. 405, 979 (2012).

more likely to default on their loans.³²⁵ The following year, it issued another report accusing these schools of fraud and misrepresentation in recruitment and admissions.³²⁶ In addition, there were several other reports that chronicled the abysmal performance of proprietary schools.³²⁷ In 2012, Senator Tom Harkin (D-Iowa) released a scathing report on behalf of the Senate Committee on Health, Education, Labor, and Pensions that attributed the sector's high drop-out rates to underspending on instruction and overspending on marketing and profit-sharing.³²⁸

In the wake of the negative reports, the DOE finalized a "gainful employment" regulation in 2011 to protect students and taxpayers alike.³²⁹ This regulation was based on language in the HEA providing that to be eligible to receive federal funds under Title IV, an educational institution must "prepare students for gainful employment in a recognized occupation."³³⁰ This regulation was intended to monitor schools to ensure that their borrowers met a minimum debt to earnings ratio.³³¹

325. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 28 (2009).

326. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-948T, FOR-PROFIT COLLEGES, UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 7 (2010).

327. See, e.g., S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS 4, 8 (2010) (questioning whether for-profit schools were targeting the military and delivering substandard product); see also David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* 4, 22 (CAPSEE, Working Paper 2012) (finding that while there are some positives associated with for-profit schools, such as the fact that they educate more minority, disadvantaged, and older students, their students have higher unemployment rates, lower earnings, higher debt, and higher rates of default).

328. See S. REP. NO. 112-37, at 92.

329. See U.S. DEP'T OF EDUC., OBAMA ADMINISTRATION ANNOUNCES NEW STEPS TO PROTECT STUDENTS FROM INEFFECTIVE CAREER COLLEGE PROGRAMS (2011), <https://www.ed.gov/news/press-releases/obama-administration-announces-new-steps-protect-students-ineffective-career-college-programs> [<https://perma.cc/267V-6D8P>].

330. See Higher Education Act of 1965, Pub. L. No. 89-329, § 461, 79 Stat. 1219, 1251 (1965) (amending § 103(b) of the National Defense of Education Act of 1958).

331. See U.S. DEP'T OF EDUC., *supra* note 329 (reporting that under the new DOE regulation, a school would remain eligible to receive federal funds if at least 35% of its borrowers were repaying their loans and the estimated loan payments did

The peak year for enrollment in proprietary schools was the academic year 2010.³³² In the wake of the negative publicity, however, there was a steady decline in enrollment in these institutions from 2011 throughout the remainder of the Obama Administration and into the Trump Administration.³³³

President Obama's 2013 budget proposed a 4.6% increase over the 2012 level in spending for higher education with an increase of 2.5% in the budget of the DOE.³³⁴ The fierce battle over this budget resulted in a government shutdown that lasted sixteen days, resulting in the budget not being approved. Instead, Congress passed a series of continuing resolutions to fund the government through September 30, 2013.³³⁵

The Bipartisan Student Loan Certainty Act of 2013 changed the interest rates for new Stafford and PLUS loans for undergraduates originating on or after July 1, 2013.³³⁶ The new rate would be fixed but would be determined on the preceding June 1st and would be equal to the lesser of (1) the rate of the high-yield federal note auctioned at the

not exceed 30% of the borrowers' discretionary income or 12% of their total earnings).

332. See NCES, *supra* note 70, at tbl.303.10 (indicating that during that year, there were 2,022,785 students enrolled in proprietary schools, representing 9.6% of total student enrollment).

333. See *id.* (indicating from 2010 through 2016, when data was last available, there was a decline of almost 42% in enrollment and in 2016 enrollment in proprietary schools was only 5.9% of total enrollment). It should be noted, however, that overall enrollment in postsecondary educational institutions declined during this period. See *id.* In 2017, there was an approximate 7% decline in enrollment from 2016. See Maria Danilova & Richard Lardner, *For-Profit Colleges Struggle Despite Assist from DeVos*, AP NEWS (Apr. 7, 2018), <https://apnews.com/5e8fa04c469b4a5daa6640ec79584c4d> [<https://perma.cc/53EF-HWZA>].

334. See Cameron Brenchley, *2013 Education Budget: What It Means for You*, WHITE HOUSE BRIEFING ROOM (Feb. 13, 2012, 7:02 PM), <https://obamawhitehouse.archives.gov/blog/2012/02/13/2013-education-budget-what-it-means-you> [<https://perma.cc/R6ML-EQVC>] (stating that this was an increase to \$69.8 billion in discretionary appropriations). In this budget, President Obama proposed doubling the number of work-study jobs and increasing by \$7.5 billion the available funding for Perkins Loans. See *id.*; see also William C. Smith, *The Second Term: Higher Education and the Obama Administration*, FORUM OF AMERICAN J. OF ED. (Jan. 21, 2013), www.ajeforum.com/the-second-term-higher-education-and-the-obama-administration-by-william-c-smith.

335. See Continuing Appropriations Resolution of 2013, Pub. L. No. 112-175, 126 Stat. 1313, 1315 (2013) (authorizing funding through March 27, 2013). See generally Consolidated and Further Continuing Resolutions Act of 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013) (authorizing funding through end of fiscal year 2013).

336. See Bipartisan Student Loan Certainty Act of 2013, Pub. L. No. 113-28, 127 Stat. 505, 506 (2013).

final auction held prior to that June 1, plus 2.05% or (2) 8.25%.³³⁷ For graduate and professional students, the interest rate on unsubsidized Stafford loans was higher.³³⁸

In 2014, Obama signed a memorandum directing the DOE to propose regulations allowing students to cap their loan repayments at 10% of their income.³³⁹ He also proposed that the federal government partner with the states in making the first two years of community college free for all students, whether they intended to complete their bachelor degrees or go on to the workforce.³⁴⁰ The Perkins Loan Program, established in 1958 as a need-based loan program,³⁴¹ was allowed to lapse in September 2015. However, it was extended in December of that year for another two years,³⁴² although this was too late to affect the decisions of those entering college that fall.

In 2014, the Department of Education found for-profit Corinthian Colleges guilty of fraud in deceptive marketing and lying to the government about its graduation and job placement rates.³⁴³ In the wake of this finding, the DOE prohibited Corinthian from receiving any further federal funding.³⁴⁴ In 2015, the school filed bankruptcy and ceased its operations.³⁴⁵

337. *See id.*

338. *See* 127 Stat. at 507 (stating that, for these students, the rate of interest on unsubsidized Stafford loans was the lesser of the rate of the high-yield Treasury note plus 3.6% or 9.5%). Consolidation loans would have an interest rate equal to the weighted average of the loans, rounded to the nearest one-eighth of one percent. *Id.*

339. *See Making College Affordable*, WHITE HOUSE BRIEFING ROOM, <https://www.whitehouse.gov/issues/education/higher-education/making-college-affordable> [<https://perma.cc/V6ZS-JWZF>] (last visited Oct. 28, 2019).

340. *See Higher Education*, WHITE HOUSE BRIEFING ROOM (Dec. 10, 2015), <https://obamawhitehouse.archives.gov/realitycheck/issues/education/higher-education> [<https://perma.cc/HV6N-URUM>]. Obama reiterated this in his State of the Union Address on January 21, 2015. *See Obama's State of the Union 2015 Transcript (Full Text and Video)*, N.Y. TIMES (Jan. 20, 2015), <https://www.nytimes.com/2015/01/21/us/politics/obamas-state-of-the-union-2015-address.html?mcubz=1> [<https://perma.cc/NSX6-KZQK>].

341. *See supra* notes 49–50, 160–161, 293 and accompanying text.

342. *See* Federal Perkins Loan Program Extension Act of 2015, Pub. L. No. 114-105, 129 Stat. 2219, 2221 (stating that this legislation was not approved until December 18, 2015).

343. *See* Danielle Douglas-Gabriel, *Feds Found Widespread Fraud at Corinthian Colleges. Why Are Students Still Paying the Price?*, WASH. POST (Sept. 29, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/09/29/feds-found-widespread-fraud-at-corinthian-colleges-why-are-students-still-paying-the-price> [<https://perma.cc/5ZN8-RYJB>].

344. *See id.*

345. *See* Alia Wong, *The Meltdown of a For-Profit College Behemoth*, THE ATLANTIC (Apr. 30, 2015), <https://www.theatlantic.com/education/archive/>

After the Corinthian closure, the Obama Administration announced a “borrower defense” regulation that would provide automatic relief from indebtedness in the event of a school closure after November 1, 2013, if the borrower had not enrolled in another Title IV-eligible institution within three years.³⁴⁶ Unfortunately, this regulation was not effective until July 1, 2017, after Obama left office.³⁴⁷

In 2016, the DOE predicted an alarming increase in student loan defaults, despite a rosy economic forecast, an increase in the maximum Pell grant, lower interest rates, and income-based loan repayment.³⁴⁸ This prediction proved true. According to the DOE’s findings released in late 2017, there was a 12% increase in student loan defaults from a year earlier.³⁴⁹ One commentator placed much of the blame on contractors hired by the government to service student

2015/04/the-meltdown-of-a-for-profit-college-behemoth/391925 [https://perma.cc/S4R4-3YZR].

346. U.S. DEP’T OF EDUC., *U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions* (Oct. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions> [https://perma.cc/VR82-PHRU]. There were other protections in this regulation, such as requiring schools with poor loan repayment records to provide warning to students, banning arbitration agreements under which students waived their right to go to court or bring class action suits in a borrower defense claim, and providing notice to borrowers of their rights in the event of a school closure. *See id.*

347. *See id.*

348. *See* Jason Delisle, *Obama Budget Sees Rising Student Loan Defaults*, FORBES (Feb. 3, 2015), <https://www.forbes.com/sites/jasondelisle/2015/02/03/obama-student-loan-defaults/#4f9a98b446d> [https://perma.cc/LU6U-UV3K] (projecting that there would be an increase in default with every type of student loan). The most dramatic projected increase was a 25.3% default rate in undergraduate Stafford loans (an increase of 2.5% from 2015). *See id.*

349. *See* Danielle Douglas-Gabriel, *The Number of People Defaulting on Federal Student Loans Is Climbing*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/28/the-number-of-people-defaulting-on-federal-student-loans-is-climbing> [https://perma.cc/EAD3-7ZE8]. These figures were not based on the cohort default rate but on a more comprehensive view of defaults that showed as of June 2017, there were millions of student loan debtors who had made no payments on \$144 billion in federal student loans in the past nine months. *See id.*

loans.³⁵⁰ These contractors have been accused of driving borrowers into default by creating obstacles to repayment.³⁵¹

6. *The Trump Administration (2017–)*

Trump's actions on education have been controversial. In his first budget request, FY 2018, he proposed to cut the budget of the DOE by \$10.6 billion, with a redirection of funds away from higher education to his primary and secondary school choice agenda.³⁵² Congress ultimately rejected this proposal.³⁵³ His nominee for

350. See Teddy Nykiel, *Navient Lawsuits: What Student Loan Borrowers Need to Know*, NERDWALLET (Oct. 5, 2017), <https://www.nasdaq.com/article/navient-lawsuits-what-student-loan-borrowers-need-to-know-cm855944> [<https://perma.cc/NRQ5-7F2X>].

351. See *id.* Navient Corp., a spin-off of Sallie Mae and once the largest of the student loan servicers, is facing lawsuits filed by the Consumer Financial Protection Bureau and the attorneys general of five states—Illinois, Pennsylvania, New York, Washington, and California—alleging fraud, predatory practices, and violations of the consumer protection laws in its dealings with borrowers. See Michelle Singletary, *How the Lawsuits Against Student Loan Servicer Navient Could Affect You*, WASH. POST (July 5, 2018), <https://www.washingtonpost.com/news/get-there/wp/2018/07/05/how-the-lawsuits-against-student-loan-servicer-navient-could-affect-you> [<https://perma.cc/TY8R-AW5C>]; see also Shahien Nasiripour, *Why This State's Navient Lawsuit Could Affect Your Student Loans*, BLOOMBERG (Oct. 5, 2017), <https://www.bloomberg.com/news/articles/2017-10-05/why-pennsylvania-s-navient-suit-may-impact-your-student-loans> [<https://perma.cc/N8AH-RGUC>]; Nykiel, *supra* note 350. Although Navient tried to get the suits dismissed, a federal judge in Pennsylvania ruled that the suit could proceed. See *Judge Allows Lawsuit Against Student Loan Servicer Navient*, DEL. ONLINE (Dec. 18, 2018), <https://www.delawareonline.com/story/money/2018/12/18/lawsuit-alleging-abuse-wilmington-based-navient-can-go-ahead-judge-says/2348657002> [<https://perma.cc/Y9VQ-WP9T>].

352. See Valerie Strauss, *Five Startling Things Betsy DeVos Just Told Congress*, WASH. POST (May 24, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/24/five-startling-things-betsy-devos-just-told-congress/?utm_term=.846d5cd7d22e [<https://perma.cc/HU4X-RQPW>]; Danielle Douglas-Gabriel, *Betsy DeVos Undoes Obama's Student Loan Protections*, CHI. TRIB. (Apr. 11, 2017, 9:47 PM), <http://www.chicagotribune.com/business/ct-betsy-devos-student-loan-protections-20170411-story.html> [<https://perma.cc/3QBA-NPPZ>]. The budget proposal would have redirected \$1.4 billion to school choice. Emma Brown, *DeVos Promises "the Most Ambitious Expansion of Education Choice in Our Nation's History" But Offers No Details*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/local/education/betsy-devos-promises-the-most-ambitious-expansion-of-education-choice-in-our-nations-history--but-offers-no-details/2017/05/22/ae90f55e-3f03-11e7-8c25-44d09ff5a4a8_story.html [<https://perma.cc/F9NP-TUP3>].

353. See Andrew Ujifusa, *Trump Fails in Bid to Slash Education Budget*, ED. WEEK (Apr. 10, 2018), <https://www.edweek.org/ew/articles/2018/04/11/trump-fails->

Secretary of Education, Betsy DeVos, was the former chairwoman of the Michigan Republican Party with no prior experience in education policy.³⁵⁴ On February 7, 2017, she was confirmed with the closest vote of any Cabinet nominee in history after the Vice-President cast the deciding vote.³⁵⁵ The controversy surrounding her confirmation has continued as she has worked to repeal many of the policies and safeguards for student loan borrowers implemented by President Obama.³⁵⁶

One of these safeguards was the borrower defense to repayment regulation, which was due to become effective on July 1, 2017.³⁵⁷ However, DeVos delayed the implementation, ostensibly to allow the DOE to “review[] the rule.”³⁵⁸ She ultimately proposed rules that would have been effective in July 2019 that would have made it much more

in-bid-to-slash-education.html [https://perma.cc/Y543-X7SB] (stating that the FY18 education budget was actually increased \$2.6 billion over the fiscal year 2017 level).

354. See Greg Toppo, *What You Need to Know About Betsy DeVos*, USA TODAY (Feb. 7, 2017, 4:21 PM), <https://www.usatoday.com/story/news/2017/02/07/facts-about-education-secretary-betsy-devos/97605238> [https://perma.cc/LZL4-4HY5].

355. Emmarie Huetteman & Yamiche Alcindor, *Betsy DeVos Confirmed as Education Secretary; Pence Breaks Tie*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/betsy-devos-education-secretary-confirmed.html> [https://perma.cc/2SCB-RWPB] (reporting that this vote (51-50) was along party lines with two Republicans voting against, and that these two noted that “Ms. DeVos was unqualified because of a lack of familiarity with public schools and with laws meant to protect students”).

356. See, e.g., Dustin Hornbeck, *Betsy DeVos’ 6-Month Report Card: More Undoing Than Doing*, CONVERSATION (Aug. 10, 2017, 8:59 PM), <http://theconversation.com/betsy-devos-6-month-report-card-more-undoing-than-doing-81793> [https://perma.cc/4WMM-YJQC]; see also Lauren Camera, *18 States Sue Betsy DeVos for Killing Student Loan Protections*, U.S. NEWS & WORLD REP. (July 6, 2017, 11:52 AM), <https://www.usnews.com/news/education-news/articles/2017-07-06/18-states-sue-education-secretary-betsy-devos-for-nixing-student-loan-protections> [https://perma.cc/WWR6-D5NQ].

357. See *supra* notes 346–347 and accompanying text.

358. Katie Lobosco, *Betsy DeVos Limits Debt Relief for Defrauded Students*, CNN MONEY (Dec. 21, 2017, 2:57 PM), www.money.cnn.com/2017/12/21/pf/college/devos-borrower-defense-debt-relief/index.html [https://perma.cc/3C92-JV32]. DeVos eventually argued that relief should be granted based on “damages incurred,” which would involve a consideration of the earnings of the borrower. *Id.* Critics counterargued that this was unfair because many borrowers never completed their degrees in the wake of the closure of a proprietary institution. See *id.*; see also Andrew Josuweit, *4 Ways Betsy DeVos Plans to Make It Harder for Ripped-Off Students to Get Loan Forgiveness*, FORBES (Jan. 5, 2018), <https://www.forbes.com/sites/andrewjosuweit/2018/01/05/4-ways-betsy-devos-plans-to-make-it-harder-for-ripped-off-students-get-loan-forgiveness/2/#> [https://perma.cc/BP3E-GKGY].

difficult for defrauded students to obtain relief,³⁵⁹ and for those who might have managed to overcome the myriad roadblocks, the relief would have been based on the borrowers' earnings, determined through the use of Social Security data.³⁶⁰

359. See Andrew Kreighbaum, *DeVos Rule Would Cut Billions in Student Loan Relief*, INSIDE HIGHER ED. (July 26, 2018), <https://www.insidehighered.com/news/2018/07/26/devos-proposes-tougher-standard-borrowers-who-seek-student-loan-relief> [<https://perma.cc/4XZ7-WZU9>] (allowing relief only for those borrowers in default). Default, however, carries severe consequences for borrowers, including wage garnishment, tax refund and social security benefit garnishment, and negative effects on credit that could affect employment and approval for housing and car loans. See *id.* They also would have eliminated the Obama-era ban on forced arbitration, although they would have required institutions to plainly notify student borrowers that they enforced such a provision. See *id.* For those borrowers who might have managed to get to court, DeVos' rules forbade class action suits, resulting in borrowers having to bring suit individually. See *id.* This would have greatly increased the cost to borrowers in having their claims addressed. See *id.* These rules also would have required borrowers to bear the burden of proving that their institutions knowingly defrauded them by making false statements in advertising or recruitment or in making promises with a reckless disregard for the truth. See *id.* They finally would have ended the Obama-era automatic loan discharge for borrowers who had not enrolled elsewhere within three years of a school closure. See *id.* These borrowers instead would have had to seek proactive relief. See *id.*

360. See Michael Stratford, *Trump and DeVos Fuel a For-Profit College Comeback*, POLITICO (Aug. 31, 2017, 4:58 AM), <https://www.politico.com/story/2017/08/31/devos-trump-forprofit-college-education-242193> [<https://perma.cc/MN3E-H2T9>]. Under the Borrower Defense to Repayment regulation, students defrauded by for-profit schools could apply to have their loans forgiven. See *id.* During the Obama Administration, \$550 million in student loan debt was extinguished under this regulation. See *id.* As of the first of November 2017, none of the 87,000 claims submitted since DeVos took office had been addressed, including 10,000 claims that previously had been recommended for approval. See Shannon Insler, *Betsy DeVos Considering New Limits on Loan Forgiveness for Defrauded Students*, STUDENT LOAN HERO (Oct. 30, 2017), <https://studentloanhero.com/news/betsy-devos-delays-closed-for-profit-colleges-student-loan-forgiveness> [<https://perma.cc/83CQ-BWPZ>]. In December 2017, DeVos unveiled her plan to provide "tiered relief" to defrauded students. See *id.* This plan would provide only partial forgiveness based on debt to earnings data that compared average earnings and debt of students in similar programs and schools. See *id.* This plan has been criticized severely by Democrats and consumer advocates. See *id.* As of April 2018, the DOE had approved 8,809 claims (with 99,000 more claims pending) with awarded relief of \$13.4 million. *Id.* However, these borrowers would have been entitled to \$70.3 million if they had received full discharge of their loans. See Michael Stratford, *A Look at Student Fraud Claims Under New DeVos Policy*, POLITICO (Apr. 16, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-education/2018/04/16/a-look-at-student-fraud-claims-under-new-devos-policy-170324> [<https://perma.cc/V4QT-VDWZ>]. Meanwhile, under DeVos' rules, those who had been defrauded by closed for-profit schools would have had to continue to pay their debt, ostensibly until July

This prompted a number of lawsuits in 2017 by the attorneys general of eighteen states, plus the District of Columbia.³⁶¹ In May 2018, a California federal district court held that the DOE's use of Social Security data to determine borrowers' earnings violated privacy laws, and it issued a preliminary injunction both against the use of this data and against collection on the loans.³⁶² The following September, a U.S. District Court judge held in favor of the states, concluding that DeVos' delay of the borrower defense rule was "arbitrary and capricious" and that the Department's legal rationale "lacked any meaningful analysis."³⁶³

In a separate suit filed by the Harvard Legal Services Center Project on Predatory Student Lending, the court concluded that the DOE's delay in implementing the borrower defense regulation was

1, 2019, according to the DOE's Federal Register expiration date for the consideration of new regulations. *See id.*

361. *See* Andrew Kreighbaum, *Democratic AGs Sue DeVos on Borrower Defense*, INSIDE HIGHER ED. (Dec. 15, 2017), <https://insidehighered.com/quicktakes/2017/12/15/democratic-ags-sue-devos-borrower-defense> [<https://perma.cc/GP9Y-7WXU>]. These states were California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maryland, Massachusetts, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. *Id.*; *see also* Danielle Douglas-Gabriel, *Betsy DeVos Takes Action on Backlog of Student Debt Relief Claims*, WASH. POST (Dec. 20, 2017, 6:25 PM), <https://www.washingtonpost.com/news/grade-point/wp/2017/12/20/betsy-devos-takes-action-on-backlog-of-student-debt-relief-claims> [<https://perma.cc/Z8JZ-JF5W>]. The suit also consolidated other suits by two aggrieved borrowers filed by the consumer advocacy group, Public Citizen. *See* Andrew M. Harris & Daniel Flatley, *Betsy DeVos Loses Student Loan Lawsuit Brought By 19 States*, BLOOMBERG (Sept. 12, 2018, 5:42 PM), <https://www.bloomberg.com/news/articles/2018-09-12/devos-loses-states-suit-over-borrower-defense-rule-delay> [<https://perma.cc/RP3F-R38D>].

362. *See* Scott Jaschik, *Court: Education Department Must Resume Debt Relief*, INSIDE HIGHER ED. (May 29, 2018), <https://insidehighered.com/quicktakes/2018/05/29/court-education-department-must-resume-debt-relief> [<https://perma.cc/RJ22-UE2Y>].

363. *See* Katie Lobosco, *Betsy DeVos Loses Lawsuit After Delaying Student Loan Protection Rule*, CNN (Sept. 13, 2018, 12:51 PM), <https://www.cnn.com/2018/09/13/politics/betsy-devos-loses-lawsuit/index.html> [<https://perma.cc/2MFU-NTPP>]. The judge, however, did not require the rule to be reinstated. *See id.* Instead, there will be a hearing to discuss remedies. *See id.*

illegal.³⁶⁴ It gave the DOE thirty days to resolve problems inherent in the repeal of the regulation.³⁶⁵

DeVos's actions belie any concern for student borrowers. Rather, her real concern is for lenders and institutions, particularly proprietary institutions, which does not bode well for borrowers.³⁶⁶ In June 2017, she announced that the DOE would reconsider the Obama Administration's gainful employment rule with the aim of creating or "resetting" a new rule.³⁶⁷ This again prompted lawsuits by the attorneys general of eighteen states plus the District of Columbia to compel implementation of the old rule on the ground that it had already undergone "extensive input and analysis, negotiated rulemaking, and public comment."³⁶⁸ In October 2018, the court gave the DOE thirty days to resolve problems with repeal.³⁶⁹

Meanwhile, the DOE announced in October 2018 that it would not be able to meet the November deadline to resolve the problems

364. See Sara Garcia, *The Lawsuits Challenging DeVos' Anti-Student Higher Education Agenda*, CTR. FOR AM. PROGRESS (Oct. 2, 2018, 9:03 AM), <https://www.americanprogress.org/issues/education-postsecondary/news/2018/10/02/458814/lawsuits-challenging-devos-anti-student-higher-education-agenda> [<https://perma.cc/859X-JUQK>].

365. See *id.*

366. See, e.g., Michael Stratford, *DeVos Escalates Fights with States Over Student Loan Companies*, POLITICO (Sept. 7, 2018, 4:29 PM), <https://www.politico.com/story/2018/09/07/devos-student-loan-companies-774599> [<https://perma.cc/Q3FT-H9MU>].

367. See Paul Fain, *AGs Sue DeVos Over Gainful Employment Rule*, INSIDE HIGHER ED. (Oct. 18, 2017), <https://insidehighered.com/quicktakes/2017/10/18/ags-sue-devos-over-gainful-employment-rule> [<https://perma.cc/3UK7-B8JD>].

368. See *Dozens of Organizations Come Out in Support of Gainful Employment, Borrower Defense Rules*, CONSUMER REPS. (May 4, 2018), <https://www.consumerreports.org/consumerist/dozens-of-organizations-come-out-in-support-of-gainful-employment-borrower-defense-rules> [<https://perma.cc/H7CA-L67L>].

369. See Garcia, *supra* note 364; see also 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/D4U8-QAS3>]. Also pending is a suit filed in August 2018 by the National Student Legal Defense Network representing the National Education Association and the California Teachers Association against DeVos and the DOE to halt the illegal delay of rules designed to protect students enrolled in online education programs. See *id.* The rules at issue require online educational institutions to notify students if the programs in which they are enrolled or plan to be enrolled fail to meet state licensing standards or are in danger of "fac[ing] adverse actions from the state or accreditor." *Educators, Students File Lawsuit Against Education Department, DeVos*, NAT'L EDUC. ASS'N. (Aug. 23, 2018), www.nea.org/home/73914.htm [<https://perma.cc/D82Y-SJRT>].

with the repeal of the borrower defense and gainful employment regulations.³⁷⁰ This means that the earliest implementation date will be July 2020, a year after the DOE had estimated.³⁷¹ Advocates called this a win for student borrowers.³⁷²

In 2016, the Obama Administration considered replacing the complex labyrinth that is the system of obtaining information about student loans with the creation of a single web portal administered by the DOE through which students could obtain this information.³⁷³ In April 2017, DeVos proposed to take that simplification plan a step further and award the student loan vendor contract to a single company instead of the then nine loan servicers.³⁷⁴ She also proposed to disregard the Obama Administration's policy of considering a loan company's track record of servicing loans in awarding loan vendor contracts.³⁷⁵ This would have placed student borrowers at the mercy of a single predatory loan servicer, without any feasible choices.³⁷⁶

370. See Garcia, *supra* note 364; see also Andrew Kreighbaum, *Missed Deadline Stalls DeVos Agenda*, INSIDE HIGHER ED. (Oct. 4, 2018), <https://www.insidehighered.com/news/2018/10/04/education-department-misses-deadline-its-overhaul-student-loan-rules> [<https://perma.cc/XG65-ATK9>].

371. See Kreighbaum, *supra* note 370.

372. See *id.*

373. See Stacy Cowley, *DeVos Abandons Plan to Allow One Company to Service Federal Student Loans*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/business/dealbook/devos-student-loan-payment-system.html> [<https://perma.cc/8MAR-2QSC>].

374. See *id.* Her rationale was that this would be more efficient because the present system is “cumbersome and confusing—with shifting deadlines [and] changing requirements.” Danielle Douglas-Gabriel, *Trump Administration Cancels Controversial Contract Bid for a New Student Loan Servicer*, WASH. POST (Aug. 1, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/08/01/senators-combat-devos-reset-on-student-loan-servicing-contracts> [<https://perma.cc/P2WR-CQGM>]. The DOE had estimated that switching to a single loan servicer would save more than \$130 million in the first five years. See *id.*; see also Roger Yu & Kevin McCoy, *Trump to Grant Student Loan Servicing Work to Just One Company*, USA TODAY (May 22, 2017, 5:31 PM), <https://www.usatoday.com/story/money/2017/05/22/trump-grant-student-loan-servicing-work-just-one-company/102004374> [<https://perma.cc/6T5X-UT3M>].

375. See Cowley & Silver-Greenberg, *supra* note 321.

376. See Gretchen Morgenson, *At Student Loan Giant Navient, Troubled Past Was Prologue*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/business/navient-sallie-mae-student-loans.html> [<https://perma.cc/5DRD-YQM2>]. The largest federal loan servicer, Navient, formerly Sallie Mae, is currently facing a lawsuit filed by the Consumer Financial Protection Bureau accusing it of shoddy service and deception. See *id.* The company denies these allegations, but in 2014, the company was investigated by the Department of Justice and the Federal Deposit Insurance Corporation for wrongdoing in overcharging military families for almost

DeVos withdrew these proposals only after they received vociferous objections from consumer advocates and members of Congress concerned about both the quality of service and creating a “too big to fail” student loan servicing monopoly.³⁷⁷ In its FY 2018 appropriations bill, Congress forbade the DOE from awarding the contract to service student loans to a single servicer.³⁷⁸ It also required the DOE to consider the performance record of any company receiving a DOE loan servicing contract.³⁷⁹

DeVos has made no secret of her desire to decrease the federal government’s role in education.³⁸⁰ She has shrunk the number of positions in the DOE to the point that there is concern about the ability of the Department to perform its key functions, such as “aiding debt-burdened students defrauded by for-profit colleges” and addressing the thousands of applications for student debt relief.³⁸¹ When she

ten years. *See id.* Navient settled the suit, paying \$60 million. *See id.*; *see also* Nykiel, *supra* note 350.

377. *See* Douglas-Gabriel, *supra* note 374.

378. *See* Consolidated Appropriations Act 2018, H. Comm. on Appropriations, 115th Cong., Rules Comm. Print 115-66, 992-994 (Mar. 21, 2018); Andrew Kreighbaum, *New Boost for Student Aid and Research*, INSIDE HIGHER ED. (Mar. 22, 2018), <https://www.insidehighered.com/news/2018/03/22/omnibus-spending-package-boosts-student-aid-while-restricting-devos-priorities>.

379. *See* Consolidations Appropriation Act, *supra* note 378, at 992–994.

380. *See, e.g.*, Moriah Balingit & Danielle Douglas-Gabriel, *Inside Betsy DeVos’s Efforts to Shrink the Education Department*, WASH. POST. (Nov. 8, 2017), https://www.washingtonpost.com/local/education/inside-betsy-devos-efforts-to-shrink-the-education-department/2017/11/08/fc03884c-ba64-11e7-be94-fabb0f1e9ffb_story.html [<https://perma.cc/5M8U-QRAT>]; *see also* Danielle Douglas-Gabriel, *DeVos Offers Buyouts to Shrink Education Department Workforce*, WASH. POST (Oct. 27, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/10/27/devos-offers-buyouts-to-shrink-education-department-workforce> [<https://perma.cc/MC79-SQGZ>].

381. *See* Balingit & Douglas-Gabriel, *supra* note 380. Previously, there were 87,000 such applications that were being reviewed by just fourteen staff members. *Id.* Recently, however, DeVos has announced that the DOE will implement part of the borrower defense rule and will automatically cancel \$150 million in student loan debt of around 15,000 borrowers who attended colleges that closed between November 2013 and December 2018. Andrew Kreighbaum, *DeVos to Cancel \$150 Million in Student Loan Debt*, INSIDE HIGHER ED. (Dec. 14, 2018), <https://www.insidehighered.com/quicktakes/2018/12/14/devos-cancel-150-million-student-loan-debt> [<https://perma.cc/A57R-B62E>]. However, in November 2019, the DOE announced that it would cancel almost \$11 million in federal loans provided to students defrauded by four defunct for-profit Art Institutes which falsely claimed to be accredited. Evidence establishes that the DOE knew the institutions were not accredited but continued issuing the loans. *See* Danielle Douglas-Gabriel, *DeVos Cancels Nearly \$11 Million in Student Loans that the Education Dept. Sent to Unaccredited For-Profit Colleges*, WASH. POST (Nov. 8, 2019, 3:14 pm),

sought to dismantle the DOE's Central Budget Office and the Office for Civil Rights, she again was rebuked by Congress with specific language in the 2018 appropriations bill that forbade her from making fundamental changes to the Department.³⁸²

Her support of student loan servicers has been unapologetic, despite numerous complaints about these entities. In 2017, she ended the DOE's relationship with the Consumer Financial Protection Bureau (CFPB), the government regulator of student loan servicers and for-profit institutions.³⁸³ The DOE abruptly announced that it would no longer honor two memoranda of understanding between it and the CFPB to share information on abusive practices of student loan servicers, along with supervisory oversight of student loan lenders and for-profit schools.³⁸⁴

DeVos has gone even further in attempting to curtail oversight and regulation of student loan servicers by the states as well. In early 2018, she issued a memorandum arguing that federal law preempts state efforts to regulate student loan servicers.³⁸⁵ Although the states

<https://www.washingtonpost.com/education/2019/11/08/devos-cancels-nearly-million-student-loans-that-education-dept-sent-unaccredited-for-profit-colleges>.

382. See Valerie Strauss, *Congress Rebukes DeVos Over Her Plans to Reorganize the Education Department*, WASH. POST (Mar. 22, 2018, 2:19 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/22/congress-rebuked-devos-over-her-plans-to-reorganize-the-education-department> [https://perma.cc/Z74H-A6FU]. However, DeVos also has staffed the DOE with for-profit industry insiders. See David Halperin, *DeVos Embrace of Predatory For-Profit Colleges Is Breathtaking*, HUFFPOST (Sept. 6, 2017, 6:03 PM), https://www.huffingtonpost.com/entry/devos-embrace-of-predatory-for-profit-colleges-is-breathtaking_us_59b0705ee4b0d0c16bb529d0 [https://perma.cc/236N-S8UU].

383. See Andrew Kreighbaum, *Education Dept. Ends Partnership with CFPB*, INSIDE HIGHER ED. (Sept. 5, 2017), <https://www.insidehighered.com/news/2017/09/05/education-dept-rebuked-cfpb-overreach-kills-information-sharing-agreement> [https://perma.cc/4PBN-S4MJ].

384. See *id.* In the 2018 Appropriations Act, however, Congress required the DOE to provide reports on a quarterly basis on borrower defense to repayment claims. See Andrew Kreighbaum, *New Boost for Student Aid and Research*, INSIDE HIGHER ED. (Mar. 22, 2018), <https://www.insidehighered.com/news/2018/03/22/omnibus-spending-package-boosts-student-aid-while-restricting-devos-priorities> [https://perma.cc/X9UY-266T].

385. See, e.g., Cory Turner, *Education Department Wants to Protect Student Loan Debt Collectors*, NPR (Feb. 27, 2018, 10:40 AM), <https://www.npr.org/sections/ed/2018/02/27/588943959/education-department-wants-to-protect-student-loan-debt-collectors> [https://perma.cc/CXZ8-89L3]. States have implemented measures to regulate this industry, such as passing a "student loan bill of rights," creating a student loan ombudsman position to assist borrowers with complaints, and requiring licenses to operate within the state. *Id.*; see Kaitlin Mulhere,

have vowed to continue their efforts to regulate the servicers,³⁸⁶ there is no indication that DeVos plans to withdraw the memo or reduce her efforts to aid the student loan servicing industry. While the memo is not law, nevertheless the fear is that the industry will seize upon it to bolster their argument that they are bound only by federal law and are not subject to state laws aimed at protecting borrowers.³⁸⁷ DeVos stated in this memo that there are federal safeguards in place to “ensure that borrowers receive exemplary customer service and are protected from substandard practices.”³⁸⁸ The reality, however, does not support this statement.

Trump has supported DeVos’s actions. In both his FY 2018 and FY 2019 budget proposals, Trump called for cuts to higher education.³⁸⁹ In 2018, he proposed cutting \$143 billion from federal student loans by allowing the Perkins loan program to expire, phasing out subsidized Stafford loans, ending public service loan forgiveness (PSLF), reducing funding for the federal work-study program by half, cutting the surplus in the Pell grant program, eliminating SEOG grants, and revamping the income-based repayment program.³⁹⁰ However, he was rebuked when Congress increased the 2018 budget of the DOE by \$3.9 billion to provide additional funding to the SEOG

Betsy DeVos Is Telling States to Stop Cracking Down on Student Loan Companies, MONEY (Mar. 9, 2018), <http://time.com/money/5193456/devos-student-loan-servicers-state-regulations> [<https://perma.cc/3ZNU-642Q>].

386. See Jillian Berman, *States to DeVos: We’ll Keep Cracking Down on Student-Loan Companies*, MARKETWATCH (Mar. 3, 2018, 1:34 PM), <https://www.marketwatch.com/story/states-to-devos-well-keep-cracking-down-on-student-loan-companies-2018-03-02> [<https://perma.cc/AQB2-2BW9>].

387. See Mulhere, *supra* note 385. There is a Freedom of Information Act (FOIA) lawsuit currently pending to compel the DOE to release documents to determine whether loan servicers illegally participated in the DOE’s attempt to restrict states’ role in regulating loan servicers. See Garcia, *supra* note 364 (discussing other lawsuits pending against DeVos and the DOE); see also *National Consumer Law Center Files FOIA Lawsuit Against U.S. Department of Education*, NAT’L. CONSUMER LAW CTR. (Nov. 16, 2018), <https://www.nclc.org/media-center/national-consumer-law-center-files-foia-lawsuit-against-u-s-department-of-education.html> [<https://perma.cc/948M-UW64>].

388. See Mulhere, *supra* note 385.

389. See FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION, 26–28.

390. *Id.* at 25–29; Andrew Kreighbaum, *Trump Budget Would Slash Student Aid and Research*, INSIDE HIGHER ED. (May 24, 2017), <https://www.insidehighered.com/news/2017/05/24/white-house-budget-includes-tens-billions-cuts-student-aid-and-research> [<https://perma.cc/NC9S-YCMX>].

program, the PSLF program,³⁹¹ the work-study program, and the Pell grant program.³⁹²

In Trump's FY 2018 budget proposal, there was a cryptic statement that the Administration "looks forward to working with Congress" to address the issue of "Higher Education Accountability" by not allowing students to "take on debt they cannot afford to repay."³⁹³ Given the Trump Administration's partiality to predatory institutions and the fact that it has worked to dismantle the Obama era "gainful employment" rule,³⁹⁴ this probably means that instead of holding underperforming schools accountable, and instead of working to hold rising tuition costs in check, students will be held accountable with a limitation on the amount of federal loan money they can obtain, while tuition continues to rise. This will force students to turn to more expensive private loans.

In his FY 2019 budget proposal, Trump again requested cuts to education, including the elimination of the PSLF program and subsidized student loans.³⁹⁵ He also requested a reform of the student loan repayment system, so that students in an income-driven repayment plan would have to make larger monthly payments of

391. See *What the 2018 Spending Bill Means for Education and the Humanities*, MLA ACTION NETWORK (Apr. 6, 2018), <https://action.mla.org/policy-what-the-2018-spending-bill-means-for-education-and-the-humanities> [https://perma.cc/F4AC-XYSV] (explaining the additional funding to the PSLF program was intended to fix the problem of loan servicers' failure to inform borrowers that either their loans or their repayment plans or both did not qualify for forgiveness). Thus, the years of payments that borrowers had made thinking they would soon qualify for forgiveness would not count, and they would have to start over making payments for another ten years to qualify for forgiveness. See *id.* This prompted a number of lawsuits, which the 2018 appropriation was intended to address. See *id.* However, this funding is on a one-time, first-come-first-served basis and will not be renewed. See *id.* There are concerns that the current appropriation will be insufficient to adequately service the number of claimants who were misled by their loan servicers. See *id.*

392. See FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION, *supra* note 389, at 24.

393. *Id.* at 25.

394. See *supra* notes 329–331, 367–368 and accompanying text. This rule prohibits schools from receiving federal funding if a certain percentage of their graduates are unable to secure jobs or "have high levels of debt compared [to] their incomes." Ben Miller, *6 Things Betsy DeVos Has Done on Higher Ed*, CTR. FOR AM. PROGRESS (June 29, 2017, 2:40 PM), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/06/29/435273/6-things-betsy-devos-done-higher-ed> [https://perma.cc/L5D6-GW5J].

395. See Preston Cooper, *President Trump's Proposed Higher Education Budget (Round 2)*, FORBES (Feb. 13, 2018), <https://www.forbes.com/sites/prestoncooper2/2018/02/13/president-trumps-proposed-higher-education-budget-round-2/#2ad58af759b9> [https://perma.cc/Z3QM-5K3D].

12.5% of their income instead of the current 10%.³⁹⁶ The trade-off would be loan forgiveness for any remaining balance at the end of fifteen years, instead of the current twenty years.³⁹⁷ This would apply only to undergraduate borrowers; graduate borrowers would not receive forgiveness until the end of thirty years.³⁹⁸ Trump's proposal claims that these changes would save \$203 billion over the next ten years,³⁹⁹ although this amount has been disputed.⁴⁰⁰

While there is an obvious advantage in lowering interest costs to students because they would pay off their loans earlier, nevertheless this proposal would hit borrowers hardest (forcing them to make larger payments) at the beginning of their careers when they are most vulnerable financially.

II. HOW WE GOT HERE: MISTAKES, INACTIONS, AND ANIMOSITY

One of the major problems facing the American economy today is the sheer size of student loan debt, surpassed only by home mortgage debt.⁴⁰¹ Unlike home mortgage debt, though, student loan debt is unsecured. For that reason, as this huge bubble continues to enlarge, if it should burst it will be more disastrous than the 2008 financial crisis.⁴⁰²

396. *Id.*

397. Miller, *supra* note 394.

398. *Id.*

399. Cooper, *supra* note 395.

400. *See id.* (stating the CBO estimates that the figure is "closer to \$100 billion").

401. *See* Weingarten, *supra* note 6 (noting that student loan debt reached \$1.5 trillion last summer which exceeds auto loan debt, credit card debt, and home equity revolving debt); *see also A Record One-In-Five Households Now Owe Student Loan Debt*, *supra* note 321; *Quarterly Report on Household Debt and Credit 2018: Q2*, FED. RES. BANK OF N.Y. (Aug. 2018). Women owe the vast majority of this amount, \$890 billion, nearly twice as much as men, and black women owe more than white women. Jonathan Berr, *Who Shoulders Most of Nation's \$1.4 Trillion in Student Debt? Women*, CBS NEWS (July 9, 2018, 4:30 AM), <https://www.cbsnews.com/news/women-shoulder-most-of-the-nations-1-4-trillion-in-student-debt> [<https://perma.cc/V2Y9-899H>].

402. *See* Susan Soederberg, *The Student Loan Crisis and the Debtfare State*, DOLLARS & SENSE (May/June 2015), www.dollarsandsense.org/archives/2015/0515soederberg.html [<https://perma.cc/46EA-GRTM>]. Student loan debt bears some similarities to the sub-prime mortgage debt that caused the 2008 financial crisis. *See id.* For instance, student loan debt, like sub-prime mortgage debt, is bundled and sold into the secondary market. *See id.* This bundle is called SLABS, an acronym for Student Loan Asset Backed Securities, and it is purchased by hedge funds, large pension plans, and other institutional investors. *See id.* It is the means through which

Student loan debt is part of a vicious circle because college students today face spiraling costs of tuition and fees. For many students, higher education is unobtainable without incurring burdensome debt to pay for it. For others, the fear of this crippling burden and its consequences dissuades them from pursuing higher education at all.

The equity in student loan debt lies in the value of the education obtained and the ability of the borrower to find a job that enables him or her not only to feasibly pay off the debt but also to become a contributing member of society. In some cases, however, the degrees these students obtain may be worthless or partially worthless, or their schools may close suddenly, leaving them with massive debt and no degree.⁴⁰³ Once the debt is incurred, students may be at the mercy of predatory lenders who may make it more difficult for these students to repay their loans.⁴⁰⁴ For those who are struggling to repay, there are dire consequences of default, in addition to the fact that this debt is almost impossible to discharge in bankruptcy.⁴⁰⁵

The problems of spiraling tuition, crisis-level student loan debt, predatory for-profit institutions, unfair laws relating to student borrowers, and predatory lenders and loan servicers can all be laid at the collective feet of Congress. Some of these problems have been the result of well-intended but mistaken congressional actions, some have been the result of congressional inactions, and some have been the result of outright enmity or disregard for student borrowers.

Whatever the origin, these problems can and should be fixed. Since the HEA is past due for reauthorization, which is likely to occur

funds are raised for student loans. *See id.* The risk of this investment depends upon borrowers' ability to repay the loans. *See id.* There is much concern that "the value of the debt [will] outstrip the value of the asset itself." Eric Reed, *Should You Invest in Student Loan Asset-Backed Securities?*, THE STREET (May 20, 2017), <https://www.thestreet.com/personal-finance/should-you-invest-in-student-loan-asset-backed-securities-14142296>; *see also* Ellen Messer-Davidow, *Investing in College Education: Debtors, Bettors, Lenders, Brokers*, MDPI (2017). However, not everyone shares this alarm. *See, e.g.*, Akin Oyedele, *Goldman Sachs: There's an Attractive Way to Profit From the \$1.3 Trillion Student Loan Bubble*, BUS. INSIDER (Dec. 9, 2017, 7:05 AM), <https://www.businessinsider.com/student-loan-bubble-investment-is-private-abs-goldman-2017-12> [<https://perma.cc/7FDK-N4G3>].

403. *See, e.g.*, *supra* notes 343–345 and accompanying text.

404. *See, e.g.*, *supra* notes 287–288, 349–351, 383–387 and accompanying text.

405. *See supra* note 359 and accompanying text (outlining the consequences of default); *see also supra* notes 154–155, 238–239, 265–266 and accompanying text (explaining student loan debt is difficult to discharge in bankruptcy).

in the near future, now is the time to carefully consider the federal role in higher education and to learn from the mistakes of the past.

A. Student Loan Policy and The Garden Path

The “golden years” of federal funding policy for higher education during the 1950s and 1960s were due to four factors: first, the Presidents themselves were keenly attuned to promoting education and access to education; second, the economy was strong during this period; third, the political climate throughout this period was consistently inclined toward the promotion of education; and fourth, there was bipartisanship with a spirit of compromise in the national interest. Nevertheless, there were some missed opportunities, such as the congressional leaning toward loans, as opposed to scholarships, in the National Defense Education Act of 1958.⁴⁰⁶ No doubt this made federal funding for higher education more palatable because loans were cheaper for the government than grants and scholarships. But the “no free rides for students” attitude that partially led to that decision was ironic considering the tremendous efforts of Congress in the 1960s to increase access to education for low-income students plus the fact that the Democrats solidly controlled both houses of Congress at the time.⁴⁰⁷

The public’s attitude toward education began to change during the 1970s, however, with the decline in the economy and the increasing distrust of the government over the Vietnam War. The demand for greater accountability in education spending and concern over growing student loan defaults, the majority of which were attributable to borrowers from proprietary institutions, were probably factors in the first congressional encroachment on student borrowers’ rights in the bankruptcy process in the third reauthorization of the

406. See *supra* notes 48–51 and accompanying text.

407. See *85th United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/85th_United_States_Congress [https://perma.cc/6KXQ-JKP4] (last visited Oct. 28, 2019) (explaining that in the 85th Congress (1957–1959), Democrats controlled 65% of the voting shares in the Senate and 53.3% of the voting shares in the House). The members of Congress who thought that students should not be given a “free ride” may have felt emboldened by the fact that Eisenhower had a very strong work ethic, developed after having grown up in a poor but very religious family in a very small town in Kansas. See Obituary, *Dwight David Eisenhower: A Leader in War and Peace*, N.Y. TIMES (Mar. 29, 1969), <http://movies2.nytimes.com/learning/general/onthisday/bday/1014.html> [https://perma.cc/3CNF-CT6T].

HEA in 1976.⁴⁰⁸ But instead of addressing the problem of defaults in a rational manner by imposing additional restrictions on proprietary institutions, which were responsible for the largest number of defaults, Congress instead chose to “punish” student borrowers by limiting their ability to discharge federally insured student loans in bankruptcy.⁴⁰⁹ At the same time, it provided an unlimited statute of limitations on collection of these loans.⁴¹⁰

The “no free rides” mentality persisted and caused Congress to decide at several points to forego the route of scholarships and grants for students and support to educational institutions, in favor of student loans.⁴¹¹ The die was cast by the HEA’s initial shift of support from educational institutions to students and from government lenders to government-guaranteed private lenders. This was the root of today’s student loan debt crisis. At the time the HEA was enacted, however, these shifts probably made the legislation more palatable politically and thus increased its chance of enactment,⁴¹² even though at the time, there was concern over the rising costs of higher education.⁴¹³

While there are numerous factors that have contributed to the high cost of post-secondary education, the biggest factor has been the decrease in state support, particularly during periods of economic downturns, which has forced colleges to raise tuition.⁴¹⁴ But in the initial enactment of the HEA, as well as in subsequent reauthorizations, Congress relinquished any significant role in moderating the spiraling costs of higher education by focusing on aid to students, rather than aid to educational institutions.⁴¹⁵

408. See *supra* notes 110–113 and accompanying text.

409. See *supra* notes 112–113 and accompanying text.

410. See *supra* note 182 and accompanying text.

411. See *supra* notes 99–101, 179–181 and accompanying text.

412. See *89th United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/89th_United_States_Congress [<https://perma.cc/XLL2-G4YR>] (last visited Oct. 28, 2019) (noting that Democratic control over Congress during the 89th Congress (1965–1967) was at an all-time high of 67% of the voting shares in the Senate and 68% of the voting shares in the House). However, it was also a period in which there was a spirit of bipartisanship. See *id.*

413. See *supra* note 70 and accompanying text.

414. See, e.g., Jeffrey J. Selingo, *Who Is to Blame for Rising Tuition Prices at Public Colleges?*, WASH. POST (Oct. 20, 2017, 9:55 PM), https://www.washingtonpost.com/news/grade-point/wp/2017/10/20/who-is-to-blame-for-rising-tuition-prices-at-public-colleges/?noredirect=on&utm_term=.e396e06fe219 [<https://perma.cc/AVE8-4H6S>]; see also UTAH SYS. HIGHER ED., *New Report Analyzes Factors for Rising Tuition* (May 5, 2015), <https://ushe.edu/new-report-analyzes-factors-for-rising-tuition> [<https://perma.cc/B8CU-DX7Z>].

415. See *supra* notes 50, 70–74, 99–101, 179–185 and accompanying text.

This problem was compounded in 1978 with the enactment of the Middle Income Student Assistance Act because this Act greatly expanded the federal student loan program by making federal loans available to any student, regardless of need.⁴¹⁶ So instead of a Democratic-controlled Congress and a Democratic President taking advantage of the moment to rethink federal education policy, they simply reacted to the immediate problem, which was the outcry from the middle class for relief from spiraling tuition costs. The immediate “price” for this “free ride” was the codification of the limitation from bankruptcy discharge for federally guaranteed loans from nonprofit institutions, even though there was no evidence to justify such a limitation.⁴¹⁷ The longer-term cost was an across-the-board tuition increase and the largest enrollment increase in proprietary institutions up to that point because of the elimination of restrictions on these institutions.⁴¹⁸ At the same time, however, there was inadequate regulation of these institutions.

Reagan’s emphasis on smaller government resulted in education policy becoming less reactive and more focused on neoliberalism, with resulting cuts in government spending across the board,⁴¹⁹ leading to steep increases in college tuition in the 1980s.⁴²⁰ Despite these tuition increases, however, in the 1992 HEA reauthorization, a Democratic-controlled Congress chose to disregard the suggestion of providing more grants, thereby reducing reliance on loans.⁴²¹ This decision resulted in an increase of 50% in student loan volume.⁴²² But this Congress did implement a pilot program of direct loans instead of using banks and other lenders as middlemen after studies showed that direct loans were cheaper for students, easier for schools to administer,

416. See *supra* notes 122–124 and accompanying text.

417. Sees *supra* notes 125–131 and accompanying text.

418. See *supra* notes 134–138 and accompanying text.

419. See Messer-Davidow, *supra* note 402, at 7–8.

420. See *supra* note 167 and accompanying text.

421. See *supra* notes 179–185 and accompanying text.

422. King, *supra* note 187.

and more economical for the federal government.⁴²³ Thus, this change was a win for everyone—except private lenders.⁴²⁴

The Republicans' 1994 victory in gaining control of both houses of Congress was an important turning point in the student loan program because the congressional spirit of bipartisanship began to seriously wane and, with it, the focus on the promotion of education. Instead, the country entered a period of politicization of education, which has continued. This has had detrimental effects on both student borrowers and taxpayers.⁴²⁵ For instance, immediately after gaining control of Congress, the newly elected Republicans bowed to pressure from private lenders and gave them an open field to use whatever means were available to persuade financial aid officers to enlist in the FFEL guaranteed loan program,⁴²⁶ despite the fact that this program benefitted no one—not the schools, not the students, and not the American taxpayers—except the private lenders.⁴²⁷

But a consequence of the direct loan program was the privatization of Sallie Mae in 1996.⁴²⁸ It was entirely foreseeable that the volume of student loans would greatly increase by allowing Sallie Mae to become a private company, no longer restricted by its narrow government charter but boosted by its reputation as a former GSE with the imprimatur of a federal guarantee.⁴²⁹ Thus, Sallie Mae had a significant advantage in the private sector.

Despite the increase in number of outstanding student loans, however, in 1998 Congress again expanded the student loan program by making unsubsidized loans under the Stafford loan program available to all students.⁴³⁰ But in keeping with the enmity toward student borrowers that it had displayed in the past, the “price” of this

423. See *supra* note 171 and accompanying text; see also *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> [<https://perma.cc/QEA7-45BH>] (last visited Oct. 28, 2019) (providing that government loans provide lower interest rates and fees than private loans, and they offer benefits like forgiveness and forbearance that private loans do not). Educational institutions find it much simpler to deal with a single government lender, rather than numerous private lenders. See *id.*

424. See *supra* notes 211–213 and accompanying text. In 1993, the direct loan pilot program was expanded in the Student Loan Reform Act. See Omnibus Budget Reconciliation Act of 1993, Pub L. No. 103-66, § 4011, 107 Stat. 312, 341 (1993).

425. See *supra* note 219 and accompanying text.

426. See *supra* notes 215–219 and accompanying text.

427. See *supra* note 219 and accompanying text.

428. See *supra* notes 220 and accompanying text.

429. See *supra* note 220–222 and accompanying text (explaining the number of student loans doubled within ten years after Sallie Mae's privatization).

430. See *supra* notes 235–237 and accompanying text.

expansion exacted by Congress was that education loans, both federal and private, were made essentially non-dischargeable in bankruptcy.⁴³¹ Yet this significant advantage to lenders was not passed on to borrowers in the way of lower interest rates or fees.

In 2002, Congress raised the interest rate on federal student loans when it changed the rate from variable to fixed, and the fixed rate, which became effective in 2006, was much higher than the variable rate.⁴³² It then took Congress six years to alleviate this unfairness, and even then it acted only in response to an outcry when the fixed interest rate threatened to double.⁴³³

In 2005, when the Republicans gained control of both Congress and the White House, there was a significant cut in student financial aid.⁴³⁴ While PLUS loans were extended to graduate and professional students, the “price” for this largesse was that these students would have to pay a higher interest rate,⁴³⁵ and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 essentially ensured that all student loans would be non-dischargeable in bankruptcy.⁴³⁶

Shortly after the Democrats regained control of Congress in the following year, there was a marked change in education policy. The wasteful payments to private lenders under the FFEL program were cut, and the savings were directed into student-friendly changes to financial aid.⁴³⁷ The financial crisis of 2008 had highlighted the inadequacies of the FFEL program when the federal government was forced to lend large amounts of money to private lenders who exercised the federal guarantee on their loans.⁴³⁸ In 2010, with the Democrats still in control of both Congress and the White House, the FFEL program was terminated, and there were further student-friendly provisions enacted, such as a decrease in borrowers’ required monthly payments.⁴³⁹

But in the fall 2010 elections, the Democrats lost control of the House and their control of the Senate was weakened. When the Republicans took over the House, they rolled back much of the

431. See *supra* notes 238–239 and accompanying text.

432. See *supra* notes 250–255 and accompanying text.

433. See *supra* notes 323–324 and accompanying text.

434. See *supra* note 259 and accompanying text. The amount of the cut was \$12.6 billion. *Id.*

435. See *supra* notes 262–264 and accompanying text.

436. See *supra* notes 264–267 and accompanying text.

437. See *supra* notes 269–276 and accompanying text.

438. See *supra* notes 277–283 and accompanying text.

439. See *supra* notes 306–309 and accompanying text.

previous student-friendly legislation, thus increasing the cost of student loans.⁴⁴⁰ In 2013, the Republicans gained control of the Senate, giving them control of both houses of Congress. In 2017, with the Republicans still in control of Congress, there was a 12% increase in student loan defaults over 2016.⁴⁴¹

The consequences of defaulting on student loans are dire. The Debt Collection Improvement Act, enacted in 1996 and implemented in 2001, permits lenders to reach Social Security, retirement, and disability benefits to offset defaults.⁴⁴² In addition, many states impose additional draconian sanctions on borrowers who default of their student loans.⁴⁴³ For instance, in twenty states a default on a student loan can result in the denial, loss, or suspension of a state-issued professional license, and in two states such a default can result in the loss of a driver's license.⁴⁴⁴ The stunning counter-productiveness of these sanctions has led to an across-the-aisle effort, spearheaded by Senators Marco Rubio and Elizabeth Warren, to introduce legislation to prevent their further enforcement.⁴⁴⁵

440. See *supra* notes 313–319 and accompanying text (explaining graduate and professional students were no longer eligible for subsidized Stafford loans and the sequester led to fee increases in both Stafford and PLUS loans).

441. See *supra* note 349 and accompanying text.

442. See *supra* notes 223–224, 249 and accompanying text.

443. Christy Rakoczy, *Facing Student Loan Default? You Could Lose Your License in These States*, STUDENT LOAN HERO, <https://studentloanhero.com/featured/unpaid-student-loans-facing-default-lose-license-states> [https://perma.cc/C3Z2-66GD] (last visited Oct. 28, 2019) (noting that some states impose sanctions for defaulting on student loans, including the loss of ability to choose a payment plan, damage to credit, wage garnishment, and loss of a professional license).

444. See Natalie Kitroeff, *Rubio and Warren Seek to Protect Licenses of Student-Loan Debtors*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/business/rubio-warren-student-loans.html> [https://perma.cc/M68B-3P6Y] (noting that “a November report by *The New York Times* revealed that 20 states had laws allowing government agencies to seize licenses from residents who had defaulted on their education debts”); Rakoczy, *supra* note 443 (noting that there are four states in which a default on a student loan will result in suspension of a professional license); Jessica Siver-Greenberg, Stacy Cowley & Natalie Kitroeff, *When Unpaid Student Loan Bills Mean You Can No Longer Work*, N.Y. TIMES (Nov. 18, 2017), <https://www.nytimes.com/2017/11/18/business/student-loans-licenses.html> [https://perma.cc/FK8A-6MLV] (stating that “critics . . . say the laws shove some borrowers off a financial cliff”).

445. See Kitroeff, *supra* note 444; see also Silver-Greenberg, Cowley & Kitroeff, *supra* note 444.

B. Predatory Lending Institutions

Predatory lending institutions and loan servicers have been blamed for fomenting student loan defaults.⁴⁴⁶ While a direct loan program may not have entirely avoided this result, nevertheless it would have allowed the government greater oversight over these lenders, and it would have afforded more advantages to students, such as lower interest rates. As it is, these predatory lending institutions are “monsters” of the government’s making because of the choices the government has made.

The HEA, from its inception, provided for loans by private lenders with an anticipated guarantee by the states,⁴⁴⁷ again, probably to make the legislation more palatable politically. However, when the states failed to assume their role,⁴⁴⁸ the federal government was forced to increase its role in funding higher education in order to encourage private lenders to participate.⁴⁴⁹ This role has continued to expand.

In 1980, the fourth reauthorization of the HEA under the Carter Administration significantly extended the student loan program to include PLUS loans for parents of college students.⁴⁵⁰ It also provided a large increase in the federal subsidies for private lenders as an additional incentive to participate in the program.⁴⁵¹ But with the election of Ronald Reagan later in 1980, the political differences in funding policy for higher education became more pronounced. Shortly after the Carter Administration’s 1980 expansion of the student loan

446. See *supra* notes 349–351 and accompanying text; see also Bill Fay, *Predatory Lending: Laws and Unfair Credit Practices*, DEBT.ORG, <https://www.debt.org/credit/predatory-lending> [<https://perma.cc/Y75G-Q97Y>] (last visited Oct. 28, 2019) (defining predatory lending practices as including “a failure to disclose information or disclosing false information, risk-based pricing and inflated charges and fees”).

447. See *supra* notes 75–76 and accompanying text.

448. See *supra* note 81 and accompanying text.

449. See *supra* notes 82–84 and 90 and accompanying text. Initially, the government increased its funding role by agreeing to guarantee 80% of the loans. See *supra* note 82 and accompanying text. In the second reauthorization of the HEA in 1972, Sallie Mae was created as a government-sponsored enterprise to provide liquidity for the loans. See *supra* note 90 and accompanying text. In the third reauthorization of the HEA in 1976, the federal government finally stepped in and agreed to guarantee 100% of student loans. See *supra* note 111 and accompanying text.

450. See *supra* notes 139–140 and accompanying text.

451. See *supra* notes 142–143 and accompanying text.

program, the Reagan Administration pulled the rug out from under student borrowers by making government loans more expensive.⁴⁵²

The sixth reauthorization of the HEA in 1992, under the George H.W. Bush Administration, was friendlier to student borrowers because both houses of Congress at that time were under the control of the Democrats. This reauthorization created a direct loan pilot program that would reduce the role of private lenders.⁴⁵³ The following year, with the Democrats still in control of Congress, this program was expanded under the Clinton Administration.⁴⁵⁴

In 1994, however, the Republicans won control of both houses of Congress, and they immediately bowed to pressure from the private lending industry to jettison the direct loan program, despite studies showing that direct loans are more cost effective for the government.⁴⁵⁵ This resulted in the guaranteed loan program once again gaining traction.⁴⁵⁶ Later, private loans also may have received a boost from the debacle over the fixed versus variable student loan interest rates,⁴⁵⁷ which may have persuaded some borrowers to forego government loans in favor of private loans. Nevertheless, in the midterm elections in 1994, the Republicans won a major victory, regaining control of both chambers of Congress and completing the political polarization of education funding policy.⁴⁵⁸

In 1996, in the wake of its declining stock value, Congress approved Sallie Mae's request for privatization, which was completed in 2004.⁴⁵⁹ It then became the largest student loan lender in the country,⁴⁶⁰ although its track record in servicing student loans has been abysmal.

Navient Solutions, the spin-off student loan servicer of Sallie Mae, has been the subject of more complaints than any other student loan lender.⁴⁶¹ It is currently facing lawsuits by the attorneys general

452. See *supra* notes 149–151 and accompanying text.

453. See *supra* notes 179–181 and accompanying text.

454. See *supra* notes 211–212 and accompanying text.

455. See *supra* notes 171, 215–219 and accompanying text.

456. See *supra* note 219 and accompanying text.

457. See *supra* notes 250–257 and accompanying text.

458. See *supra* notes 215–219 and accompanying text.

459. See *supra* notes 220–221 and accompanying text.

460. See *Largest Education Lenders*, FIN. AID, www.finaid.org/loans/biglenders.phtml [<https://perma.cc/KE28-Y46E>] (last visited Oct. 28, 2019).

461. See Zack Friedman, *Navient Ranks Highest for Student Loan Complaints*, FORBES (Jan. 14, 2019, 8:32 am), <https://www.forbes.com/sites/zackfriedman/2019/01/14/navient-complaints-student-loans/#6f4b0fe35152>; Dieter Holger, *Most Complaints About Student Loan Debt are About These Five Issues*,

of three states plus the CFPB for violations of the consumer protection laws.⁴⁶² In 2015, the Department of Justice announced that nearly 78,000 military service members and disabled borrowers would begin receiving nearly \$60 million in compensation for being charged excess interest on their student loans and having their credit ruined by Navient.⁴⁶³

Navient's abysmal record did not dissuade Secretary DeVos in 2017 from contemplating the award of the then \$1.3 trillion in student loan contracts to a single vendor, of which Navient was one of four contenders.⁴⁶⁴ She abandoned that plan only when forced after receiving strong backlash from consumer advocates and members of Congress.⁴⁶⁵

The stock of Navient, however, soared in the wake of DeVos's actions.⁴⁶⁶ Despite the complaints and lawsuits against it, the Trump Administration has shown no concern for Navient's bad behavior or for the plight of student borrowers, many of whom are at the mercy of predatory lenders like Navient. In fact, Secretary DeVos has hamstrung the CFPB by prohibiting the DOE from sharing information on its then \$1.3 trillion in student loans with the Bureau.⁴⁶⁷

QUARTZ (Feb. 28, 2018), <https://qz.com/1217456/most-complaints-about-student-debt-are-about-these-five-issues> [<https://perma.cc/2BZT-F32A>].

462. See Nykiel, *supra* note 350. Among the myriad charges against Navient is that it cheated borrowers by steering them away from repayment options that could lower their monthly payments. See *id.* In some cases, borrowers have charged that because of misrepresentations by Navient and other lenders, loans on which they had been paying for years and which they thought were eligible for the PSLF Program are actually not eligible and the years of payments that they had made on these loans will not count toward forgiveness. See Weingarten, *supra* note 6. Thus, they will have to start over repaying the loans for ten additional years in order to obtain forgiveness. See *id.* As of 2017, only 96 borrowers out of 28,000 who sought relief under the PSLF program had actually had their loans discharged. *Id.*

463. See *Nearly 78,000 Service Members to Begin Receiving \$60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans*, U.S. DEP'T. JUSTICE (May 28, 2015), <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement> [<https://perma.cc/X7ZX-VG63>]; see also Morgenson, *supra* note 376.

464. See *supra* notes 374–376 and accompanying text.

465. See *supra* note 377 and accompanying text.

466. See Shahien Nasiripour, *DeVos Undoes Obama Student Loan Protections*, BLOOMBERG (Apr. 12, 2017), <https://www.timesunion.com/business/article/DeVos-Undoes-Obama-Student-Loan-Protections-11066031.php> [<https://perma.cc/D4PA-ZJAG>].

467. Shahien Nasiripour, *DeVos Tells CFPB to Back Off On Student Loans*, BLOOMBERG (Sept. 8, 2017, 2:05 PM), <https://www.timesunion.com/business/article/DeVos-tells-CFPB-to-back-off-on-student-loans-12183394.php> [<https://perma.cc/87NA-G3PM>]; see *supra* notes 383–384 and accompanying text.

Navient, as one of the largest lenders, stands to benefit from this action.

There has been a sea change in higher education policy from the Obama Administration to the Trump Administration. The policy of the Obama Administration was to focus on protections for student loan borrowers. So far, the Trump Administration seems intent on undoing these protections and instead favoring loan servicers by eliminating further regulation or restrictions on those servicers. This is a policy that makes no sense because not only are student loans likely to be more expensive,⁴⁶⁸ creating serious problems in access to higher education, but the bad behavior of the most notorious student loan lenders, like Navient, will be encouraged. The plight of hapless student borrowers then will be worsened, the outstanding amount of student loan debt will be increased, and taxpayers will be more at risk of having to pay the ultimate bill.

C. Proprietary Educational Institutions

In 1952, when the original GI Bill was nearing its end, Congress decided, with bipartisan support, to extend its benefits to veterans of the Korean War.⁴⁶⁹ At that time, there were numerous reports of abuses by proprietary schools that included targeting veterans for their benefits while offering them worthless degrees.⁴⁷⁰ To curb this abuse, Congress made the decision to award these benefits directly to students rather than to educational institutions.⁴⁷¹ This brought the

468. For example, among the Obama-era borrower protections that DeVos has eliminated is the sixty-day grace period for borrowers in default who formerly could avoid a fee of 16% of their loan balance. See Donna Rosato, *Complaints About Student Loan Servicers Mount as Protections Erode*, CONSUMER REPS. (Apr. 28, 2017), <https://www.consumerreports.org/student-loans/student-loan-servicers-complaints-mount-as-protections-erode> [https://perma.cc/KWZ7-MD75].

469. See generally Veterans Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663 (extending benefits to veterans of the Korean war).

470. See generally David Whitman, *Truman, Eisenhower, and the First GI Bill Scandal*, CENTURY FOUND. (Jan. 24, 2017), <https://tcf.org/content/report/truman-eisenhower-first-gi-bill-scandal> (discussing reports by the VA, Congress, and the General Accounting Office).

471. See *id.* The 1952 GI Bill also included an “85-15” rule to address abuses by proprietary institutions. See *id.* Under this rule, a school could receive no federal funds if more than 85% of its students were veterans using federal funds for their education. See Pub. L. No. 82-550, § 226, 66 Stat. at 667. The Bill also provided that only an accredited school could receive federal funds. See § 242. The U.S. Department of Education was tasked with publishing a list of reliable accrediting agencies. See §§ 241–45.

expansion of proprietary schools to an immediate halt,⁴⁷² at least for the time being.

Although proprietary schools were not included under either the original 1965 HEA legislation or the federal guaranteed student loan program, they were covered under a smaller program for vocational schools for better oversight.⁴⁷³ However, in the first reauthorization of the HEA in 1968, the decision was made to merge the two programs⁴⁷⁴ even though Congress was fully aware of the problems with these schools.⁴⁷⁵ This decision led to the opening of the floodgates that have allowed proprietary schools to flourish.⁴⁷⁶

In 1972, during the second reauthorization of the HEA, Congress chose to continue to award federal aid to students rather than to educational institutions.⁴⁷⁷ This was a momentous decision because it affected not only veterans but all lower-income and lower-middle-income students, and it applied to students at all schools—public, private, nonprofit, for-profit, and vocational—even though concern was expressed at the time about extending federal aid to proprietary institutions.⁴⁷⁸ This concern, however, was not heeded, and the result was another proliferation of proprietary schools.⁴⁷⁹

The concern over the predatory practices of proprietary institutions and the growing number of student loan defaults, most of which were attributable to these institutions, worsened during the early 1970s.⁴⁸⁰ There were restrictions placed on these schools at that time to address the same problems we continue to see today. In 1976, an 85-15 restriction was placed on proprietary institutions in an attempt to curb the abuse of targeting veterans and other students for their federal aid dollars.⁴⁸¹ This restriction resulted in a decline in student loan default rates.⁴⁸² Despite that decline and despite complaints of fraud, misrepresentation, and deception by these institutions, the for-profit lobby prevailed, and the restriction was

472. See Whitman, *supra* note 470.

473. See Protopsaltis & Masiuk, *supra* note 76.

474. See *id.*

475. See *id.*

476. See NCES, *supra* note 70, at tbl.303.10.

477. See *supra* note 95 and accompanying text.

478. See *supra* notes 96–97 and accompanying text.

479. See NCES, *supra* note 70, at 403 tbl.303.10 (showing an enrollment increase of over 62% from 1972 to 1973 at proprietary schools).

480. See *supra* note 105 and accompanying text.

481. See *supra* note 114 and accompanying text.

482. See Whitman, *supra* note 105, at 12.

weakened during the Carter Administration.⁴⁸³ From 1979 to 1980, enrollment in these institutions experienced one of the greatest increases in their history.⁴⁸⁴ Not surprisingly, there also was an increase in the student loan default rate.⁴⁸⁵ But instead of addressing the real problem, Congress chose to “punish” students by including private student loans within the exception to nondischargeability in bankruptcy.⁴⁸⁶

Meanwhile, concern continued to be expressed into the 1980s about the high default rate of these institutions,⁴⁸⁷ but further restrictions were opposed by the Democrats, who saw these institutions as opportunities for low-income, underprivileged students.⁴⁸⁸ Thus, there were no noteworthy actions taken in the 1980s to curb the default rate of these institutions.⁴⁸⁹

Consequently, in 1990, default rates at proprietary institutions reached an all-time high, and Congress was then forced to act by placing restrictions on these institutions.⁴⁹⁰ These restrictions reduced the student loan default rate at these schools.⁴⁹¹

During the Clinton Administration, a Republican-controlled Congress loosened the eligibility restrictions on proprietary institutions, yet afterward there was a decline in default rates.⁴⁹² This

483. See *supra* notes 134–137 and accompanying text.

484. See *supra* note 138.

485. See *Student Loan Default Rate Soars*, *supra* note 154.

486. See *supra* note 155 and accompanying text. Government loans had been nondischargeable since 1976. See *supra* notes 125–127 and accompanying text.

487. See *Student Loan Default Rate Soars*, *supra* note 154.

488. See *supra* notes 162–166 and accompanying text.

489. See *supra* note 167 and accompanying text.

490. See *Education Policy: Debt, Default and Collections*, NEW AMERICA, <https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/debt-default-and-collections> (last visited Dec. 6, 2019). The result was the Omnibus Budget Reconciliation Act, which provided that any school with a cohort default rate equal to or greater than 35% in the following two years would be ineligible for federal loans. See *supra* notes 175–176 and accompanying text. Afterward, the rate would drop to 30%. See *supra* note 177 and accompanying text.

491. The five-year default rate at for-profit institutions fell from 62% in 1988–1989 to 29% in 1998–1999. See *Trends in Higher Education, Five Year Federal Student Loan Default Rates by Institution Type Over Time*, COLL. BD., <https://trends.collegeboard.org/student-aid/figures-tables/five-year-federal-student-loan-default-rates-institution-type-over-time> [<https://perma.cc/SB5J-AX6K>] (last visited Oct. 28, 2019).

492. See *supra* notes 243–244 and accompanying text. The eligibility restrictions on proprietary institutions were loosened when the 85/15 rule that had been implemented in 1992 was changed to a 90/10 rule so that these institutions could

decline was attributable to the sixth reauthorization of the HEA that slashed student loan interest rates and restricted any college with a default rate of 25% or greater for three consecutive years (40% or more in a single year) from participating in any federal student loan program.⁴⁹³

During the George W. Bush Administration, there was a significant enrollment increase in proprietary schools, despite the publicity surrounding the sudden closure of some of these institutions.⁴⁹⁴ This increase was attributable primarily to the financial crisis of 2008 plus an increase in eligibility and size of Pell grants.⁴⁹⁵

During the Obama Administration, a government study concluded that students at proprietary institutions were more likely to default on their loans.⁴⁹⁶ Another study by the same government body concluded that these schools were continuing to engage in fraud and misrepresentation.⁴⁹⁷ This prompted the Administration to issue the “gainful employment” regulation and later the “defense to borrower repayment” regulation to provide protections to students.⁴⁹⁸ In 2016, however, the Republicans gained control of both Congress and the White House, and newly appointed Secretary of Education, Betsy DeVos, decided to delay the implementation of the Obama regulations, making it more difficult for students to obtain relief from predatory institutions.⁴⁹⁹ Moreover, her action in severing ties between the DOE and the CFPB⁵⁰⁰ is a clear message that the Trump

derive no more than 90%, instead of 85%, of their revenues from Title IV funds. *See supra* note 241 and accompanying text. Another contributing factor to the decline in default rates was the increase in the period of nonpayment or underpayment from 180 days to 270 days before a delinquent borrower was considered in default. *See supra* note 243 and accompanying text. The three most common factors leading to default are lack of postsecondary degree, lack of an adequately paying job, and an increase in interest rates. *See Common Reasons for Student Loan Default and How You Can Avoid It*, COLL. RAPTOR <https://www.collegeraptor.com/paying-for-college/articles/student-loans/common-reasons-student-loan-default-can-avoid> [https://perma.cc/A9Y8-F2S8] (last visited Oct. 28, 2019).

493. *See supra* notes 243–244.

494. *See* NCES, *supra* note 70, at tbl.302.30.

495. *See supra* notes 301–304 and accompanying text.

496. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-600, *supra* note 325 and accompanying text.

497. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-948T, *supra* note 326 and accompanying text.

498. *See supra* notes 329, 346 and accompanying text.

499. *See supra* notes 357–359 and accompanying text.

500. *See* Kreighbaum, *supra* note 383.

Administration favors predatory proprietary institutions, as opposed to safeguarding students.⁵⁰¹

The problems of abuse, waste, incompetence, fraud, and misrepresentation at proprietary schools have not only continued since the 1970s; they have significantly worsened.⁵⁰² The restrictions that Congress has imposed to curb some of these problems have waxed and waned over the years. In the years in which the restrictions have been more lax, there has been an uptick in student loan defaults;⁵⁰³ and conversely, when the restrictions have been tighter, there has been a corresponding decline in student loan defaults.⁵⁰⁴

So with such a tangible link between the relaxation of restrictions on these institutions and student loan defaults, why does the government not impose strict requirements on these institutions to prevent these defaults, protect students, and prevent waste of taxpayer money? There are several reasons for this phenomenon. First, these organizations have very effective lobbyists, and they contribute generously to congressional campaigns of both political parties.⁵⁰⁵ Second, these schools exist in every congressional district, making it difficult for Representatives and Senators to criticize their constituents. Third, these schools have bipartisan appeal: to Republicans they are businesses that have existed for generations; for Democrats they represent access to education for lower-income students.⁵⁰⁶ Thus, a political solution to this problem does not appear to be on the horizon. However, enrollment in these institutions has declined because of a stronger economy and declining public

501. See *For-Profit Colleges Struggle Despite Assist from DeVos*, NBC NEWS (Apr. 7, 2018, 9:43 PM), <https://www.nbcnews.com/news/education/profit-colleges-struggle-despite-assist-betsy-devos-n863641> [https://perma.cc/352V-DKBX] (indicating the Trump Administration favors for-profit institutions through the fact that DeVos has staffed the DOE with for-profit industry insiders and has halted further investigation into proprietary schools).

502. See *supra* notes 296–299, 325–333, 343–345 and accompanying text.

503. See *supra* notes 162–165, 172 and accompanying text; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-600, *supra* note 325 (CAO report showing that students at proprietary institutions were more likely to default on their loans).

504. See *supra* notes 114–115, 243–244 and accompanying text.

505. See Polis, *supra* note 12.

506. See Whitman, *supra* note 172, at 8.

confidence.⁵⁰⁷ For this reason, some for-profit institutions are seeking non-profit status.⁵⁰⁸

III. PENDING LEGISLATION TO REAUTHORIZE THE HEA: WILL IT HELP OR HURT?

In the 115th session of Congress, congressional leaders indicated an interest in reauthorizing the HEA.⁵⁰⁹ To begin the process, the parties each drafted bills: the Republican's "Promoting Real Opportunity, Success, and Prosperity through Education Reform" (PROSPER) Act and the Democrat's Aim Higher Act.⁵¹⁰ These bills, however, are polar opposites. The question is whether and how each bill addresses the salient problems facing students (and taxpayers) in higher education: the spiraling costs of tuition, crippling student loan debt, defaults, predatory lenders, and unscrupulous proprietary institutions.

A. The PROSPER Act

The PROSPER Act was reported out of the House Committee on Education and the Workforce during the 115th Congress on a

507. See Doug Lederman, *For-Profit Free Fall Continues, U.S. Data Show*, INSIDE HIGHER ED. (June 6, 2018), <https://www.insidehighered.com/quicktakes/2018/06/06/profit-free-fall-continues-us-data-show>.

508. See Michelle Hackman, *After Obama-Era Crackdown, For-Profit Colleges Seek Nonprofit Status*, WALL ST. J. (May 30, 2018), <https://www.wsj.com/articles/after-obama-era-crackdown-for-profit-colleges-seek-nonprofit-status-1527681600>. In addition, some unscrupulous schools are claiming non-profit status "without adopting non-profit financial controls"; such "covert" status is undertaken to dupe students and keep an income stream flowing to the owners. See Robert Shireman, *These Colleges Say They Are Nonprofit—But Are They?*, CENTURY FOUND. (Sept. 5, 2019), <https://tcf.org/content/commentary/colleges-say-theyre-nonprofit>.

509. See Teri Lyn Hinds, *PROSPER Act: The House Higher Education Act Reauthorization Bill*, NASPA (Dec. 15, 2017), <https://www.naspa.org/blog/prosper-act-the-house-higher-education-act-reauthorization-bill> [<https://perma.cc/MM7H-D7ZG>]. The HEA has been reauthorized eight times. See *supra* note 68 and accompanying text. So, if enacted, it will be the ninth reauthorization. See *Reauthorization of the Higher Education Act of 1965*, FinAid, <https://www.finaid.org/educators/reauthorization.phtml> (last visited Dec. 6, 2019). The provisions of the last reauthorization expired in 2013 but have been extended each year. See Hinds, *supra*. The next reauthorization originally was scheduled for 2014, but it is currently more than five years behind schedule. See *id.*

510. See *id.*

partisan vote and was awaiting consideration by the House.⁵¹¹ Since the Democrats took control of the House in the 2018 elections, there is virtually no chance this bill will pass in its current form.⁵¹² Nevertheless, the bill is important because it is indicative of the Trump Administration's policy on higher education. It is also an attempt to secure Trump's spurned budgetary requests through legislation.⁵¹³

The PROSPER Act does nothing to address the most important problem facing students in higher education, which is the spiraling cost of tuition and fees,⁵¹⁴ most of which is attributable to the decline in state support for higher education.⁵¹⁵ This problem affects access and completion rates, particularly of minorities and lower-income individuals.⁵¹⁶

Despite its title, this bill significantly cuts funding to higher education, making student loans more expensive, which would particularly affect the neediest students.⁵¹⁷ In the interest of "simplifying" and "streamlining" financial aid, the bill eliminates the SEOG grant, the academic competitiveness grants, and the federal

511. H.R. 4508, 115th Cong. (2d Sess. 2018). There has been concern expressed about the process through which this bill was pushed through the committee. *See Hinds, supra* note 509. Teri Lyn Hinds, writing for NASPA—Student Affairs Administrators in Higher Education, explained,

For legislation of such magnitude, the unusually fast pace with which it was pushed through the Ed and Workforce Committee is both concerning and problematic . . . [T]he bill was prepared behind closed doors with little to no opportunity for association input, and then rushed almost immediately to mark-up, preventing legislators from seeking or providing input on key provisions prior to having to vote on the legislation.

Id.

512. *See* Andrew Kreighbaum, *Seeking Votes on PROSPER, GOP Appears to Come Up Short*, INSIDE HIGHER ED. (June 14, 2018), <https://www.insidehighered.com/news/2018/06/14/no-movement-prosper-act-after-gop-vote-count> [<https://perma.cc/PGX2-HZZZ>]. The bill also had little support from Republicans after strong criticism from various groups, including veteran's representatives. *See id.*

513. *See supra* notes 352–353 and accompanying text.

514. *See* CAP Postsecondary Education Team, *What You Need to Know About the House Higher Education Bill*, CTR. FOR AM. PROGRESS 3 (Dec. 7, 2017, 1:33 PM), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/12/07/443915/need-know-house-higher-education-act-bill> [<https://perma.cc/T8TZ-V7DD>]. The costs of undergraduate education, according to one source, have risen 20% since the last HEA reauthorization in 2008. *Id.*

515. *See supra* notes 103, 119, 311 and accompanying text.

516. *See* CAP Postsecondary Education Team, *supra* note 514.

517. *See id.*

PSLF program, among others.⁵¹⁸ It provides one loan and one grant—the Pell grant.⁵¹⁹ While it eliminates loan origination fees, it consolidates subsidized Stafford and PLUS loans into a single unsubsidized federal ONE loan.⁵²⁰ Thus, under this bill, student loans will begin to accrue interest immediately, making them more costly, particularly for the neediest students who otherwise would have qualified for federally subsidized loans.⁵²¹ Further, there is a proposed cap on the amount that can be borrowed under the ONE loan.⁵²² Despite its name, the loan amount varies according to the borrower's status as dependent student, independent student, graduate student, or parent.⁵²³ This will force more borrowers to turn to private loans, which will mean not only that the loans will cost more,⁵²⁴ but these borrowers will be at the mercy of predatory private lenders.⁵²⁵

518. See H.R. 4508, 115th Cong. § 406(b) (2d Sess. 2018) (repealing SEOG); §§ 423–425 (outlining loan forgiveness for teachers, for those who serve in areas of national need, and for civil legal assistance attorneys). It also eliminates the academic competitiveness grants, the Leveraging Educational Assistance Partnership program, and the Robert C. Byrd Honors Scholarship program, and it allows the TEACH grants to expire. See §§ 406–407. The SEOG grant currently provides \$732 million in aid to 1.6 million students each year. CAP Postsecondary Education Team, *supra* note 514.

519. See H.R. 4508, at 291 (amending 20 U.S.C. § 1087). In an effort to encourage earlier completion, the bill provides an additional \$300 bonus for Pell Grant recipients who take extra courses each term. See *id.* at 163–64. However, the bill eliminates the current annual increases in the grant tied to inflation. This means that the value of the grant will erode even faster over time. In an earlier article, I predicted this problem and suggested a solution to it. See Camilla E. Watson, *The Future of Lower Income Students in Higher Education: Rethinking the Pell Program and Federal Tax Incentives*, 45 FLA. ST. U. L. REV. 1107, 1152 (2018).

520. See H.R. 4508, at 321 (noting that interest begins to accrue on day loan is disbursed). An exception is provided in which no interest will accrue for active duty service members. *Id.* at 319.

521. See CAP Postsecondary Education Team, *supra* note 514. This proposed provision is estimated to affect six million borrowers and to cost students \$27 billion over the next decade. *Id.* By one estimate, a student who borrows \$19,000 over four years and makes timely payments will realize a 44% increase in the cost of the loan. See Hinds, *supra* note 509.

522. See H.R. 4508, at 303–07.

523. See *id.* For undergraduates, the amount increases in each year of the first three years of instruction. *Id.* at 303–05.

524. See CAP Postsecondary Education Team, *supra* note 514 (stating that the interest rate generally is higher on private loans than on government loans). In addition, there is no subsidized interest, no six-month grace period before repayment, no forbearance or deferral, generally no income-based repayments, and no loan forgiveness with private loans. See *Federal Versus Private Loans*, *supra* note 423. In contrast, federal loans, unlike many private loans, do not require repayment until the student graduates, drops out, or enrolls on a less than half-time basis. See *id.*

525. See *supra* Section II.B.

This bill also would have a particularly detrimental effect on graduate students. It would place a lifetime cap on the amount they would be able to borrow under the ONE loan program,⁵²⁶ it would forbid them from participating in the federal work-study program,⁵²⁷ and the immediate accrual of interest would make their combined undergraduate and graduate loans much more expensive.⁵²⁸

The bill offers borrowers two repayment plans: a standard repayment plan with equal payments stretched over ten years and an income-based plan based on 15% of the borrower's discretionary income over an indefinite period, with no real forgiveness of principal.⁵²⁹ For those borrowers who may be struggling financially, there is forgiveness only after they have paid an amount equal to what they would have paid under the standard plan.⁵³⁰ Thus, some borrowers may never reach forgiveness. In addition, current income-based plans generally provide for payments of 10% of the borrower's discretionary income.⁵³¹ While a higher percentage payment will result in lower interest charges because the loan ideally would be paid off faster, nevertheless these higher payments come at a time when the borrower has just graduated and is starting out in the world.⁵³² Thus, borrowers would make higher payments when they are most vulnerable financially.

While the elimination of loan origination fees is a positive aspect of the bill, the amount the government will save under the bill through

526. See H.R. 4508, at 306.

527. See *id.* at 250.

528. See CAP Postsecondary Education Team, *supra* note 514.

529. H.R. 4508, at 325–26. It allows for limited payment deferral in the event of economic hardship, unemployment, or illness. See *id.* at 373, 375, 377.

530. See *id.* at 331–32.

531. *Income-Driven Plans*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> [<https://perma.cc/V28F-BBBL>] (last visited Oct. 28, 2019). There currently are four income-based repayment plans: REPAYE, PAYE, IBR and ICR. See *id.* These are based on percentages of discretionary income, which differ with each plan and in cases of low income and larger family size may require no payment at all. See *id.* REPAYE and PAYE plans require a payment of 10% of discretionary income but not above the ten-year standard repayment amount; IBR plans also require a 10% payment limited by the standard repayment amount if the recipient is a new borrower on or after July 1, 2014. See *id.* A new borrower is someone who has no outstanding balance under the William D. Ford Direct Loan Program on or after July 1, 2014. See *id.* Under the ICR plan, the repayment amount is the lesser of 20% of discretionary income or the amount that would be paid under a fixed repayment plan over twelve years. See *id.*

532. See *Federal Versus Private Loans*, *supra* note 423.

cuts to student benefits would be greater than the costs.⁵³³ Critics have expressed concern that the cost of cuts in areas that are profitable for the government, such as graduate and parent loans, may be driving proposed cuts to subsidized loans and restrictions in borrowing under this bill.⁵³⁴

Among conservatives, there has been resistance to any expansion of the government student loan program because of its cost.⁵³⁵ But the cost of the program is a matter of debate because it depends on the accounting method used.⁵³⁶ In 1990, Congress enacted the Federal Credit Reform Act (FCRA),⁵³⁷ which changed the accounting method of the federal student loan program to more accurately reflect its cost.⁵³⁸ The current debate centers on whether the FCRA or the fair value accounting method is the most accurate cost indicator of the program.⁵³⁹ The fair value method, unlike the FCRA, takes into account the risk that the projected budget estimates under the FCRA will be wrong.⁵⁴⁰ This is known as a market value discount rate.⁵⁴¹ Examples of such risks include a downturn in the economy, an increase in defaults, or an increase in administrative costs of the program. The difference in projected cost between the two methods can be significant. For instance, in 2017 the FRCA predicted a profit

533. See CAP Postsecondary Education Team, *supra* note 514.

534. See *id.*

535. See, e.g., Jason Delisle, *The Spiraling Costs of a Student Loan Relief Program*, POLITICO (July 21, 2017, 5:33 AM), <https://www.politico.com/agenda/story/2017/07/21/public-service-loan-forgiveness-cost-double-000478> [<https://perma.cc/RB74-JA8K>]; see also Danielle Douglas-Gabriel, *It's Going to Cost Taxpayers \$108 Billion to Help Student Loan Borrowers*, WASH. POST (Nov. 30, 2016, 4:08 PM), https://www.washingtonpost.com/news/grade-point/wp/2016/11/30/its-going-to-cost-taxpayers-108-billion-to-help-student-loan-borrowers/?utm_term=.f5e99 [<https://perma.cc/59TU-NWLS>].

536. See Preston Cooper, *Why Government Doesn't Profit from Student Loans*, FORBES (Aug. 4, 2017, 11:56 AM), <https://www.forbes.com/sites/prestoncooper2/2017/08/04/why-government-doesnt-profit-from-student-loans/#b68308ceb630> [<https://perma.cc/VS4U-PRBZ>].

537. Federal Credit Reform Act of 1990, Pub L. No. 101-508, 104 Stat. 1388 (1990).

538. See Jason D. Delisle, *Costs and Risks in the Federal Student Loan Program: How Accountability Policies Can Protect Taxpayers*, AM. ENTER. INST. 7 (Jan. 30, 2018).

539. See, e.g., *id.*; see also Matthew Yglesias, *Fair Value Accounting Overestimates Lending Costs*, SLATE (Apr. 10, 2012, 8:26 PM), <https://slate.com/business/2012/04/fair-value-accounting-overestimates-lending-costs.html> [<https://perma.cc/SWF2-7H2Z>].

540. See Yglesias, *supra* note 539.

541. See *id.*

of \$28 billion in the federal student loan program over the next ten years, while fair value accounting predicted that taxpayers would suffer a loss of \$183 billion over that same time period.⁵⁴² Both of these methods have been criticized as inaccurate.⁵⁴³

The current student loan program can be reformed to avoid the issue of whether it results in too much profit or loss. Matthew M. Chingos of the Brookings Institute proposed in 2015 that the risk be shifted from the government to borrowers through a “guarantee fund” in which borrowers would pay a fee that would be escrowed in a trust fund to cover the losses the government would suffer through loan defaults.⁵⁴⁴ Under this proposal, students who successfully repay their loans would receive a refund, with interest, at the end of their repayment period of any money remaining in the fund for their cohort of borrowers.⁵⁴⁵

The beauty of a guarantee system is that it functions as a self-insured plan in which borrowers would self-insure against the risk that others would default.⁵⁴⁶ Thus, the government would not profit off student loans and would only suffer a loss if the defaults were so unexpectedly high as to exhaust the guarantee fund.⁵⁴⁷ The guarantee fee could be covered through a small loan origination fee, with the remainder prorated over the life of the loan and added to the principal amount.⁵⁴⁸ Since the government currently charges interest at a rate equal to around two-percentage points above the ten-year Treasury rate, it would have no need to charge a higher interest rate to cover its

542. See Cooper, *supra* note 536.

543. See Donald B. Marron, *The \$300 Billion Question: How Should We Budget for Federal Lending Programs?*, URBAN INST. (Sept. 2014) (discussing the methods and proposing an “expected returns” method to combine “the best of FRCA and fair value”).

544. See Matthew M. Chingos, *End Government Profits on Student Loans: Shift Risk and Lower Interest Rates*, BROOKINGS INST. (Apr. 30, 2015), <https://www.brookings.edu/research/end-government-profits-on-student-loans-shift-risk-and-lower-interest-rates> [<https://perma.cc/2C4Q-653D>]. Chingos based his proposal on a similar trial plan undertaken in the 1920s by the Harmon Foundation, a philanthropic entity. See *id.*

545. See *id.*

546. See *id.*

547. See *id.*

548. See *id.* (noting that federal student loan borrowers currently pay a loan origination fee). The PROSPER Act proposes to eliminate this loan origination fee. See *supra* note 520 and accompanying text. Chingos suggests retaining that fee, set at a level to cover administrative costs, and further suggests that both the loan origination fee and the guarantee fee “could be rolled into the balance of the loan.” See Chingos, *supra* note 544, at n.5.

anticipated losses.⁵⁴⁹ Thus, borrowers' interest rate on the loans would be lower (i.e., equal to the government's borrowing rate).⁵⁵⁰ Instead of a refund with interest, as Chingos proposes, during the last year of the loan borrowers could reduce their payments to reflect the payment record of their cohort.⁵⁵¹ As Chingos acknowledges, the guarantee fee and any potential refund could entail increased administrative costs.⁵⁵² However, those could be factored into the amount of the loan origination fee,⁵⁵³ as could the costs of forbearance and the PSLF program.

A 100% government loan program still would require private companies to service the loans. Thus, there would have to be adequate oversight over these companies to ensure that borrowers, both current and future, are treated fairly by these companies. Under the Trump Administration, however, there has been no real oversight over student loan lenders and servicers,⁵⁵⁴ and there is no indication that would change under the PROSPER Act.

While the PROSPER bill purports to "give our students the opportunity to prosper,"⁵⁵⁵ it primarily gives proprietary institutions the opportunity to prosper by paving the way for greater Title IV federal aid access for these schools. The bill does this in two ways. First, it would blur the distinction between private institutions and proprietary institutions by providing a single definition of an "institution of higher education."⁵⁵⁶ Second, it would measure academic legitimacy based on demonstrated mastery of subject matter, instead of number of credit hours completed.⁵⁵⁷ This could open the

549. See Chingos, *supra* note 544, at n.5.

550. See *id.*

551. See *id.*

552. See *id.*

553. See *id.*

554. See *supra* notes 366–368, 374–379, 459–467 and accompanying text.

555. From Staff Reports, *Giving Students the Opportunity to Prosper*, LAGRANGE DAILY NEWS (Dec. 8, 2017, 6:27 PM), www.lagrangenews.com/2017/12/08/giving-students-the-opportunity-to-prosper [https://perma.cc/2EJP-YMEJ].

556. H.R. 4508, 115th Cong. §101 (2d Sess. 2018) (amending 20 U.S.C. § 1001). The bill requires a proprietary institution or nonprofit or public institution that offers only non-degree programs to have been in existence for at least two years in order to meet the definition. See § 101(b). Also, proprietary institutions would be ineligible for Titles III and V funds for minority-serving institutions. See *id.*

557. §§ 103(e), 104(a)(1)(A). The PROSPER bill refers to this as "Competency-based education." § 103(e) (amending 20 U.S.C. §1003); see also § 104(a)(1)(A) (repealing definition of "credit hour").

floodgates to Title IV funds not only to vocational schools, but to proprietary schools as well.

In addition to this proposed funding boost to proprietary schools, the bill would eliminate the 90/10 rule,⁵⁵⁸ the strongest incentive for proprietary institutions to do a better job of serving students. This would open the door for proprietary schools to receive full federal funding.⁵⁵⁹ The bill also would eliminate the gainful employment and borrower defense regulations,⁵⁶⁰ and it would remove the postsecondary institution performance rating system,⁵⁶¹ thereby protecting the worst performing schools. Further, it would eliminate the requirement that online schools acquire state authorization before enrolling students in that state.⁵⁶²

The PROSPER bill would fundamentally change the oversight role of both the DOE and the CFPB, while reducing the accountability of predatory for-profit institutions.⁵⁶³ The bill would limit state efforts to oversee schools (especially proprietary schools) and loan servicers and would limit the DOE's ability to conduct oversight.⁵⁶⁴ It would add a new seven-person advisory board to oversee the Office of Federal Student Aid.⁵⁶⁵ This office oversees thousands of educational

558. See CAP Postsecondary Education Team, *supra* note 514.

559. See *id.*

560. See §§ 104(a)(1)(B)–(C); see also *supra* notes 329–331, 346–347 and accompanying text. The elimination of the borrower defense regulations will mean that there will be a reversion to the prior rule on borrower defense to repayment, in which defrauded students had to file separate actions within a narrow time frame (three years from the date of any fraud, misrepresentation, or breach of contract) and the case had to be heard by an administrative law judge or through arbitration, rather than by allowing borrowers their day in court. See *supra* note 346 and accompanying text.

561. See § 104(b)(3). This elimination is in the guise of providing “regulatory relief.” The Postsecondary Institution Rating System (PIRS) was a proposal of the DOE during the Obama Administration to increase transparency and accountability. See Tim Harmon & Anna Cielinski, *Transparency and Accountability: Implementing a Postsecondary Institution Rating System that Empowers Students while Avoiding Unintended Consequences*, CTR. FOR POSTSECONDARY & ECON. SUCCESS 1, 3 (Nov. 2014). It proposed specifically to help disadvantaged students by providing information on which schools might offer them the most in terms of resources. See *id.* While the system did not seek to rank schools overall, it did rank schools according to improvement in performance. See *id.* President Obama had proposed to use the system in allocating student aid. See *id.*

562. See § 495(b).

563. See §§ 495–497.

564. See *id.* (noting the repeal and prohibition on state authorization regulations; limitation on authority of DOE).

565. See § 131(f).

institutions and is responsible for eradicating waste, fraud, and abuse in the federal financial aid programs. While an advisory board may be a positive addition, the role of this board is solely to oversee the distribution of federal aid and the office's management of its loan portfolio.⁵⁶⁶ This narrow role is a concern in light of the Secretary's efforts to undermine the CFPB, the other major regulator of higher education financial aid.⁵⁶⁷

The bill further deliberately cripples the ability of the DOE to issue new regulations by providing mandated periods of Congressional comment prior to the issuance of new regulations.⁵⁶⁸ The chicanery of this is evident in the fact that Congress already has the ability to comment on rules through the legislative process. Providing an additional period for comment will favor lobbyists, political action committees, and others with enough resources to pay for congressional access. This means that proprietary institutions, in particular, will be advantaged at the expense of students.⁵⁶⁹

The bill eliminates the cohort default rate that requires schools to keep their student loan default rates below a certain threshold in order to receive federal funds.⁵⁷⁰ Instead, it substitutes a new measure assessed at the program level.⁵⁷¹ Under this new measure, schools would remain eligible for federal funds only if at least 45% of their borrowers have not defaulted and are less than ninety-days delinquent at the end of the third fiscal year in repayment.⁵⁷² While the cohort default rate eliminated very few schools from eligibility for federal funds, this new measure is an unknown, so it remains to be seen whether it will be a better gauge of eligibility and whether it will hold the worst performing schools accountable.⁵⁷³

566. See § 131(f)(3).

567. See CAP Postsecondary Education Team, *supra* note 514.

568. See § 492. This is a nebulous period that is "10 days after the Secretary—(I) receives and addresses all comments from the authorizing committees; and (II) responds to the authorizing committees in writing with an explanation of how such comments have been addressed." *Id.* In addition, the bill prohibits the Secretary from promulgating "any rule or regulation that exceeds the scope of the explicit authority granted to the Secretary under this Act." § 117 (amending Part B, Title I, 20 U.S.C. § 1011 *et seq.*).

569. See CAP Postsecondary Education Team, *supra* note 514.

570. See § 426.

571. See § 481B.

572. *Id.*

573. See CAP Postsecondary Education Team, *supra* note 514 (noting that there were only ten schools affected by the cohort default rate).

The bill provides that schools with few resources and those supporting minority students which receive funding under Titles III and V of the HEA remain eligible for federal funding only if they have a combined completion and transfer rate of 25% or greater.⁵⁷⁴ While an accountability measure is to be applauded, nevertheless it is troubling that the bill applies the requirement only to underfunded schools serving low-income students, while relaxing the accountability requirements for proprietary schools.⁵⁷⁵

The bill provides questionable oversight because it allows accreditors to waive out of its requirements if they deem it necessary to encourage innovation, improve the delivery of services to students, or reduce the administrative burden to schools.⁵⁷⁶ While that in itself is not necessarily bad, the bill contains no process to evaluate these waivers to ensure that they achieve their goals, and it provides no safeguards, such as loan forgiveness, for students who may be harmed by the waivers.⁵⁷⁷

The bill further significantly changes funding and accountability for teacher preparedness.⁵⁷⁸ It eliminates Title II of the HEA and substitutes a so-called “In-Demand Apprenticeships” program to provide a closer link between higher education and the marketplace.⁵⁷⁹ While that, in itself, may be an admirable goal, nevertheless the bill provides inadequate standards and reporting requirements for this program.⁵⁸⁰ Since students in this program will have access to little training and accountability, they may be unaware that they are registered in a low-quality program that will not train them properly to pass the licensure and certification requirements to enable them to begin a teaching career.⁵⁸¹

574. See § 301 (amending 20 U.S.C. § 1057 *et seq.*).

575. See CAP Postsecondary Education Team, *supra* note 514.

576. See § 496(q).

577. See CAP Postsecondary Education Team, *supra* note 514.

578. See *id.*

579. See §§ 201–202 (amending 20 U.S.C. § 1001 *et seq.*). According to the bill, the purpose of this change is to “expand student access to, and participation in, new industry-led earn-and-learn programs leading to high-wage, high-skill, and high-demand careers.” *Id.*; see also § 407 (providing for the sunset of TEACH grants).

580. See CAP Postsecondary Education Team, *supra* note 514.

581. See *id.*

B. The Aim Higher Act

There is a world of difference between the PROSPER Act and the Aim Higher Act (AHA).⁵⁸² Unlike the PROSPER Act, the AHA focuses on and attempts to address the problems of equal access, affordability, completion rates, and fairness in funding of higher education.⁵⁸³

The AHA addresses the problem of access to higher education in several different ways. First, it encourages high school students to earn college credits and at little to no cost.⁵⁸⁴ It does this by creating a matching grant program to encourage postsecondary institutions to partner with K-12 school districts to promote “dual enrollment and early college high schools.”⁵⁸⁵ Second, unlike the PROSPER Act, the AHA would provide federal aid to foster and homeless students, undocumented students, Native Americans, students in U.S. territories, and incarcerated individuals to enable them to obtain access to higher education.⁵⁸⁶ Third, the AHA would strengthen programs designed to identify and assist students from disadvantaged backgrounds to enroll in higher education.⁵⁸⁷ Fourth, it would simplify the Free Application for Federal Student Aid (FAFSA) and would provide automatic Pell grants to those students with the lowest incomes who received means-tested federal benefits in the previous two years.⁵⁸⁸ Fifth, it would provide improved data on postsecondary institutions to allow students to make more informed decisions.⁵⁸⁹ Sixth, in stark contrast to the PROSPER Act, the AHA would strengthen institutional accountability and quality by requiring the DOE, rather than state accreditors, to conduct Title IV compliance checks and by allowing the DOE to veto accreditor-set standards it deems too low.⁵⁹⁰ It also would establish multiple thresholds to require institutions to improve their cohort default rate metric.⁵⁹¹ Finally,

582. See H.R. 6543, 115th Cong. (2d Sess. 2018).

583. See §§ 2002–2003.

584. See EDUC. & LABOR COMM., *Aim Higher Act, H.R. 6543 Bill Summary 2* (July 26, 2018).

585. *Id.* The Bill would invest \$250 million in the first year to provide funding to the states for this partnership. *Id.*

586. See *id.* at 2–3.

587. See *id.* at 4.

588. See *id.*

589. See *id.*

590. See *id.* at 4–5.

591. See *id.* at 5. Currently, institutions can “game” the system by staying just under the mandated threshold to avoid improvement. The AHA encourages

instead of opening the federal coffers to proprietary schools, as the PROSPER Act does, the AHA protects students by raising the 90/10 rule to 85/15,⁵⁹² and by closing the loophole that allows these institutions to obtain funding from other federal programs without penalty.⁵⁹³ It further prohibits schools that spend less than half their tuition revenue on instruction from “using federal funds for marketing, advertising, recruiting or lobbying.”⁵⁹⁴ It also would maintain the “gainful employment” requirement and would further protect students who have been defrauded by their institutions by providing them full relief and allowing them their day in court.⁵⁹⁵

The AHA addresses college affordability in several different ways. First, instead of eliminating the SEOG and TEACH grants, as the PROSPER Act does, it strengthens these grants⁵⁹⁶ and permanently indexes the Pell grant to inflation to maintain its purchasing power.⁵⁹⁷ It also extends Pell grant eligibility to quality short-term programs “to strengthen the workforce.”⁵⁹⁸ Second, instead of narrowing the federal work-study program to eliminate participation by graduate students, the AHA maintains graduate student participation and changes the funding allocation formula from one based on length of participation in the program to one based on number of low-income students plus unmet need at that institution.⁵⁹⁹

Unlike the PROSPER Act, which would cut funding to student aid programs and push students into more expensive private loans, the AHA simplifies the repayment process and helps borrowers manage their repayments to avoid default. It does this by reviving the expired Perkins loan program for needy undergraduate and graduate students and providing better loan counseling to apprise students of the

improvement by providing technical and financial support with a high adjusted cohort default rate. *Id.*

592. *See supra* notes 114, 194–195, 241–242 and accompanying text.

593. *See* EDUC. & LABOR COMM., *supra* note 584, at 5.

594. *Id.*

595. *Id.* at 5–6.

596. *See id.* at 6–7. The AHA does this by changing the formula for federal funding of the SEOG by allocating federal funds based on the level of unmet need plus the number of low-income students at that school, instead of the current allocation based on length of time the school has been participating in the program. *See id.* at 7. The AHA further protects recipients of the TEACH grants from their grants being inadvertently converted to loans, and it retains the teacher loan forgiveness programs, both of which are eliminated under the PROSPER Act. *See id.*

597. *See id.* at 7.

598. *Id.*

599. *See id.* at 8. In addition, the AHA provides a bonus funding allocation for institutions in the top “20% in serving and graduating Pell students.” *Id.*

amounts they have borrowed and what their repayments will be.⁶⁰⁰ Similar to the PROSPER Act, the AHA eliminates the loan origination fee.⁶⁰¹ But unlike the PROSPER Act, the AHA allows borrowers to refinance their debt at the prevailing interest rates offered to new borrowers.⁶⁰² It also maintains the PSLF program and expands it to include farmers and those who work for Veteran Service Organizations.⁶⁰³ It simplifies repayment by replacing the current four repayment plans with one fixed-payment plan and one income-based repayment (IBR) plan.⁶⁰⁴ The IBR plan provides more generous repayment terms for low- and middle-income borrowers, and for those earning below 250% of the federal poverty level, no repayment would be required until their earnings rise above that level.⁶⁰⁵ It further provides for automatic recertification of income for those borrowers enrolled in IBR,⁶⁰⁶ which would eliminate the need for annual re-enrollment that is currently required. Moreover, it extends eligibility for an IBR plan to parent PLUS loans and consolidated loans that repay PLUS loans, and it extends disability forgiveness to PLUS loans if the student should become totally and permanently disabled.⁶⁰⁷ Borrowers who are more than 120 days delinquent on their loans will be automatically enrolled in the IBR plan.⁶⁰⁸ Borrowers who consolidate their student loans with those of their spouses will be allowed to separate their remaining balance and be liable only for their particular portions, instead of the entire amount.⁶⁰⁹ The AHA stipulates that states have the right “to enact, regulate, and enforce consumer protection laws that protect their residents.”⁶¹⁰

The AHA also operates to make higher education more affordable in general by providing incentive grants to states to increase education funding.⁶¹¹ These grants would be provided to states that

600. *See id.*

601. *See id.*

602. *See id.*

603. *See id.* at 9. These include the American Legion and Veterans of Foreign Wars (VFW). *Id.* The expansion also includes doctors employed by non-profit hospitals or other health care facilities “in states that prohibit the direct hiring of these individuals, such as California and Texas.” *Id.*

604. *See id.*

605. *Id.*

606. *See id.*

607. *See id.*

608. *Id.*

609. *See id.*

610. *Id.*

611. *See id.* at 6.

make tuition more affordable and to those that strive to make public two-year colleges free to every student.⁶¹²

The AHA would support lower-income students by providing additional funding to community colleges, particularly those that are underfunded and with high levels of low-income and minority students.⁶¹³ This funding is intended to encourage these institutions to develop “high quality career and technical education programs,”⁶¹⁴ improve remedial education, and provide financial advising, as well as financial assistance, to offset costs that otherwise may lead to delay in degree completion.⁶¹⁵

In contrast to the PROSPER Act, the AHA would strengthen Title II of the HEA to provide support for programs to recruit, retain, and support teachers and school leaders.⁶¹⁶ It would further provide graduate fellowships for students pursuing careers in underserved areas such as special education, English-language instruction, STEM courses, and computer science.⁶¹⁷

The primary drawback to the AHA, however, is its cost, an issue that the bill does not purport to address. The provisions of the AHA will require a considerable increase in education funding, which may be offset to some extent by a partnership with the states and with the alleviation of much fraud and abuse through increased regulation.⁶¹⁸ Another potential cost offset, albeit more long-term, is the increase in tax revenue from the stimulation of the economy by a more educated

612. *See id.* at 10. The AHA also provides grants to “low-income students who transfer from a community college to a Minority-Serving Institution (MSI) for the remainder of their degree.” *Id.* In addition, the bill provides for grants to schools that expand the use of open textbooks to help cut students’ costs. *See id.*

613. *See id.* The AHA also provides support for students with disabilities, in addition to the support for foster and homeless students. *See id.* at 12.

614. *Id.* at 11.

615. *See id.* at 11–12. The bill also requires evaluation of program effectiveness to determine which programs are more likely to lead to degree completion. *Id.* In addition to other costs, the AHA would increase funding to CCAMPIS (Child Care Access Means Parents in School) and for programs to prevent and treat substance abuse. *See id.* at 12–13. It also would increase funding for veterans to address their discrete needs, such as coordination of benefits and development of a national website to allow institutions to share information on how best to support completion by veterans. *See id.* at 13.

616. *See id.* at 14.

617. *See id.*

618. *See* Delece Smith-Barrow, *With the New “Aim Higher Act,” House Democrats Want States to Make Community College Free*, HECHINGER REP. (July 27, 2018) <https://hechingerreport.org/with-the-new-aim-higher-act-house-democrats-want-states-to-make-community-college-free> [<https://perma.cc/G3R2-77QT>].

workforce. In the shorter term, perhaps the reinstatement of the loan origination fee could be used to defray some of the costs.⁶¹⁹

CONCLUSION

Over the years, politics have had a profound effect on federal education financing. The problems of higher education today—spiraling costs, unequal access, burgeoning debt, unscrupulous for-profit institutions, and predatory student loan lenders—are all problems that should have been addressed in a meaningful way by Congress years ago. But since the late 1950s, federal education financial aid policy has been used to advance political agendas.⁶²⁰ This has become more problematic over time as political discourse has become increasingly polarized, rather than focused on a clearly reasoned educational aid policy.

Unfortunately, the problems of higher education will have tangible effects on the national economy, not only because of the huge amount of outstanding student loans but also because these problems will negatively affect the supply of educated, skilled workers and professionals, unless they are adequately addressed. In addition, they will affect the ability of current and future borrowers to contribute in a meaningful way to the economy through new home, car, and other major purchases, and they will negatively affect the creation of new businesses.⁶²¹

Unless there is a change in congressional attitude from regarding federal funding for higher education as a “free ride” or a “handout” to viewing it as an investment in the future of this country, the spiraling amount of student loan debt will remain on a collision course with the economy. The federal government, in partnership with the states, must act to remedy the situation by providing affordable education and by adequately regulating unscrupulous proprietary institutions and student loan lenders.⁶²² It also must act to ensure that there is equal and fair access to higher education by lower-income individuals and that student loan borrowers are treated fairly.

When Congress addresses the next reauthorization of the HEA, it must give meaningful consideration to the direction in which the government should be heading in funding for higher education. This

619. See *supra* notes 544–553 and accompanying text.

620. See *supra* Part I.

621. See *supra* note 8 and accompanying text.

622. See *supra* Sections II.B–C (discussing the government’s limited regulation of student loan lenders and proprietary institutions, respectively).

should not be a political issue; such a meaningful discussion cannot occur if lobbyists control the process and there is no bipartisan discussion and cooperation.⁶²³ The two bills currently pending to reauthorize the HEA indicate the polarity of congressional opinion on education funding policy.⁶²⁴ The salient issue is the focal point at which the problems should be addressed. The resolution of this issue will determine the outcome of federal education policy for generations to come. For instance, if the focal point is on protecting large lenders and servicers and proprietary institutions, then the next reauthorization of the HEA will do nothing to solve the problems of access, high cost of tuition, and crisis level student loan debt. In fact, these problems may be exacerbated through decreased access, more expensive student loans, and increasing defaults.⁶²⁵ But if the focal point is on the needs of students, both undergraduate and graduate, and on what is best for the country in the long run, then Congress will have taken an important step toward addressing these critical problems.

Congress should learn from the mistakes of the past. There should be less focus on loans and more focus on grants, the federal work-study program, and aid from both state and federal levels to educational institutions. Those who have borrowed and will borrow in the future to fund their education should be treated fairly. It is fundamental that these borrowers obtain value for their investment—a degree that will allow them to comfortably repay their loans and lead productive lives. This will not happen, however, if the government does not strictly regulate certain educational institutions. Proprietary educational institutions have a place in higher education because some offer a valuable education and provide access to lower-income and nontraditional students, particularly those with an interest in vocational education. But many of these institutions target students for their federal aid dollars while offering them worthless degrees.⁶²⁶ If these institutions are not strictly regulated, the government will continue to waste taxpayers' money on them. These institutions must

623. See, e.g., Polis, *supra* note 12 (complaining that Republicans are shutting Democrats, and even other Republicans, out of the deliberative process).

624. See H.R. 4508, 115th Cong. (2d Sess. 2018) (the PROSPER Act proposed by Republicans); H.R. 6543, 115th Cong. (2d Sess. 2018) (the Aim Higher Act proposed by Democrats); *supra* Part III (comparing the two).

625. See John F. Wasik, *Why Trump's Education Plan Will Make Student Debt Crisis Worse*, FORBES (May 26, 2017, 7:00 AM), <https://www.forbes.com/sites/johnwasik/2017/05/26/why-trumps-education-plan-will-make-student-debt-crisis-worse/#1b747cd7721c> [<https://perma.cc/AU4R-SVGR>].

626. See *supra* notes 499–504 and accompanying text.

be strictly regulated, and the gainful employment regulation should be reinstated to determine eligibility for federal funding of these institutions.

Students who have been defrauded by educational institutions or have been unable to complete their course of study because of school closure should be able to discharge their debts. The fact that they are suffering this hardship means that the government has not done a thorough job of regulating and overseeing these institutions. Since these institutions operate with a substantial amount of government funding,⁶²⁷ it is to be expected that the government would exert strong oversight as a responsible steward of taxpayers' money. If it fails to do that, the government, not the students, should suffer the consequence.

If these problems are not resolved, they will only worsen over time with devastating consequences to borrowers, to taxpayers, and to the economy. The time to act is now, with a thoughtful and meaningful reauthorization of the HEA, and the stakes could not be higher.

627. See Stuart Shepard and James Agresti, *Government Spending on Education Is Higher Than Ever. And For What?*, FOUND. FOR ECON. ED. (Mar. 1, 2018), <https://fee.org/articles/government-spending-on-education-is-higher-than-ever-and-for-what>.