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Policy Considerations regarding Student Loan Debt and Higher Education

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by

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DEDICATION

This dissertation is dedicated to my mom and dad, from which a desire to learn was instilled. It is dedicated to my wife, Meghan, and children, Hannah and Jack. It was only with their support I achieved this goal, and I hope, through me, they believe that learning should never end. Only by pushing our limits can we become the best we can be. Only by sailing far from shore, can we see the true horizon, always striving to learn more.

"Always dream and shoot higher than you know you can do. Do not bother just to be better than your contemporaries or predecessors. Try to be better than yourself."

- *William Faulkner*

By being better than yourself, you can do amazing things, and the benefit to society is bestowed in kind.

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Abstract

Within the last 30 years, the policy considerations regarding student loan debt and higher education have become a series of strong opinions, heated debate, and partisan politics. Key stakeholders including the United States Government, both for-profit and traditional higher-educations institutions, financial organizations, special interest groups, and students all have interests. More so, all branches of Government, the Legislative, Judicial, and Executive, are areas where policy is both born and challenged. Some are aligned, and some are competing such that crafting sound policy regarding the lending and management of student loan debt has created a difficult situation that may well lead to disastrous consequences.

Currently the outstanding student loan debt is at $1.56 trillion dollars and rising (Friedman, 2020). Next to outstanding mortgage debt, student loan debt is the next highest debt in the United States (Friedman, 2017). Comparisons in student debt have been made to the "housing bubble" of 2008, and the repercussions may be as equally devastating, if not worse, should default rates increase. From the Federal government's perspective, balancing diversity and access to higher education with the risks of increased and unregulated student lending are key issues. From the students' perspective, how can affected students and graduates address unfair lending practices and hold subpar higher-education institutions accountable? Legal remedies, including the Borrower Defense Rule and the statutory provisions of the bankruptcy statutes may be available to students and graduates to challenge student loan forgiveness and subpar higher-education institutions, but these are complex legal remedies. More so, changes in bankruptcy law have made this much more difficult (Dobson, 2019; Iluiano, 2012; Grant 2011).

All of these issues affect society at large. Should the student-loan bubble burst, the effects on the economy may be tantamount to the Great Recession. According to the Federal Reserve, the Great Recession is known as a two-year economic downturn from 2007 to 2009 (Rich, 2013). It marked the longest recession since World War II, resulting in unemployment peaking at 10 percent (Rich, 2013). Notably, this played a part in triggering a housing crisis where 9.3 million homeowners lost their homes between 2006 and 2014 (Kusisto, 2015). The steady increase in student loan debt is remarkably similar to the outstanding debt in the housing bubble.

This dissertation will analyze student loan debt while specifically focusing on the legal ramifications of the Borrower Default Rule and student loan debt defenses. These increasingly litigated issues provide a broad picture of evolving policy in higher education and will provide a means to highlight current issues and trends related to the policy considerations being debated amongst students, educators, and law makers.

Policy Considerations regarding Student Loan Debt and Higher Education

Chapter 1 - Introduction

By examining the interplay between the Legislative, Judicial, and Executive branches of government, the evolution of student loan policy and its impact on social, economic, and political environments highlights the complexity of the issue of student loan debt. Each branch either creates or reacts to policy considerations that are driven by social, economic, and political stakeholders such that the impact of student debt policy transcends government into virtually every facet of culture.

Consider the situation of Jane Doe as dramatized in the following scenario. Jane was about to undertake an activity that could have a tremendous effect on the student debt she owed.

Jane took a deep breath. The room was silent, and she could feel the lights and cameras around her as the room grew darker. Suddenly the heat in the room became noticeable, and she began to sweat. She closed her eyes, and the path that led her here rushed through her mind. All the studying, all the stress and sacrifice led to this moment, and now she had made it to the final round. She felt her whole future was at stake. If she could only answer a few more questions correctly, her life would be different. She would have a chance at a fresh start.

“Set the clock,” the announcer said. And she took another breath, the sweat beginning to bead on her neck, anxiously waiting for the first question. She squeezed hard on her podium and closed her eyes.

“Ready . . . begin,” the announcer’s voice hanging in the air.

This scenario is not a dissertation defense or the oral portion of a board exam, but rather another twist in the ongoing saga of student loan debt and its effect on students. This is the format for a new game show. “Paid Off” allows contestants to compete for a chance at getting their student loan debt satisfied. In this instance, the contestant was able to answer seven questions within the allotted 60 seconds, and she was awarded over $24,000 towards the payment of her student loan debt. Although a substantial sum, this was merely 50 percent of her total debt. Should she have been able to answer eight questions, the entire balance would be paid.

Dubbed an “absurd show to match an absurd crisis,” “Paid Off” began in July 2018, as a means to highlight the student loan crisis. Expected for a 16-episode run, the show plans on paying over $500,000.00 towards student loan debt (Friedman, 2018). The show’s creator, comedian Michael Torpey, is quick to acknowledge the political statement the show makes, and he urges viewers to contact their representatives for a better solution to student debt than a game show after every episode (Corinthios, 2018).

While it may be considered lighthearted and whimsical, the idea of staging a gameshow to showcase the student loan crisis is an act of hyperbole in an attempt to show the seriousness of this situation. Student loan debt has increased dramatically within the last 15 years rising from around $250 billion to over $1.56 trillion currently (Friedman, 2020), and it ranks as the second largest consumer debt behind mortgages (Friedman, 2017). More so, this accumulated debt is often saddled to an uncertain future for many students after graduation. Job prospects and salaries are rarely commensurate with the amount required to pay back loans used for higher education.

The current state of higher education related to student debt is challenging the deep, unshakable wisdom of these deeply rooted philosophies of education. For decades, students have begun to realize that "learning to fish" does not equate to "food for a lifetime." More so, the cost of the instruction requires a high-priced fishing license all too often in the form of substantial student loan debt. All forms of higher education have become susceptible to scrutiny, and changes in the Executive administration have led to increased uncertainty and a drastic change in how both traditional and for-profit higher education are viewed, as well as how to manage student lending and debt.

Prior to 2016, the Federal government had begun giving increased scrutiny to for-profit education both in these institutions' means to provide a successful education and their business strategies. For-profit institutions were under increased scrutiny for both the cost of attendance and the value of a degree. More so, traditional education was no longer immune from criticism due to increased tuition and similarly contributing to increased student loan debt. For example, the estimated Federal student loan debt is $1.56 trillion dollars and climbing (Friedman, 2019). This record number, coupled with the increasing difficulty of students' ability to find relevant work after graduation, had led to policies to increase Federal regulations, restructure the student loan financial structure, and an increase in lawsuits against learning institutions. These issues, faced with a change in the Executive administration (2016), are pitted against new policies that are arguably at odds with student well-being and will impact the future of the higher-education funding and the United States economy at large. Now with another change in the Executive administration (2020), more uncertainty is brought into student loan debt management.

Background and History of Student Loans and Traditional Higher Education

The evolution of student loans in higher education is a function of political and economic perceptions beginning at the turn of the 20th century. The Federal Government's policies specific to student loans have evolved from a human capital model to a market driven model in the last 50 years (St. John et al., 2013). Federal involvement began with the policy concern of populating the United States. As that time, the United States was a vast land with population centers distributed mainly in cities on the Eastern coastline. With the need to expand and develop the rest of the country, the Federal government provided land grants to establish colleges and universities (Cornelius, 2014). These institutions offered engineering and agricultural degrees as a way to provide human capital that would assist in providing the foundation for the developing United States. Direct involvement with student loans began in 1944, with the Serviceman's Readjustment Act, also known as the GI Bill. This program, still in existence today, was designed to provide higher education funds to veterans after their service in the military. An example of human capital policy, the GI Bill's goal is to provide additional education and training for veterans after their service (St. John et al., 2013). This additional education and training, based on fulfilling a prior military service to the country, is believed to benefit both the individual and society at large while incentivizing military service to the country.

The Federal government's next foray into student loans was in 1965, with the passage of the Higher Education Act. This included free grants, later to be known as Pell Grants, and the Guaranteed Student Loan Program (Cornelius, 2014). In 1988, it was renamed the Robert T. Stafford student loan program in honor of Senator Stafford's work on higher education. This program underwent numerous iterations and amendments to this day, and it continues to be the center of controversial issues.

This focus on loans rather than grant funding reflected the changes from human capital to a market model in higher education (St. John et al., 2013). In the early 1970s, market logic began to have a substantial influence on educational policy (St. John et al., 2013). Previously, grant-based funding proved to be the favorable means to provide opportunity for students and stimulate innovation within higher education (Committee on Economic Development, 1973). This belief was short lived, however, as research began to appear arguing that loans, not grants, provided a greater economic benefit to students (Bennet, 1986, 1987). Through loans, greater access and opportunity would be provided (St. John et al., 2013). Access to higher education continued to be a prime justification for student loans (St. John et al., 2013), and student loans continued to expand in scope.

In 1972, for-profit institutions became eligible as recipients of Stafford loan dollars. This change has led to increased scrutiny for for-profits and has traditionally become a central tenet in the policy considerations arguing against for-profit funding and operation. In conjunction with this amendment, student loan debt was no longer dischargeable in bankruptcy proceedings absent an *undue hardship*. (*Brunner v. New York Higher Educ. Servs. Corp*., 831 F.2d 395 (2d Cir. 1987)). As *undue hardship* was not legislatively defined, this brought legal policy considerations into the student loan foray and continues to influence policy to date.

Reviewing further changes in student-loan availability, there was a steady increase in allowing easier access to student loans. In 1978, Stafford loans were made available to all students, regardless of financial need, and in 1979, the Higher Education Technical Amendment allowed private lenders to market loans to students attending for-profit institutions. Other additions included increasing aggregate loan limits. In addition to Stafford Loans, private lenders continue to aggressively lend money under the guise of student loans. The result is student loan debt at $1.56 trillion dollars (Friedman, 2020) and climbing.

History of Student Loans and For-Profit Education

There is nothing new about for-profit education. Rather, for-profit institutions have been operating in the United States for the last 300 years (Ruch, 2001), although historically, for-profit institutions tended to focus on vocational or technical training (Garrity, Garrison, & Fiedler, 2010). However, within the last 20 years, for-profit education has expanded beyond trade schools into the realm of higher education, including masters and doctoral programs, and their enrollments are growing (Garrity et al., 2010). The increase in enrollments and the growth of for-profit organizations greatly expanded through the Higher Education Act of 1965. Designed as aid for students, this law ultimately allowed for-profits institutions to receive Federally-guaranteed loans. Additionally, in 1979, the Higher Education Technical Amendments allowed private lenders to market educational loans to students at for-profits.

As such, for-profit education models have experienced tremendous growth within the last 15 years. From 2000 to 2010, for-profit enrollment increased 235% (Douglass, 2012). The 11 largest for-profit education companies saw a 30% increase in enrollments between 2008 and 2010 (Douglass, 2012). Based on this increase in enrollments, new for-profit institutions were created (Zhao, 2011). Of the 483 new colleges and universities formed since 2005, about 77% were for-profit institutions (Zhao, 2011). Currently, for-profit growth has slowed, but it remains a viable option in higher education (Hodgman, 2018).

More so, in 2005 the Higher Education Act enacted the “90/10” rule that raised the level of Federal student grants and loans that could be used for the organization’s tuition and fees to

90 percent (Skinner, 2005). This allowed for-profits to identify a consistent revenue source to grow and expand (Douglass, 2012). However, it is argued this growth model is more a result of government subsidies than a response to the free market (Douglass, 2012). For example, the Apollo Group, owner of the University of Phoenix, gets over 80% of its revenues from its students federally funded grants and loans (Douglass, 2012). Nevertheless, trends in heavy borrowing continued with for-profits, and in 2007, 92.8% of students at four-year for-profits held student loan debt (U.S. Department of Education, 2011).

Thus, the marriage between for-profit institutions and federal aid creates an interesting paradox. For-profit institutions are creating educational opportunities historically inaccessible for lower income and minority groups, but it is argued that the only reason for-profits target those students is because they are eligible for the financial aid that readily increases their income and profits (Baum & Steele, 2010). This argument, coupled with the previous Federal administration's favorable view of for-profit education, in conjunction with policy moves weakening student protections, will continue to create issues within economic, political, and social policy.

Need for Study

The cost to value ratio of higher education is increasingly scrutinized through economic, political, and social policy lenses. Within the United States, there is an increasing focus on the relationship between for-profit education and Federal aid, and traditional higher education is no longer immune to such criticism. More so, existing policies have called into question the value of for-profit and traditional degrees relative to the cost of attendance. Immediate job prospects and long-term career sustainability are being analyzed under the guise of student loan debt. Of immediate note, the current political climate has cast an unknown shadow on the regulatory scheme of for-profit education and student loan debt at large. This is becoming particularly more acute as seen by the Federal government's cutting student protections regarding predatory student loans and questionable institutions. All in all, student loan debt is a $1.56 trillion dollar problem that has the potential to affect everyone in the United States. Student loan debt creates a chilling effect on spending, which in turn affects the economy; it also becomes a factor in life decisions (Cornelius & Frank, 2015). Debtors are forced to forgo spending on consumables, and large purchases, such as homes and cars, and even deciding to marry or have children are considerations where student loan debt becomes a factor (Cornelius & Frank, 2015; Peralta, 2014; Ungarnio, 2014). Stress over making payments is increasing to the point of mental health concerns (Pisaniello, Asahina, Bacchi, Wagner, Perry, Wong & Licinio, 2019), and the legal system is becoming increasingly active in student debt litigation. All of these factors have contributed to student loan debt as a hot-button political issue as well. This dissertation will analyze the economic, political, and social policy considerations of higher education as a function of student loan debt. The interplay between legislative and executive action drives policy considerations that, if challenged, eventually find their way to courtroom. The majority of this analysis will be researched through legal ramifications. Ultimately, the Courts are the likely means through which student loan issues are eventually vetted into policy.

Purpose

Higher education has always been thought of as the means to an end. The dream of graduating from college was the foundation to getting a good job and ultimately the American dream. In today's world, however, a college degree is far from a "golden ticket" to financial success that it was once thought to be. From an economic perspective, high student loan debt is having an impact on new graduates' capital incomes. They are unable to afford housing, cars, or other larger items to the point it is impacting the economy as a whole (Peralta, 2014). Students are delaying key life decisions such as marriage or home ownership (Ungarnio, 2014). The curse of overburdened student loan debt is even haunting borrowers into retirement. Student loan debt for borrowers over 60 is estimated at $86 billion dollars (Adriotis, 2019). There are even instances where social security checks are garnished (Berman, 2015).

Politically, with the election of Donald Trump in 2016, issues emerged as to policy considerations regarding everything from regulating for-profit education to student loan forgiveness programs. Notable changes include the Trump administration's cutting of Consumer Financial Protection Bureau's budget by $150 million (Arnold, 2018), the effort to end public service student-loan forgiveness (Friedman, 2019), and ending subsidized student loans (Friedman, 2019). The implementation of these changes are seen as efforts to save the Federal government money, but critics say they come at a great cost to consumers (Friedman, 2019). With the election of Joe Biden, it is unclear to what extent, if any, the previous Administration's policy will be rolled back, and if the new Administration will favor some form of student loan relief (Minsky, 2021).

From a societal perspective, the overburdening of student loan debt coupled with the difficult prospect of finding gainful employment is leading to social and psychological issues further burdening current and future generations (Pisaniello et al., 2019). The Consumer Financial Protection Bureau (CFPB) is tasked with protecting consumers' financial interests, including student loan complaints, and eliminating its resources may impact fair lending to the detriment of students. Cutting public student loan forgiveness could dissuade many graduates from entering public service leading to a shortage of police officers, firefighters, prosecutors, public defenders, and teachers (Friedman, 2019). The interest accrued in subsidized loans is paid by the Federal government, and eliminating this type of loan would greatly increase the debt burden of students (Friedman, 2019).

The purpose of this dissertation is to analyze the policy considerations and the impact of the economic, political, and social issues facing higher education within the framework of growing student loan debt. This dissertation will provide succinct pictures of current trends and the likely future impact of those trends on both students and higher education. Specifically, this dissertation will analyze the developing trends in jurisprudence as a remedy for resolving student loan disputes as well as accountability of higher education institutions. Current litigation related to the Borrower Defense Rule as well as bankruptcy relief will be analyzed and applied to evolving policy considerations.

Research Questions

The issues affecting student loan debt and higher education are undergoing a rapid change rarely seen within academic research. With the change in the Executive administration in 2016, policies that were trending toward favoring consumer protection, strengthening the CFPB, increased lender accountability, and more liberal student loan forgiveness have seen an acute policy shift now favoring lending institutions, businesses, and for-profit higher education. The Executive administration (Trump) appears to disfavor regulation, and any meaningful outcomes are yet to be known (Arnold, 2018; Ashford, 2019; Friedman, 2019; Hackman, 2019). With the change in the Executive administration in 2020, at this early stage, uncertainty still remains as to policy considerations regarding student debt (Minsky, 2021).

This dissertation will seek to answer timely questions involving how policy shifts may impact student loan debt and the various stakeholders involved. Students, graduates, lenders, government, and society-at-large are the major stakeholders in this issue.

Students and graduates

- How can affected students and graduates address unfair lending practices and hold subpar higher-education institutions accountable?
- What legal remedies are available for students and graduates to challenge student loan forgiveness and subpar higher-education institutions?

Lenders and government

- What are the expected results of increased and unregulated student lending?
- How will decreasing regulation and accountability affect for-profit education?

Society at large

- Should the student loan bubble burst, what effect would it have on the economy as a whole?
- What are the consequences of the current bankruptcy code regarding student loan debt, and does it need to be changed?

Organization of Study and Methodology

The research for this dissertation is based on archival sources. All sources are public record. According to Lewis-Black, et al. (2004) archival research involves locating, evaluating, and a systematically interpreting and analyzing sources found in archives. Archives are defined as material that is created by a person, group, organization, either public or private, in the conduct of their affairs and preserved because of its value, and as evidence of functions and responsibilities of its creator (Pearce-Moses, 2005). Sources include national education databases such as the National Center for Educational Statistics (NCES). Also, there will be data from peer-reviewed sources such as academic journals. Further, given the timeliness of this research, the information on student loan debt and higher education is constantly changing, and secondary sources will be utilized as a present- day snapshot of policy views and cultural climate.

Additionally, data will be reviewed in the form of legal documents such as case law, legal motions and pleadings, treatises, and law review articles. Data sources such as Westlaw, Nexis, and PACER will be used to analyze current case law regarding legal remedies and current causes of action as related to student loan debt, higher education accountability, and student loan forgiveness. Lastly, Continuing Legal Education (CLE) seminars are addressing issues related to student loan forgiveness and bankruptcy to assist lawyers with gaining knowledge in these areas.

Analyzing traditional archival materials will use new archivists' methodology and jurisprudential inquiry. A key understanding to incorporating new archivists' methods is to understand how archival materials are used in research. Archival materials are treated as data to be analyzed, and this data is used to study the social aspect of organizations (Ventresca & Mohr, 2001). New archivists theorize and measure social organizational processes directly, and, to take the analysis further, they analyze the ways in which these social processes are related to one another in distinct ways (Dacin, Ventresca, & Beal, 1999). Jurisprudential inquiry will meld established legal analysis methods relying on the IRAC method as a foundation.

Analyzing legal archives will incorporate the core analytics of issue spotting, rule, analysis, and conclusion (IRAC). The IRAC methodology is preferred when analyzing case law as it provided a standardized baseline to trace any evolution in issues and subsequent reasoning. It presents a uniform synthesis of the factual history, yet provides enough leeway for in-depth analysis (Bittner, 1990; Miller & Charles, 2009). Lastly, conclusory results are objective as to the outcome of the case. For example, court orders typically spell out the court's determination in clear and concise language. Further, utilizing IRAC as a research methodology will incorporate many of the *terms of art* used throughout legal analysis. Elaborating on these *terms of art* will create a better understanding for the reader and allow more insight into how policy determinations are derived from legal precedent.

Significance

With over $1.56 trillion dollars in outstanding debt (Friedman, 2020), the student loan crisis, as it has been dubbed, is having a nationwide impact in the United States. These numbers are on par with the housing bubble of 2009, that resulted in the Great Recession. Studies have shown that recently graduated students are foregoing milestone purchases such as cars and houses due to student loan debt burden (Peralta, 2014). There are reports where students are even putting off marriage and family due to student loan debt (Ungarino, 2014). And while these life choices are arguably stymying the economy, students' physical and mental health may also be affected. More so, should a large portion of the debtors default, the impact on the financial situation in the United States could trigger another recession similar to that of the 2009 Housing

Crisis, for which many Americans have yet to recover. Given these high stakes, evaluating the policy considerations of the higher education and student loan debt is extremely significant to many stakeholders in society.

Limitations

Given the expansive scope of higher education and the major scholarly focus of student loan debt within the last 10 years, the primary delimitation will be the need to narrow the focus of research to a few core topics. Every student has a unique experience in higher education, and each student also has different economic means to support his or her studies. The majority of research is based on general policy considerations and does not take into account unique and specific data as related to individuals and their circumstances. Rather, any policy consideration is based on the general prognosis of its goals, and the very nature of researching policy delimits any introspective criticisms to a major extant.

Specific limitations were intentionally placed on the statutory framework in controversy, namely United State Code and the Code of Federal Regulations as related to student financial aid and codified defenses. The purpose of this was to limit research to administrative policy determinations and remedies that would have a direct effect on policy decisions. This encompassed the crux of Borrower Defense claims as the specific administrative laws are the only proper means to challenge student loan debt within this context.

When determining specific decisions related to case law, the focus was on bankruptcy cases where student debt was discharged, thereby bringing to light the legal and factual requirements necessary to successfully discharge student loan debt. This choice better contrasts the intense scrutiny courts have given to student loan debt, rather than muddy analysis by including the generally accepted position of denying a discharge of student loan debt. Within the analysis of the cases included, there are references to additional cases where courts have distinguished between factual elements that caused a failure of the necessary legal standard to support a discharge.

Definitions

Administrative Procedure Act (APA) – A Federal law that governs the process that Federal agencies use to formulate and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking, provides opportunities for the public to comment on notices of proposed rulemaking. Particularly as it relates to litigation, the APA provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action (5 USC § 551).

Adversarial Proceeding – In Bankruptcy Court, a separate complaint is filed within the bankruptcy case to determine a particular type of relief (United States Bankruptcy Court, 2021).

Appellate court – A court having jurisdiction of appeal and review. A court of limited jurisdiction that reviews decisions of the trial court. These decisions are not typically reviewed *de novo*, meaning the Court merely reviews the written record for appellate purposes (Black, 1990).

Arbitrary, Capricious, and Contrary to the Rule of Law – A standard for judicial review, associated with the APA, such that agency decisions may only be struck down if meeting these standards. A court may reverse under the arbitrary and capricious standard only if proven that the agency relied on factors that Congress had not intended it to consider, entirely failed to consider an important aspect of the issue, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise (*Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

Bankruptcy – Chapter 7 – A proceeding designed to liquidate debtor's property, pay off creditors, and discharge remaining debt (Black, 1990).

Bankruptcy – Chapter 13 – A bankruptcy where the debtor files a plan with the court agreeing to pay off a portion of the debts. The plan is confirmed by the court and is subject to objection by any creditor. Once the plan is completed, the remaining debt may be discharged (Black, 1990).

Borrower Defense Rule – A legal defense for students and graduates that, if successful, results in the dismissal of student loans (20 U.S.C. §1087e(h); *CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Black letter law – An informal term for basic principles of law generally accepted by the courts and legal community (Black, 1990).

Case law – An aggregate of reported cases forming a body of jurisprudence apart from law derived through statutes (Black, 1990).

Class Action – A lawsuit filed by one or more individuals on behalf of a class of people similarly situated or affected by an issue (Black, 1990).

Consumer Finance Protection Bureau (CFPB) – Federal agency tasked with enforcing Federal consumer financial laws and protecting consumer's financial interests. The CFPB's core functions include:

- Rooting out unfair, deceptive, or abusive acts of practices by writing rules, supervising companies, and enforcing the law;
- Enforcing laws that outlaw discrimination in consumer finance;
- Taking consumer complaints;
- Enhancing financial education;
- Researching the consumer experience of using financial products;
- Monitoring financial markets for new risks to consumers (CFPB, 2019, Core Functions section).

Code – A systematic collection of laws, rules, or regulations typically presented as statutes or codes (Black, 1990).

Dicta – An authoritative statement of opinion given weight because of the stature of the person making it. In a judicial opinion, dicta are the statements related to the case, but carry no legal weight. Dicta often provide insight into a Court’s reasoning on related matters (Black, 1990).

Due Process – A fundamental principle of jurisprudence establishing a set of rules and procedures to ensure that all litigants are afforded fair treatment within the legal system (Black, 1990). The concept of due process is captured in the Fifth Amendment to the United States Constitution. “No person shall…be deprived of life, liberty, or property, without due process of law . . .” (U.S. Const. Amend. V).

Educational Benefit – A *Term of Art* defined through case law, an educational benefit, in the form of a private student loan, is not exempt from bankruptcy discharge (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Facts – Facts are used to contrast legal questions. Questions of *fact* are for the jury, and questions of *law* are for the court. Specific events or actions in the case that relevant to the outcome of the case. Facts are either materially disputed or there is no material dispute to the facts (Black, 1990).

Federal Rules of Civil Procedure – A codified set of uniform rules and procedures applicable to Federal court (Black, 1990).

Holding – The court's determination regarding the controversy in question. The legal principle to be drawn from the opinion of the court (Black, 1990).

Injunction – A court order prohibiting a party from doing a specified act or commanding a part to undue a wrong. Generally aimed at preventing future acts (Black, 1990).

IRAC – A methodology for analyzing case law (Bittner, 1990).

- Issue – The subject of the controversy in question.
- Rule – The law as determined by the court.
- Analysis – A review and explanation of the interplay between the Issue and the Rule. A description of how the court arrived at its determination.
- Conclusion – The final holding of the court as it relates to the specific facts of the case.

Jurisdiction – The Court's power to decide a matter in controversy and presupposes power and control over both subject matter and the parties (Black, 1990).

Matter in controversy – The subject of the litigation; the specific issue for which the court must make a determination. The controversy in question is narrowly defined and tailored to be applicable to the facts at hand (Black, 1990).

Motion – A formal request to the Court for a determination on an issue between parties (Black, 1990).

Motion for Summary Judgment – A procedural motion asking the court to rule in the party's favor because there are no issues of material fact in dispute (Black, 1990).

Noscitur a sociis – A legal doctrine that stands for the proposition that a word is known by the company it keeps (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Order/Stipulated Order – A mandate, precept, command. An order is a proclamation issued by the Court stating its determination of the issue presented. A stipulated order is agreed to by both the plaintiff and defense and presented to the court for execution (Black, 1990).

Precedent – A court's ruling in a case that provides authority for similar questions of law (Black, 1990).

Preliminary Injunction – A motion filed with the court to prevent the opposing party from some type of action or conduct. This is typically filed before the trial, and the filing party must make a showing of extensive damage or irreparable harm for the motion to be granted (Black, 1990).

Private Cause of Action – A right of a person, as an individual, to have standing to bring an action before the court (Black, 1990).

Qui Tam Action – A type of lawsuit where a private individual brings a suit against a party that has violated a contract or regulation typically with the government. Under a Qui Tam suit, the plaintiff is suing for himself as well as the state, and the plaintiff will recover a percentage of the final damages (Black, 1990).

Reasonableness Standard/Objective Standard – A standard of law that does not take into account the subjective mindset of the person. Based on factual measurements apart from biased judgment (Black, 1990).

Rebuttable Presumption - A presumption, or legal position, that may be rebutted by evidence. Rebuttable presumptions hold true until disproved by evidence (Black, 1990).

Standing – The right to file a lawsuit. A person with standing to file a lawsuit must be affected by the issue of the lawsuit (Black, 1990).

Stare Decisis – A policy adopted by courts to adhere to precedent rather than disturbing a settled point of law. Under this policy, once a settled point of law is established, future cases are determined based on the accepted law, thus providing increased stable and consistent jurisprudence (Black, 1990).

Statutory Construction – A methodology for statutory interpretation using plain meaning of words to derive legislative intent when interpreting a statute (Black, 1990).

Statutory Law – The body of law created by a legislature in contrast to constitutional law and law generated by court decisions. Typically codified into written form (Black, 1990).

Strict Liability – A legal precept where a defendant is found liable or guilty without any negligent intent or ill will (Black, 1990). Usually reserved for minor infractions due to deprivation of due process.

Term of Art – A term that has a specialized meaning in a particular field or profession (Merriam-Webster, n.d.).

Undue Hardship – A *term of art* used in bankruptcy cases defining an element needed to grant the discharge of student loan debt *(Brunner v. New York State Higher Educ. Servs. Corp*. 831 F.2d 395 (2d Cir. 1987).

Research Structure and Methods

Archival and Jurisprudential Research Methods

This dissertation will employ a unique amalgamation of new archival methodology in conjunction with the traditional tenets of jurisprudential inquiry. New archivists employ research strategies that comprise a complex set of principles for archival work (Ventresca and Mohr, 2001). Archival materials are treated as data to be analyzed, and these data are used to study the social aspect of organizations (Ventresca & Mohr, 2001). New archivists theorize and measure social organizational processes directly, and they analyze the ways in which these social processes are related to one another in distinct ways (Dacin, Ventresca, & Beal, 1999). By acknowledging this “social” turn in archival research, it accepts that histories change in response to the dominant values of institutions, cultures, and the history writers themselves (L’Eplattenier, 2009). This concept is useful in analyzing policy considerations and legal scholarship, including judicial case law affecting student debt today.

Using a new archival methodology to provide a baseline for analysis and research, within this framework, the use of legal case law allows further in-depth analysis using the IRAC (Issue, Rule, Analysis, Conclusion) method. This method, long established as the standard for case law analysis, will allow a legal perspective to the case law that so often is important to establishing policy considerations. The interplay between these two methods will provide a new understanding of roots of the student loan crisis as wells as allowing a reasonable and logical perspective on future policy considerations.

According to Lewis-Black et al. (2004) archival research involves locating, evaluating, and systematically interpreting and analyzing sources found in archives. Archives are best defined as materials that are created by a person, group, organization, either public or private, in the conduct of their affairs and preserved because of its value, and as evidence of functions and responsibilities of its creator (Pearce- Moses, 2005). As archival research has progressed, the modern view sees archival data as a means for creating knowledge rather than as a mere storehouse of information (Gaillet, 2012). Incorporating archival data into a methodology is a complex process with multiple facets, and the methods and data collected can be as varied as the very purpose for which the creator of the data intended. Given the ever-present acknowledgment of bias within the research framework, employing archival research is far from the mere collection and rote recitation of documents.

Ventresca and Mohr (2001) defined archival methods as a loosely-coupled constellation of analytic endeavors where the goal is to gain insight through a systematic interrogation of texts, documents, and other material artifacts. A more modern view posits the complex social structure in which the archival data was created. By acknowledging this “social” turn in archival research, it accepts that histories change in response to the dominant values of institutions, cultures, and the history writers themselves (L’Eplattenier, 2009). According to Gaillet (2012), this reading “around” the historical text in contemporaneous history leads to discovering what is “not” evident. Often, what is “not” evident is the underlying policy considerations driving the creation of the data. This is especially important when examining data moored to time, place, and politics (Wang, 2004).

Using archival research, specific practices, ideologies, and social arrangements can be better understood by exploring their origins (Ventresca & Mohr, 2001). More so, by analyzing key historical shifts in actions and policy, historical study can identify organization and societal change in increments of time that capture significant institutional processes (Ventresca & Mohr, 2001). In this sense, recognizing inherently political features of archival material is a central methodological concern and must influence significant decisions about design and analysis (Ventresca & Mohr, 2001). Archival research provides a basis for defining key questions, it establishes a base of evidence, and it supports debate about familiar and contemporary issues (Zald, 1993). It allows a tracing of societal viewpoints, or more specifically, policy considerations surrounding meaningful issues. Piore and Sable (1984) defined these historical changes as "branching points" that allow researchers to follow even subtle changes in policy concerns. As such, archival analysis is akin to following a breadcrumb trail of data leading to a synthesis of policy developments. These "branching points" are similar to the evolution of legal theories and legal scholarship when applied to analyzing case law and legal precedent.

Particularly in the realm of higher education and financial aid, the policy considerations are mammoth. Each stakeholder has a specific vision and those with the power to influence policy are free to direct the data to influence their own ends. This is particularly important given the sometimes-assumed belief that archival data is created to document and objectify a factual position. Upon a brief review of current events and media, one will find there is a staggering amount of information directed toward student loan debt, and its impact on society and the economy. Secondary sources often cite to the problem student loan debt creates not only for the individual but also for society at large (Cornelius & Frank, 2015). It is certainly arguable that framing student loan debt as a societal problem is driving toward specific policy goals, and the interest in student loan debt as a presidential platform piece is evidence of its importance.

Within the bulk of information on student-loan policy, even within the seemingly objective and fact-driven area of published case law, statutes, and treatises, it is important to recognize that even the scriveners, sometimes even sworn non-partial magistrates, are subject to the "social" and policy goals put forth by their organizations. Holding true to the axiom, *if it is in print, it must be true*, once written down, archival data takes on new dimensions of veracity, credibility, and efficacy, often going beyond the intent or expectations of the author (Ventresca & Mohr, 2001). Nowhere is this more applicable than the interpretation of case law.

The seemingly innocuous court's opinion, also known as case law, is at first glance a straight-forward document simply describing the court's solution to a controversy. Either from a state appellate court to the Supreme Court of the United States, the form and function of legal writing is designed to be written in a similar manner to best allow for legal analysis (Miller & Charles, 2009). The goal is to make a uniformed structure to provide guidance to the reader, and any result is specifically related to the controversy in question (Steinberg, 2001). The fundamental concept of the controversy in question is an important distinction as courts only rule on the specific facts set forth before the court (Steinberg, 2001). Confusion seeps into the court's ruling when researchers read language beyond the facts of the case and apply it to other similar controversies that are often the subject of policy disputes. This extrapolation from the court's holding may lead both lawyers and laypeople astray from the court's meaning and even the established law of the land resulting in confusion and even anger (Steinberg, 2001).

As a means to provide consistency within case law analysis, the IRAC method was developed as means to standardize the way lawyers review cases (Miller & Charles, 2009). It is a means to develop legal writing but also a valuable tool for reading and analyzing case law (Metzler, 2003). First developed for United States legal writing, the IRAC methodology can be traced back to 1976 (Maclean, 2010). IRAC in an acronym for Issue, Rule, Analysis/Application, Conclusion (Miller & Charles, 2009). Taught from the first day of law school, this method remains the foundation for case law analysis throughout a lawyer's practice, and it is the framework that courts have in mind when its opinions are published (Miller & Charles, 2009). At the most basic level, IRAC involves a description of the issue, an explanation of the legal rule, an application of the rule as applied to the facts of the case, and conclusion statement (Metzler, 2003). Employing IRAC provides a roadmap for the reader so legal issues are easily identified (Lebovits, 2010). It requires deconstructing complex narratives to analyze each issue on an individual level and creates a structure for effective legal reasoning (Metzler, 2003; Salmon, 2014). Using this method, a legal issue is identified within the court's opinion and the facts are analyzed according to legal precedent to reach a conclusion (Bittner, 1990). Ultimately, a value judgment can be made about the facts, issues, and conclusions within the case (Bittner, 1990).

Much akin to developing critical thinking skills, using the IRAC methodology allows an informed and coherent value judgment based on understanding the facts, recognizing the issues that arise from those facts, analyzing the facts in relation to the law, and then reaching a conclusion about the analysis (Bittner, 1990). In addition to framing an organization structure, IRAC also acts as a mental exercise fostering a deeper understanding of the legal issues at stake (Metzler, 2003). While a strong foundation for analysis, as legal knowledge, research skills and experience develop, the IRAC methodology will recede into the background in favor of a greater emphasis on flow and synthesis (James, 2011). Strict adherence to any organizational method may hinder strong writing (Lebovits, 2010), but using an IRAC framework allows an organizational model to convey arguments efficiently (Lebovits, 2010). Similar to the goal in a qualitative literature review, while synthesis of ideas and complex analysis are evident, the basic structure still remains in the shadows.

As a non-lawyer guide, the following table, developed by Burton (2017), describes the basic tenets of the IRAC methodology utilizing a scaffold-type approach.

Table 1
IRAC grid

Issue	Rule	Application	Conclusion
• Frame the legal issues in the factual problem as questions using material facts, party names and elements of the relevant rules of law.	• Break down the relevant rules of law into elements. • Include definitions from statute and case law. • Include the facts of cases that are similar to factual problem.	• Make a linkage between the elements of the law and the factual problem. • Make analogies between the factual problem and the case law. • Distinguish the factual problem from the case law. • Make assumptions clear. • Identify additional facts required.	• Reach a convincing conclusion on all of the legal issues in the factual problem based on strong support from statute and case law. • Justify why alternative conclusions were not reached.

This table describes the basic information that should be included using the IRAC methodology. Each step is specific to a purpose, yet each also builds and expands on the others. In the end, a succinct analysis is provided that is particular to each issue presented.

While the IRAC methodology is the standard for case-law analysis, the rule for statutory interpretation is somewhat differentiated. Statutory law is law written and made by the legislative branch, as opposed to case law which is derived from court opinions. Statutory law is codified – it is generally organized into a code such as United States Code or the Bankruptcy Code. And while statutes remain open to interpretation, there are generally established guidelines practitioners use to analyze them. Ideally, the *plain meaning* of the text is evident, and this is the foremost interpretation of the statute by the courts (Eskridge & Frikey, 1990). Additionally, legislative history, the context in which the legislation was enacted, the general legal landscape, common sense, and good policy all can play roles in interpreting ambiguous statutes (Eskridge & Frikey, 1990).

Both archival and jurisprudential inquiry methodologies contain a social element. As the researcher is aware of how powerful this social element can be, the acknowledgment of the researcher's positionality is equally important in analyzing the data. Positionality is where the researcher stands in relation to the subject matter (Gaillet, 2012). According to Gaillet (2012), scholars bring a set of preconceived notions, experiences, and perspectives to their topic choices. This is wholly appropriate, and many scholars embrace the concept as related to archival studies (Gaillet, 2012). Archivists need to acknowledge their own agendas in the creation and use of archival data (Brereton & Gannett, 2011). More so, within the methodological framework, the recognition of inherently political features of archival material remains a central concern and is relevant to the design and analysis of the study (Ventresca & Mohr, 2001).

Credibility and Rigor

Much research has been done establishing the credibility and rigor of archival research. Within archival methodology, the analysis of archival research can be synthesized into three broad methods (Ventresca & Mohr, 2001). The historiographic approach, ecological analysis, and the new archival tradition (Ventresca & Mohr, 2001). Each method varies in how research is designed, materials are selected, and how the data are analyzed (Ventresca & Mohr, 2001).

The historiographic approach was at the forefront of archival research, and methodologies tended to be similar to ethnographic studies focusing on the rich details of life in organizations (Ventresca & Mohr, 2001). Ecological analysis developed in 70s, and its basis was to analyze small amounts of information taken from the culture of large numbers of organizations to tell a story about the dynamics within organizations and their environments (Baum & Amburgey, 2002). This methodology derived institutionalist studies where arguments focused on how authority and expertise drove organizational change within structured organizations (Ventresca & Mohr, 2001). New archivists adapted methods of both historiographic and ecological to form a more intense methodology.

New archivists employ research strategies that comprise a complex set of principles for archival work. The principles are equally applicable to legal research as well. According to Ventresca and Mohr (2001), these include:

> A reliance on formal analytic methodologies, a focus on the measurement of social organization and its constituent elements rather than on organizations themselves, an emphasis on the study of relationships rather than objects or attributes, a concern with measuring the shared forms of meaning that underlie social organizational processes, and an interest to understand the configurational logics that tie these various elements together into organizational activity. (p. 9)

A key understanding to incorporating new archivists' methods is to understand how archival materials are used in research. Archival materials are treated as data to be analyzed, and these data are used to study the social aspect of organizations (Ventresca & Mohr, 2001). New archivists theorize and measure social organizational processes directly, and, to take the analysis further, they analyze the ways in which these social processes are related to one another in distinct ways (Dacin, Ventresca, & Beal, 1999). This often results in a discovery of the rationale as to why decisions were made. The language or terms used within an organization evolve into a *term of art*, such that it had particular meaning to the stakeholders at the time. More so, these *terms of art* often drove future organizational decisions. Such is the case within a legal framework where *terms of art* are routinely used to describe processes and fixtures with the legal community. A *term of art* is defined as a term that has a specialized meaning in a particular field or profession (Merriam-Webster, n.d.). *Terms of art* are particularly used in the legal profession. Put another way, new archivists analyze a "set of material practices and symbolic constructions" that provide the principles for a particular field of organizational study just as legal scholarship involves readily understood constructs such as *terms of art* or precedents (Friedland & Alford, p. 248, 1991). These legal concepts also represent material practices and symbolic constructions within the legal field.

Given the breadth of archival materials and often overlapping relevance, it is important to determine the proper scope of materials and the methodology best used to conduct the research. In choosing the research goal, there are some basic tenets germane to the new archivist tradition. According to Ventresca and Mohr (2002), these include:

> Concern with the structural embeddedness of organizations and their components, a focus on shared systems of understanding and meanings that facilitate organizational action, and an understanding and mapping of institutional logistics that set all of the processes in motion. (p. 21)

Analysis will combine Ventresca and Moore's new archival principals (2002) in association with legal scholarship techniques. The archival materials, such as case law and other sources, will be treated as data to be measured in the sense that specific issues within the archival materials can grouped, much like any other data, and which can then be used to derive systematic variations and patterns within the materials. For example, a court's views on student's rights and financial burden may be discerned from published opinions, and these views ultimately affect policy considerations. The same analysis is relevant to developments in student debt and bankruptcy law. Additionally, a court's viewpoint may be affected by geographical region or political leanings (Klerman, 2014).

This is the precise evolution of case-made law as it proceeds through the various levels of the judicial system. By analyzing the relationship between the data and how it affects participants, a distilled view of policy considerations regarding student loan debt and higher education is revealed through the lens of the legal system, the political system, and social systems within society. The unique nature of legal writing lends itself to archival research as it provides a strong baseline to ensure the honesty of its participants and the credibility of the research.

At least on its face, published case law carries with it a certain reliability as to the point of law under analysis (Steinberg, 2001). More so, under the term of art, *stare decisis*, there are defining principles of reliability in the court's findings, often labeled as precedent (Steinberg, 2001). Yet, however revered the principle of *stare decisis*, it is still important to recognize any inherent bias of the fact finder, even when dealing with the esteemed judiciary (Klerman, 2014). *Stare decisis* can be defined as the doctrine of precedent, where courts should follow earlier judicial decisions when the same points arise again in litigation (Blacks, 1990). However, difficulties arise when there is authority that squarely supports two diametrically opposed positions (Steinberg, 2001). Further, within the legal landscape this happens with regular frequency. Such that courts have acknowledged the constant struggle between firmly adhering to precedent and recognizing that the law must change with the times. This concept is evident in Judge Cardozo's dictum that “precedent drawn from the days of travel by stage-coach does not fit the conditions of travel today” (*McPherson v. Buick Motor Co*., 217 N.Y. 382, 391 (1916)).

Thus, while firmly established, the concept of *stare decisis* is but a starting point for legal analysis and helps to create a roadmap for tracing the evolution of law and legal theory.

As the researcher, reflexive commentary will be kept as objective as possible relying on 16 years of practicing law, both in trial and transactional work. The researcher has a substantial academic background holding a Master of Arts in Literature, a Master of Business Administration and a Juris Doctorate. The researcher graduated in 2005 from a for-profit law school in Florida. Having passed the Florida Bar the same year, the researcher practiced criminal defense law as an Assistant Public Defender for eight years in the Fourth Judicial Circuit on Florida. For the last eight years, the researcher has practiced business and privacy law as corporate counsel for a Fortune 500 company. The researcher currently has active student loans.

This diverse background provides a unique research opportunity allowing an academic, economic, and legal point of view to the research material. These perspectives allow a greater insight into the meaning of the particular sources, whether they are academic or legal in substance, and will provide an overall clarity that will benefit the research. Such perspectives allow a unique yet practical ability to understand the various stakeholders and their motivations that influence policy decisions. Particularly related to legal research, attorneys are trained to remain objective and see both sides to a point of view, notwithstanding personal opinion. While acknowledging different lenses show a different picture, given the heavy legal focus of this dissertation, the melding of academic and legal disciplines will combine to present a strong, robust explanation of the research.

In researching archival materials, the information created has, at a minimum, some form of the creator’s bias (Lipartito, 2014). On one end of this spectrum, case law is written narrowly, and fact specific with great effort to eliminate any superfluous opinion that may distract from the purpose of the court's position (Steinberg, 2001). On the other end, other sources may be ripe with creator bias, and these sources, while valuable to get a snapshot of the issue, must be reviewed with care to avoid contaminating an objective viewpoint (Lipartito, 2014).

One need only to read a few news headlines to confirm the interplay between student loan debt, higher education, and the effects on the social, economic, and political spheres has been an intense topic for many years. By focusing on these specific groups and circumstances, similarities in situations and phenomenon will develop enabling thick descriptions of the mechanisms at play to see how stakeholders extract these elements to push toward policy goals. To thwart any agenda, one method is to read them critically against the intended purpose (Lipartito, 2014).

All of the archival material used is public record and readily available. To verify the dependability of the research, replication of the study is wholly feasible using the archival materials utilized, or by further exploring additional, related materials. It is important to realize this subject matter is constantly evolving and great changes are developing even within the last two years with the change in executive power. Further, with the changes in the judiciary, this will likely further affect policy considerations in this area.

The collection methods involve both traditional and web-based inquiry. Archival data, while typically thought of as old or preserved data, may comprise a wide array of empirical materials created by individuals for their own purposes or on behalf of organizations (Fischer & Parmentier, 2010). Examples include not only traditional sources such as diaries, letters, and photographs, but also weblogs, advertisements, magazine articles, and discussion boards, as well as sources such as corporate annual reports and press releases (Fischer & Parmentier, 2010).

Traditionally, researchers used archival data to develop understandings of the research context, rather than as a primary means to inform the development of concepts and theories (Fischer & Parmentier, 2010). However, given the rich vein of secondary source material, and the insight into current trends and policy issues, Fischer and Parmentier (2010) argue that there is increasing value in drawing on archival data as one primary resource.

The internet provides relatively easy, accessible, and abundant archival material. However, it is understood these databases only scratch the surface of digital archives. Moreover, the challenge for the archivist researchers today is not finding relevant archival data, but best deciding how to limit its use and scope (Fischer & Parmentier, 2010). Limitations of web-based research stem from an inability to size-up the breadth and depth of the material available based on the unknown limitations of the browsers and databases used.

Indeed, many archival sources will be found in what Yakel (2010) termed the "deep web." Materials in the "deep web" cannot be retrieved through public search engines and house content often requiring passwords or other access restriction. Legal specific search databases such as Westlaw and Nexis are within the category. In additional to typical web-based browser search criteria, Yakel (2010) recommends additional useful digital search methods such as synonym generation, chaining, name collection, and successive segmentation. Databases and repositories such as NCEDS, WestlawNext, Nexis, JSTOR, law reviews, SAGE, ERIC, Congressional Hearings, secondary sources such as periodicals, Google Scholar, Drudge, MSN, all provide rich access to archival data.

Case Materials and Search Terms

The research is a review of applicable statutory authority and case law as related to student loan debt policy. Statutory authority included analysis of United States Code and the Code of Federal Regulations. Case Materials consisted of primarily of bankruptcy cases as heard in Bankruptcy Courts and published in judicial opinions. Cases were identified and categorized based on areas of controversy such as administrative challenges, the Borrower Defense Rule, and bankruptcy proceedings including student debt. Secondary sources included law journals and peer reviewed journals related to higher education, bankruptcy, and student loan debt.

As the goal was to identify published, thereby precedential, cases that affect student loan policy, *WestlawNext* was the legal database used. *WestLawNext* is a comprehensive search tool allowing searches for judicial opinions in all 50 states and all Federal courts. The tool allows for searches employing terms and connectors (Boolean) searches as well as natural language. Search terms were derived using a general to specific approach. Generalized topics were targeted, and based on the results, more specific terms were included to target a specific set of resources. These sources related to the economic, legal, social, and political determinations that influence policy determinations affecting to student loan debt. Multiple search terms were included in specialized searches. The goal was to create a pool of resources encompassing current trends, derived from archival resources, including secondary sources, as well as legal case law and statutes. Search terms included:

For-profit, law school, Florida, Coastal, higher education, traditional, student, loan, debt, money, bankruptcy, chapter seven, chapter thirteen, court, bias, forgiveness, *qui tam*, educational benefit, accreditation, ABA, American Bar Association, standards, guidelines, gainful employment standard, financial aid, archival, historical, document, arrest, civil, warrant, Sallie

Mae, precedent, probate, IRAC (Issue, Rule, Analysis, Conclusion), statute, statutory, *stare decisis*, borrower, defense, rule, repayment, undue hardship, creditor, borrower defense rule, social security, Federal government, Department of Education, Higher Education Act, United States Code, Final Rule, Borrower Defense, DeVos, economics, Corinthian, garnish, Brunner, Rosenblum, *Noscitur a sociis*, Trump, political, CFPB.

Chapter 2 - Literature Review

Historical Background of Student Aid

The expansion of higher education in the United States began to take shape in the 1860s as a result of the Civil War and the passing of the Morrill Land Grant Act (Thelin, 2011). While lauded by some scholars as the source for creating affordable, practical state colleges and universities, according to Thelin (2011), it more represents the haphazard Federal-State dynamic that has always affected higher-education policy. After the Civil War, the United States was a vast land with population centers distributed mainly in cities on the Eastern coastline. While it was a Federal policy consideration to encourage populating the Western United States, the Morrill Land Act did not bestow land to the state for the sole purpose of building colleges (Thelin, 2011), rather the Act created a complex partnership where the Federal government would provide incentives to the states to sell land with the promise of using some of the proceeds to fund advanced instructional programs (Thelin, 2011). Federal involvement was not about the need to build colleges, but more about the need to populate Western lands (Thelin, 2011).

These newly-formed institutions were encouraged to offer "useful arts" such as agriculture, mining, mechanics, and military instruction; however liberal arts offerings were also encouraged (Thelin, 2011). While the goal was to provide a burgeoning United States with human capital to build a foundation in undeveloped lands, a side effect was a rift between a science or classics curricula (Thelin, 2011). Despite this schism, there was an increase in the creation of colleges and universities, access to higher education became easier, and the policy goal to increase higher education attendance within the U.S. began to materialize.

This transition from elite education to mass-higher education (about 40-50 percent of high-school graduates) worked fairly well, until there was a policy shift to encourage universal higher education (Thelin, 2011). The expansion of higher-education institutions, through political, social, and economic means, had opened the door to post-secondary education to virtually anyone seeking it (Thelin, 2011). However, while there were ample higher-education options to choose from, this increase in demand left the inner workings of many colleges and universities in disarray (Thelin, 2011). Thelin (2011) argued this trend to universal higher education was rooted in consumerism, and higher-education institutions began to target potential students as consumers. Students' demand for higher education prompted competition among higher-education institutions that led to overextending budgets in the quest for increased prestige (Thelin, 2011).

Between 1970 and 1980, higher-education institutions pushed more for grander accolades while ignoring studies that pointed out the increasing shortcomings of running a high-level university (Thelin, 2011). Thelin (2011) referenced the Newman Report (1971),

> As we have examined the growth of higher education in the postwar period, we have seen disturbing trends toward uniformity in our institutions, growing bureaucracy, overemphasis on academic credentials, isolation of students and faculty from the world – a growing rigidity and uniformity of structure that makes higher education reflect less on the interests of society. (p. 320)

This trend towards consumerism and increasing bureaucracy, contributed to the Federal government taking an interest in higher-education financial aid.

Direct involvement with student Federal financial aid actually began in 1944, with the Serviceman's Readjustment Act, also known as the GI Bill (Cornelius, 2014). This program, still in existence today, was designed to provide higher education funds to veterans after their service in the military. An example of human capital policy, the GI Bill's goal is to provide additional education and training for veterans after their service (St. John et al., 2013). This additional education and training, based on providing a prior service to the country, is believed to benefit both the individual and society at large while incentivizing service to the country.

Student aid as an entitlement began with the Basic Education Opportunities Grants (BEOG). Passed in 1972, as an amendment to 1964 Higher Education Act, this was grant-based financial aid, and as an entitlement, any applicant that complied with its terms was guaranteed financial aid. More so, this money was portable in that it was dependent on student compliance with the program rather than institution (Thelin, 2011). This free financial aid later became known as Pell Grants in honor of Senator Claiborne Pell. This federal program included students from all socio-economic backgrounds while simultaneously encouraging all institutions to participate (Thelin, 2011). The success of the Pell Grant program established federal financial aid as an enduring plank within the Federal government's support for higher education (Thelin, 2011). More so, because most institutions were receiving federal money, they were now subject to any Federal regulations that went along with accepting said money (Thelin, 2011).

Despite the success of Pell Grants, there began an increased focus on loans rather than grants to provide financial aid (St. John et al., 2013). This focus on loans rather than grant funding reflected the changes from a human capital to a market model in higher education (St. John et al., 2013). In the early 1970s, market logic began to have a substantial influence in educational policy (St. John et al., 2013). Previously, grant-based funding proved to be the favorable means to provide opportunity for students and stimulate innovation within higher education (Committee on Economic Development, 1973). This belief was short lived however, as research began to appear arguing that loans, not grants, provided a greater economic benefit to students (Bennet, 1986, 1987). Through loans, greater access and opportunity would be provided (St. John et al., 2013). Access to higher education continued to be a prime justification for student loans (St. John et al., 2013), and the Federal government continued to take a more active role in providing access to student aid.

Serious attention to higher education student loans, particularly as related to political and economic policy, emerged in the 1960s. In 1965, with the passage of the Higher Education Act, Federal financial aid was greatly expanded. The Federal government's policies specific to student-loans have evolved from a human capital model to a market driven model in the last 50 years (St. John et al., 2013). The Federal government's foray into student loans began in 1958, with the passing of the National Defense Education Act (NDEA) in response to the U.S.S.R.'s launch of Sputnik (Cornelius, 2015; Mohr, 2017). The goal of this Act was to provide low-interest loans to prospective teachers encouraging them to pursue teaching careers in science and mathematics (Cornelius, 2015; Dobson, 2019).

The Higher Education Act of 1965 created the Guaranteed Student Loan Program (Cornelius, 2014). This was renamed the Robert T. Stafford student loan program in 1988, in honor of Senator Stafford's work on higher education. This program underwent numerous iterations and amendments to this day (Mohr, 2017), and it continues to be the center of controversial issues impacting presidential campaign platforms, the global economy, and debt forgiveness (Looney et al., 2020).

Reviewing further changes in student-loan availability, there was a steady increase in allowing easier access to student loans (Mohr, 2017). The 1972 reauthorization of the Higher Education Act expanded availability of Stafford loans to for-profit higher education institutions (Cornelius, 2015). In 1978, Stafford loans were made available to all students, regardless of financial need (Mohr, 2017), and in 1979, the Higher Education Technical Amendment allowed private lenders to market loans to students attending for-profit institutions (Higher Education Technical Amendments of 1991). Other additions included increasing aggregate loan limits.

In addition to Federal government loans, private lenders realized the profit potential of lending to students and began to aggressively lend money under the guise of student loans. Private lenders often hedge their loans by encouraging a co-signer so a parent or guardian will be left to secure the debt should the student default. The result is student loan debt at $1.56 trillion dollars and climbing (Friedman, 2020).

For-Profit Higher Education and Student Loan Debt

The education industry continues to grow. In 2012, the overall education industry was valued as $500-600 billion dollar industry (Kumashiro, 2012), and in 2018, the higher education industry alone was valued at $671 billion (NCES, 2020). Like any industry, it is subject to an array of forces that impact decision making. Social, political, and economic forces all impact how educational institutions structure their curriculum and mission. Focusing on the changes in higher education, current policies tend to favor for-profit institutions, lenders over consumers, and a changing marketplace requires careful scrutiny of the effects of these polices. More so, the very core of higher education seems to be nearing a crossroads that will have extreme consequences on a national scale. Under the Trump administration, for-profit education, once under governmental pressure for reform, was now blessed with a more sympathetic climate (Hackman, 2019; Waldman, 2017).

The literature suggests that there are two schools of thought regarding for-profit education and how it is changing the face of traditional education. From the traditional school, researchers are suspect of the motive of this type of educational model-- i.e., that profit rather than the pursuit of knowledge is the driving force (Leistyna, 2007). Conversely, the for-profit school is quick to point out that their model allows for greater choice, greater access for minority students, and the ability to fit a dynamic world (Tierney & Hentschke, 2007). These proponents argue that the traditional model has become stagnant, and those that resist or disparage the for-profit model are wary of change (Shaw, 2011).

The Business of Education

Looking past the intellectual and pure goals of preparing tomorrow's youth, at its very core, education is a business (Kumashiro, 2012). And like any organization, financing is needed to run any school, college, or university. Whether from public dollars or private endowments, even in the world of education, money is an important element. Thus, education can be analyzed like any other business, and forces that drive business-- such as the economic environment and consumer awareness-- have tremendous impact on an organization's success. Today, education is a $500-600 billion dollar business (Kumashiro, 2012). In addition to the large amount of economic capital that flows through the various facets of education, the frail economy has also had an impact on the number of students that are looking to educational institutions for a more secure future (Douglass, 2012). When these two factors are added to a technological boom and the increase in on-line classes, the foundation of traditional education is poised for a major shift.

Further, the traditional educational institution must now face an increasing presence of for-profit schools.

The last 20 years have seen a change in how students are viewed (Sturgis, 2012; Richardson et al., 2020). Traditionally, students chose an institution and wanted to attend for traditional reasons such as reputation, academic success, and family history. The students came to the institutions without much coaxing. However, students now see themselves as consumers and evaluate education like a product (Lane et al., 2014; Richardson et al., 2014). Rather than merely deeming a student worthy to attend, colleges and universities market themselves to students much like a business would market its product. The educational arena has become much more competitive, and traditional institutions are finding they must adapt or risk losing market share (Sturgis, 2012; Richardson et al., 2014).

Historical Overview and the Emergence of Competition

There is nothing new about for-profit education. Rather, for-profit institutions have been operating in the United States for the last 300 years (Ruch, 2001), although historically, for-profit institutions tended to focus on vocational or technical training (Garrity et al., 2010). Trade schools operated on the for-profit model for over 100 years (Johnson, 2011). However, within the last 20 years, for-profit education has expanded beyond trade schools into the realm of higher education, including masters and doctoral programs, and their enrollments are growing (Garrity et al., 2010). The foundation for this growth can be found in basic business practices. In the past, philanthropic donations supported a large number of educational institutions, but since the second half of the 20th Century, significant shifts in economic and ideological policies have drawn businesses more and more into education (Kumashiro, 2012). Based on the policy of trimming governmental spending and waste, public education was considered to be a major drain on public resources, and reform was needed in the form of privatization (Kumashiro, 2012). For-profit organizations greatly expand their reach by pushing policy agendas about choice and flexibility funded mainly through the Higher Education Act of 1965. Designed as aid for students, this law ultimately allowed for-profits institutions to receive Federally-backed loans. Additionally, in 1979, the Higher Education Technical Amendments allowed private lenders to market educational loans to students at for-profits.

This newly privatized education sector operates much like the free-market economy encouraging competition through choice and increasing competence by supposedly allowing poorly performing schools to fail (White, 2017). However, the Trump administration did not embrace efforts for increased accountability (Ashford, 2019). So much so, students saddled with heavy student loan debt have nothing to show for their effort (Dobson, 2019; Cornelius & Frank, 2015). Emerging legal remedies such as the Borrower Defense Rule and a shift in bankruptcy proceedings are the direct result of overbearing student debt and failing schools (White, 2017; Rhode, 2017).

Nevertheless, for-profit education companies have continued to fill a niche, and they have influenced public policy to further establish themselves as necessary (Leistyna, 2007). Leistyna (2007) argued that the desire for profit has led to a corrupt change in policy toward education masterminded by corporate executives and politicians that resulted in a mindset that puts profit over performance, with little to no accountability. Given the amount of money and the future of higher education, there is an increasing divide between the traditional education model and the for-profit sector. Yet, for-profit education continues to grow and flourish, and had experienced increased protections under the Trump administration (Ashford, 2019; Fossey, 2017).

The Rise of For-Profit Institutions and Current Trends

For-profit education models have experienced tremendous growth within the last 15 years. From 2000 to 2010, for-profit enrollment increased 235% (Douglass, 2012). The 11 largest for-profit education companies saw a 30% increase in enrollments between 2008 and 2010 (Douglass, 2012). According to the National Center for Educational Statistics (NCES), enrollments continued to increase at for-profits compared to non-profit institutions. From 2000 to 2017, for-profit undergraduate enrollment increased 109% while public institutions increased 24% (NCES, 2019). In 2010, for-profit enrollment was 403,000 students and increased to 1.7 million students at its height in 2010 (NCES, 2019). Based on this increase in enrollments, new for-profit institutions were created (Zhao, 2011). Of the 483 new colleges and universities formed since 2005, about 77% were for-profit institutions (Zhao, 2011).

It is suggested this growth is based on a number of factors. The trend of declining public funding for traditional educational institutions, the vocationalization and commercialization of higher education, and a decrease in economic vitality are all factors relating to the growth of for-profits. (Marklein, 2011; Garrity, et al., 2010). Apart from environmental factors, a growing body of research has focused on the operational aspects of for profits as compared to traditional models of education (Tierney & Hentschke, 2007). For-profits are touted as having the ability to adapt and quickly meet the new demands of students, lower expenses by employing part-time faculty, use business models that employ corporate governance for oversight, minimize investment into large campuses and buildings, and forego costly research (Tierney & Hentschke, 2007). Tantamount to the success of for-profit education is its ability to treat education as a business rather than an institution, and this idea is directly at odds with the ideals of a traditional university. Keeping costs low allows greater return to the investors, and for-profit proponents would argue that the educational value is as good or superior to those of traditional universities. Shaw (2011) argues that traditional universities have become much too complacent with their place in the educational hierarchy. The rising costs of sustaining a traditional university have created a "bubble," very similar to the bloated housing market a few years back, where students may realize the cost of their education is not worth the final product (Shaw, 2011). Whether through new technologies or the need for greater flexibility, for profits are filling a need faster than traditional universities can adapt.

Further, even if traditional universities wanted to cut costs, there are many reasons why this is difficult (Martin, 2009). Perhaps foremost is the idea that a traditional university lacks any direct accountability (Martin, 2009). There is no clear "owner," rather there is typically shared governance between the administration and the faculty (Martin, 2009). More so, the faculty and administration tend to drift to their own ends, and there can be different opinions regarding the university's mission- education, research, value, excellence. This can all lead to the pursuit of self-interested goals (Martin, 2009). Additionally, Martin (2009) argued that the real capital in a traditional university is its reputation. Rather than risk scandal or encourage radical change, administrators have been comfortable with the status quo, and this thinking has steadily led to increased costs for traditional education (Martin, 2009). This constant increase in spending and subsequent raising of money resulted in the maxim of *Bowen's Law*.

Bowen's Law

Howard Bowen was a 20th century economist and the University of Iowa college president from 1964 to 1969. Touted as the preeminent economist studying higher education (Kerr, 1980), Bowen's book (1980), *The Costs of Higher Education: How much do Colleges and*

Universities spend per Student and how much should they spend?, put forth a theory for analyzing higher-education spending that came to be known as *Bowen's Law* (Kimball, 2014). In short, according to Bowen's Law, "colleges raise all the money they can, and spend all the money they can raise" (Fried, 2011, p. 3). This theory, also known more technically as the revenue theory of cost (Bowen, 1980), posed a set of generalizations that defined the unit costs of operating a higher-education institution. According to Bowen (1980), five tenets defined financial management in higher education.

1. The dominant goals of institutions are educational excellence, prestige, and influence.
2. In quest of excellence, prestige, and influence, there is virtually no limit to the amount of money an institution could spend for seemingly fruitful educational ends.
3. Each institution raises all the money it can. No college or university ever admits to having enough money.
4. Each institution spends all it raises.
5. The cumulative effect of the preceding four laws is toward ever-increasing expenditure. The incentives inherent in the goals of excellence, prestige, and influence are not counteracted within the higher educational system by incentives leading to parsimony or efficiency. (pp. 19–20)

For researchers examining rising education costs, Bowen's law has remained in prominence so much so that it is the widely accepted view on the subject. According to Thelin and Trollinger (2011), Bowen's law remains one of the most influential theories on higher-education costs, and still holds true for universities worldwide (Vught, 2008). While Bowen is credited with this theory, its implementation dates back to Harvard president Charles Eliot during his tenure from 1869 to 1909 (Kimball, 2014). Eliot espoused the management of a university's finances as a "free money" strategy over a century before Bowen's research, eventually growing Harvard's endowment to the largest in country (Kimball, 2014). In the 1920s, other higher-education administrators began adopting Eliot's strategy, thus explaining the origins, the historical operation, and the implementation that Bowen eventually codified (Kimball, 2014).

Of note, Eliot's "free money" approach was not designed to be reckless with the university's finances, rather he strongly believed higher-education institutions should be run like a business (Kimball, 2014). It should operate efficiently, and its finances should be transparent (Kimball, 2014), however, there was one glaring exception: a university should never carry a surplus. It should always run at deficit creating the justification to ask for more free money (Kimball, 2014). This policy, when viewed alongside other policy considerations in higher education such as increased student lending, arguably contributed to increased costs perpetuating the need for students to rely more on student loans (Ehrenberg, 2002).

Interestingly, Fried (2011) blamed a lack of business savvy on colleges' excessive spending rather than any malicious intent; however he readily accepts the idea that nonprofit spending is a black hole where a never ending spiral effect develops between spending and costs (Fried, 2011). As revenues are increased through higher tuition and fundraising, more and more is extracted from the surplus so that tuition must be raised and fundraising increased, thus the need for more revenue is justified (Fried, 2011). Because for-profits' goal is to maximize shareholder return, efficiency must play a large role in their strategy, yet they are scrutinized because their return is not squandered (Fried, 2011). Bowen draws a similar conclusion is comparing the higher-education institution with a non-profit company. Bowen (1980) maintained employees in non-profit sectors will tend to seek out limitless resources because they do not have the “broad public interest” in mind (p. 19).

The Brazilian Effect

According to Douglass (2012), the rise of for-profit education can be viewed globally using what he has termed the Brazilian Effect. The Brazilian Effect is a reaction witnessed in Brazil when for-profit education became the dominant provider enrolling over 50 percent of students (Douglass, 2012). This phenomenon has also occurred globally, evidencing itself in other countries such as Poland and South Korea (Douglass, 2012). This occurs when public higher education can no longer keep pace with growing demand for access and programs, so the government allows for-profit companies to fill in the gap, and sometimes they remain as the dominant provider (Douglass, 2012).

According to Douglass (2012), for-profits began to establish a foothold within the mainstream-education market based on three factors: the rising demand for education, changing technology, and more favorable regulations. On a basic level, given economic forces and changing labor markets, increased education lends itself to better employment opportunities. This, in conjunction with increasing technology, has increased the efficiency of long-term learning, created less expensive forms of teaching, and changed the perception of what constitutes a college experience (Douglass, 2012).

Political Motivations

While the rising demand for education and changing technology can be seen as evolutionary, the third was guided with political help. Under George W. Bush, policies were implemented that greatly expanded taxpayers subsidies to for-profit educational organizations

(Douglass, 2012; Leistyna, 2007). Beginning with the Higher Education Act of 1965, for-profit institutions began to realize an untapped revenue stream funded with Federally-backed student loans. More so, in 2005 the Higher Education Act enacted the “90/10” rule that raised the level of Federal student grants and loans that could be used for the organization’s tuition and fees to 90 percent (Skinner, 2005). This allowed for-profits institutions to identify a consistent revenue source to grow and expand (Douglass, 2012). However, Douglass (2012) argues this growth model is more a result of government subsidies than a response to the free market. For example, the Apollo Group, owner of the University of Phoenix, gets over 8 percent of its revenues from its students Federally funded grants and loans (Douglass, 2012). Trends in heavy borrowing continued with for-profits, and in 2011, 96 percent of students at four-year for-profits held student loan debt (U.S. Senate, 2011).

Criticisms of For-Profit Education

The connection between federal money and for-profit educational organization has not gone unnoticed, and it has led some to believe that for profits are purposefully targeting the lower-income students that typically receive Federal aid. The “disadvantaged student” is a term that described a student, generally a minority from a lower-income family that historically lacked access to traditional educational models, and was eligible for Pell Grants (Garrity et al., 2010). Garrity et al. (2010) argued that for-profits institutions are targeting disadvantaged students as an easy way to generate consistent revenue. Coupled with lower costs, this created a sustaining business model that has generated large profits that signify a successful business and create further investor interest. Its most benign critics acknowledge that for-profits have provided access to a broader range of student, but this benefit has allowed for-profits tremendous access to the public treasury (Garrity et al., 2010). Alarming statistics suggest that, while receiving a greater amount of Federal aid than traditional universities, for-profits still spend less per student than traditional educational organizations (Garrity et al., 2010). While of concern, the issue is compounded as a substantial number of students that enter a for-profit program do not graduate and are saddled with a large debt with nothing to show for it (Douglass, 2012). In 2009, 62 percent of all public higher education students incurred student loan debt, while it was 72 percent at private non-profits and 96 percent at for-profit institutions (Grant, 2011). Currently, as of 2020, 66 percent of public higher-education graduates hold student loan debt, 75 percent of private, non-profit graduates hold student loan debt, and 88 percent of for-profit graduates hold student loan debt (Friedman, 2020). Of further concern, some for-profits specifically target veterans. Military benefits, as a result of the 2008 Post 911 G.I. Bill, do not count against a for-profit's 90/10 rule requirement (Sridharan, 2012).

More so, the debt load incurred by students is creating national economic concerns. In 2012, the Federal Reserve Bank of New York estimated total student loan debt will reach 1 trillion dollars. Today it reached $1.56 trillion and climbing (Friedman, 2020). Even a typical student loan debt, $30,000, requires a $345.00 per month payment (Cornelius & Frank, 2015). For the majority of workers, this is a sizable portion of a monthly paycheck, and this can have the effect of chilling spending on consumables, large purchases such as homes and cars, and even deciding to marry or have children (Cornelius & Frank, 2015).

As such, the marriage between for profits and Federal aid creates an interesting paradox. For-profits institutions are creating educational opportunities historically inaccessible for lower income and minority groups, but it is argued that the only reason for-profits target those students is because they are eligible for the financial aid that readily increases their income and profits (Baum & Steele, 2010). According to Sturgis (2012), for-profit institutions have nimbly exploited this disparity by focusing on low-income and minority via electronic and print media. For example, at the University of Phoenix, minority students make up about 50 percent of its 380,000-student body (Sturgis, 2012). There are concerns how many of these students will be able to find employment and repay their student debt (Sturgis, 2012).

The Senate Committee on Health, Education, Labor, and Pensions had growing concerns about these issues. Between June 24, 2010, and July 21, 2011, the Committee, held six hearings investigating the link between student loan debt and for-profit colleges. Alarming findings included disparities between funding and enrollments, poor graduation rates, unethical recruiting practices, higher tuition in relation to comparable traditional counterparts, institutional lending at higher interest rates, and higher default rates (Senate Committee on Health, Education, Labor, and Pensions, 2011). The Committee determined for-profits institutions are a major contributor to the student loan crises, but still acknowledged the important role for-profits play in allowing non-traditional students access to higher education.

Non-traditional students are defined as those who either delayed college, attend part-time or work full-time while enrolled, are independent of their parents, or have dependents other than a spouse (Senate Committee on Health, Education, Labor, and Pensions, 2011). The trend in this type of enrollment has created a “new American majority” of non-traditional students (Senate Committee on Health, Education, Labor, and Pensions, 2011). The Committee conceded that for-profits are well suited to cater to the new American majority due to the flexibility, convenience, and efficiency that they offer. However, when analyzed more closely, disturbing trends developed regarding quality and the for-profit sector’s reliance on Federal loan dollars. It was determined that 96 percent of for-profit students take out student loans (Senate Committee on Health, Education, Labor, and Pensions, 2011). This is significantly higher than the 13 percent at community colleges, the 48 percent at four-year public colleges, and the 57 percent at private four-year colleges (Senate Committee on Health, Education, Labor, and Pensions, 2011). Given the large number of student loans attributed to for-profit higher education, it is further concerning that for-profit students account for 47 percent of loan defaults (Senate Committee on Health, Education, Labor, and Pensions, 2011).

The Committee ultimately determined three strategies needed to be implemented to successfully monitor for-profit higher education. As the for-profit education model is conducted more akin to a business model, enhanced transparency is needed to better gauge the services and the results of the for-profit education sector (Senate Committee on Health, Education, Labor, and Pensions, 2011). This needs to be accomplished by collecting relevant and accurate information regarding student outcomes (Senate Committee on Health, Education, Labor, and Pensions, 2011). Next, strengthening the oversight of Federal financial aid will hold for-profit institutions more accountable (Senate Committee on Health, Education, Labor, and Pensions, 2011). By better controlling the purse strings, poorly performing schools will not be able to operate. Lastly, more meaningful student protections needed to be implemented (Senate Committee on Health, Education, Labor, and Pensions, 2011).

This last strategy creates an interesting segue into the contrasting views of the Trump administration. Due in large part to increased scrutiny of for-profit institutions, there was a policy shift under the Obama administration to protect students from predatory practices used by some for-profits to recruit students and usurp their student loan dollars (Kreighbaum, 2017). Much like a consumer protection measure, the Borrower Defense Rule was a measure adopted to allow student loan forgiveness to students who were victims of for-profit’s fraud or misrepresentation. Passed just before the 2017 National Presidential Election, the Borrower

Defense Rule created increased requirements regarding for-profits' financial accounting, arbitration requirements, as well as increasing students' defenses to repaying student loans. These defenses are raised directly against the for-profit institution, and it bears the burden of any loan forgiveness (*California Association of Private Postsecondary Schools (CAPPS) v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

The Borrower Defense Rule

The Borrower Defense Rule originally was created in 1994, as a temporary measure in association with the Federal Direct Loan Program (Ali, 2018, 20 U.S.C. § 1087e). The Direct Loan Program was implemented to provide low-interest student loans directly from the United States government rather than private financial institutions, and it remains the only government-backed loan program in the United States (Dobson, 2019). Codified under United States Code, the rule states, "notwithstanding any other provision of the State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part" (20 U.S.C. §1087e(h)). The Department of Education did little to provide guidelines or interpretation of this clause until the fall of Corinthian Colleges in 2015 (Ali, 2018).

For-profit Corinthian Colleges' closure of multiple campuses left thousands of students with little recourse regarding an educational future coupled with a large load of student debt. Ultimately, it was determined Corinthian defrauded students and misrepresented its educational quality such that many students were left with little to no job skills and extremely high student loan debt. In 2015, then Department of Education Secretary Arnie Duncan, agreed to forgive the loans of Corinthian students, thus bringing the Borrower Defense Rule back into relevance (Ali, 2018).

In June of 2016, the Department of Education proposed a new interpretation of the Borrower Defense Rule. The new rules were more student-centered and imposed increased institutional accountability while providing a comprehensive procedure for students defrauded by higher-education institutions (Ali, 2018). According to Ali (2018), the revised Borrower Defense Rule includes several key components empowering defrauded students:

- Eligibility included borrowers who had not yet entered the collection process;
- Allowing group claims to speed up loan forgiveness for borrowers victim to mass fraud such as Corinthian Colleges;
- Requiring institutions with several consecutive years of substantial borrower default rates to provide proof of financial health;
- No longer requiring students to sign pre-dispute arbitration agreements and class action waivers;
- Requiring institutions to create school discharge and teach out plans should an institution suddenly close.

These new measures were met with protest from both for-profit institutions and Historically Black Colleges and Universities (HBCUs), yet the revised Borrower Defense Rule regulations were approved and released in November 2016, just days before the 2016 Presidential election.

With the election of Donald Trump, Betsy DeVos was appointed Secretary of the Department of Education. While the new regulations were to go into effect July 2017, the Trump administration challenged their implementation, pushing back the date until July 2018, and then postponing the regulations indefinitely (Ali, 2018). Coinciding with the Department of

Education's actions, a lawsuit was brought in an effort to judicially enforce the revised regulations. (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Despite the lawsuit, in July 2018, the Department of Education issued a Notice of Proposed Rulemaking soliciting a response to its newly revised regulations to the Borrower Defense Rule. The new rules essentially negated all of the previously proposed rules and severely limited the protections afforded to students (Ali, 2018). According to The Institute for College Access & Success (TICAS), the differences between the 2016 and 2018 rules would reduce student loan forgiveness by $13 billion dollars (TICAS, 2018). TICAS (2018) estimated the 2016 rules would provide $15 billion dollars in relief, while it estimated the 2018 rules would reduce that to $2 million.

Additional Legal Consequences for Student Loans and For-Profit Institutions

In association with a student's debt, a student's earning potential is equally important. The job placement and expected earnings resulting from a for-profit degree are under increased scrutiny. According to Miller (2013), debt to income is a vital indicator of a program's success, and the Department of Education's current proposal does not hold low-return programs accountable. Many vocational programs, while graduating students, do not provide for adequate income regardless of the debt incurred (Miller, 2013). Miller (2013) argued schools need to be accountable for absolute income, irrespective of debt, to ensure better school performance. As evidence, many programs place students in jobs earning below the 150 percent poverty line (Miller, 2013). Even with minimal debt, these programs are not preparing students to prosper, and they should be held accountable (Miller, 2013).

While there has been some legal action against for-profit organizations for recruitment abuses and false claims, because of the nature of for-profits as an educational institution, they have traditionally been exempt from the traditional legal liabilities associated business organizations (*U.S. Ex Rel. Hoggett v. Univ. of Phoenix*, No. 2: 10-cv-02478-MCE-KJN (E.D. Cal. 2012); *Herrera v. Charlotte School of Law*, 2018 WL 944396). Critics argued that without effective accountability measures in place, for-profit management companies have free reign to divert public money into their coffers (Conn, 2002). The problem lies between the duty to maximize shareholder wealth and their moral duty to students. The students that attend for-profit schools, although vested in their educational services, are not viewed as shareholders. They do not benefit from the fiduciary duties imposed on business managers (Conn, 2002). Unlike a business organization, this creates difficulty in holding a for-profit organization legally liable for any breach to its consumers – the students.

Conn (2002) has suggested innovative means of ensuring the gap between fiduciary duty and the students by vesting them as owners/shareholders in the organization, but this has not had any serious consideration. However, for-profits are frequently pulled into lawsuits through other causes of action. Lawsuits alleging bad faith, corrupt recruiting quotas, breach of fiduciary duty, and anti-fraud legislation have been claims brought against for-profit institutions such as the University of Phoenix and DeVry on behalf of stakeholders but not students. (*Boca Raton Firefighters'& Police Pension Fund v. DeVry Inc.*, 2012 WL 1030474; *U.S. Ex Rel. Hoggett v. Univ. of Phoenix*, No. 2: 10-cv-02478-MCE-KJN (E.D. Cal. 2012)). While these types of lawsuits allow recovery by business investors, students, so far, are left with few options, including bankruptcy (Dobson, 2019).

Bankruptcy and student loan debt

The arena of student loan debt and bankruptcy law, once thought to be severely limited, is slowly broadening. The evolution and growth of student loan debt has led to increased discussion regarding the validity of the current state of bankruptcy law. In fact, attorneys that practice in debt relief and debtor's rights are expected to review all possible discharge options, including the bankruptcy potential for each client (First, 2017).

The history of bankruptcy as it relates to student loan debt begins in 1976, with an amendment to the Higher Education Act of 1965 (White, 2017). Prior to 1976, student loans were dischargeable in bankruptcy (White, 2017). However, in 1978, the bankruptcy code adopted the amended student loan caveat whereby student loans could only be discharged after a five-year period, unless the court determined the debtor suffered an *undue hardship* (White, 2017). The next major change occurred in 1990, when Congress, under the Crime Control Act of 1990, extended the time for mandatory repayment to seven years before a discharge could be granted (White, 2017). Then in 1998, Congress removed the seven-year requirement, and student loans were essentially non-dischargeable in bankruptcy, however the *undue hardship* exception still remained as the sole means to determine a student loan discharge (White, 2017).

Established through case law, the *Brunner* Test remains the standard to determine *undue hardship*. According to *Brunner v. New York State Higher Education Services Corporation* (1987), the *Brunner* Test for *undue hardship* must meet the three following criteria:

> 1. The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loans, and;

3. The debtor has made good faith efforts to repay the loans. (*Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987))

The Court then elaborated on the standard of living element stating the applicable standard of living was the poverty line (*Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)). Given the *Brunner* parameters, many bankruptcy judges feel constrained to act appropriately, particularly in difficult cases that should require more judicial discretion (Bernardo, 2015).

Additionally, Bankruptcy courts have the ability to discharge student loan debt based on disability or if the loans were for another purpose besides education. For bankruptcy purposes, borrowers are disabled if they are a veteran with proof of disability from the Veteran's Administration, if receiving Social Security Income (SSI) or Social Security Disability Insurance (SSDI) pursuant to an award from the Social Security Administration (SSA), or if a doctor certifies the disability (34 CFR § 685.213). The doctor must further aver that the borrower cannot engage in gainful activity because of an impairment that is expected to result in death, has lasted for a continuous period of not less than 60 months, or can be expected to last for 60 months (34 CFR § 685.213).

Given these strict parameters, many bankruptcy judges feel constrained to act appropriately, particularly to difficult cases that should involve more judicial discretion (Bernardo, 2015). However, the United States Supreme Court has affirmed a student-loan bankruptcy discharge in a chapter 13 bankruptcy (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260

(2010)). A chapter 13 is a debt restructuring bankruptcy where a portion of debt is agreed to be paid according to a plan approved by creditors and the court. If the plan is completed, the remainder of the debt is discharged forever. An important case is student-loan bankruptcy law, the Supreme Court upheld a creditor's challenge to the dismissal of the remainder of Espinosa's student loans despite failing to show an *undue hardship* (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

For-Profit Education under the Trump Administration

Research suggests that for-profit education will continue to sustain growth and be a viable education option (Douglass, 2012). The United States' population continues to grow so the demand and need for educational options will be strong (Douglass, 2012). Additionally, economic demand is requiring more and more post-high-school degrees. This idea, coupled with the public sector's inability to cope with demand, means that many states are experiencing the *Brazilian effect*, a situation where public higher education cannot keep pace with growing public demand for access and programs (Douglass, 2012). With the increase in for-profit enrollment, a greater disparity between traditional and for-profit education will begin to emerge. The public sector is best suited to address social needs requiring trust, a commitment to individuals, equity, and stability, while the for-profit sector is best suited to adapt to rapid change and technical tasks (Garrity et al., 2010). More than ever, students will be able to shop around to find a program that suits their needs, but such programs may be plagued with false promises and weak academic standards (Douglass, 2010). A diversified higher-education market is necessary to promote expanding graduation rates, but if the for-profit sector becomes bogged down in sub-par, yet expensive programs, the students and ultimately the nation will suffer. Currently, for-profits are still generating profitable returns, and money is still seen as an indicator of business success.

However, recent enrollment trends have seen for-profit institutions declining. For-profit enrollments peaked in 2010 enrolling 1.7 million students (NCES, 2019). There has been a decline from 2010 to 2017 to 842,000 students, marking a 51 percent decrease (NCES, 2019). This does not mirror the trends in traditional institutions seeing a four percent decrease. Whether from systemic change in demand or due to increased regulations implemented in the Higher Education Act of 2008, there remains ample opportunity for for-profits to sustain revenue.

Critics point out the Trump administration's loosening of regulations regarding for-profit accountability. For example, the Department of Education recently eliminated an Obama-era policy known as gainful employment rule (Kreighbaum, 2019). The rule's intent was to hold higher-education institutions accountable by requiring students to be gainfully employed after graduation. Those institutions that did not meet the required guidelines would eventually lose access to Federal student loan dollars. The rule was directed to for-profit institutions (Kreighbaum, 2019). Given the stark policy changes from the previous administration to the Trump administration, it will be interesting to monitor for any increases in for-profit enrollments from 2016 to 2020, although available data shows a slight decrease in for-profit attendance from 2016-2018 (NCES, 2020).

Student Loans under Future Administrations

Perhaps student loan debt is as the forefront of politics than ever before. Democratic hopefuls in the 2020 presidential race isolated student loan debt as a campaign issue in and of itself. For example, presidential candidate Senator Bernie Sanders proposed legislation eliminating all $1.6 trillion of student debt (Stein, 2019), and presidential candidate Senator Elizabeth Warren also proposed her own student-loan forgiveness plan (Friedman, 2019). Sander's plan proposed to pay for loan debt by implementing a tax on financial transactions including taxing stock transactions and bonds (Stein, 2019). Warren's plan would forgive $640 million in student debt, based on the debtor's income. President-Elect Biden has supported a plan to eliminate $10,000 of student loan debt (Minsky, 2021).

Currently, there is a real-time crossroads between policy makers. For-profit institutions are just one segment of the student-loan crisis, and the issue of high student debt is being spread across higher education to both for-profit and traditional education. At present, there are pending lawsuits (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018); *New York Legal Assistance Grp. v. DeVos*, No. 20 Civ.1414 (S.D.N.Y., 2020) that will affect changes in policy, but absent abrupt measures, student debt will continue to increase. Just how high remains to be seen, but if history is a guide, these types of problems tend to come crashing down.

Chapter 3 - Litigation and Student-Debt Relief

The Final Rule – The Borrower Defense Rule in 2016

The Borrower Defense Rule was originally created in 1994, as a temporary measure in conjunction with the Federal Direct Loan Program (Ali, 2018; 20 U.S.C. § 1087e). The United States government implemented the Federal Direct Loan Program to provide low-interest student loans directly from the United States government rather than from private financial institutions, and it remains the only government-guaranteed loan program in the United States. Codified under United States Code, the rule states, "notwithstanding any other provision of the State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part" (20 U.S.C. §1087e(h)). Since its initial codification, the law received little attention, and the Department of Education (DOE) did little to provide guidelines or interpretation of this clause until the fall of Corinthian Colleges in 2015 (Ali, 2018).

For-profit Corinthian Colleges' closure of multiple campuses left thousands of students with little recourse regarding an educational future as well as a large load of student debt. Corinthian Colleges was a for-profit college with multiple campuses operating under the brands Everest, Heald, and WyoTech (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)). Its campuses included a wide variety of programs such as accounting, IT network systems, dental hygiene, and plumbing. At its peak in 2010, it operated over 100 campuses in 25 states, enrolled over 110,000 students, and collected over $1.7 billion in revenue (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)). Corinthian Colleges derived over

80 percent of its revenue from Direct Loan Program student loans (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)).

In January 2014, Corinthian Colleges' advertised job placement rates came under scrutiny, and the DOE requested data supporting its placement rates. (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)). After Corinthian Colleges refused to provide the data, the DOE placed it on a heighted cash monitoring status, and in July 2014, the DOE and Corinthian Colleges entered into an agreement to begin downsizing it operations (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)). Downsizing activities included selling off its campuses and appointing a person to oversee federal student aid draws, expenditures (including refunds required under the agreement), and its compliance with its obligations to the DOE (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)).

Despite the agreement, in March 2015, Corinthian Colleges failed to file audited financial statements. This violation triggered a letter of credit request, and in April 2015, the DOE concluded that Corinthian Colleges falsified its placement rates and fined it $30 million for "substantial misrepresentation" under 34 C.F.R. § 668.71-75. (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)). Corinthian Colleges closed its operations in April 2015. Ultimately, it was determined Corinthian Colleges defrauded students and misrepresented its educational quality such that many students were left with little to no job skills and extremely high student loan debt. In 2015, then DOE Secretary Arnie Duncan agreed to forgive the loans of Corinthian students, thus bringing the Borrower Defense Rule back into relevance (Ali, 2018). (Of note, in October of 2019, current DOE Secretary Betsy DeVos was held in contempt of court and fined $100,000.00 for continuing to collect on some of these same loans (Kamenetz &

Nadworny, 2019). Examples such as this further highlight the complexity and animus regarding the Borrower Defense Rule).

In June of 2016, the DOE proposed a new interpretation of the Borrower Defense Rule. The new rules were more student-centered and imposed increased institutional accountability while providing a comprehensive procedure for students defrauded by higher-education institutions (Ali, 2018). According to Ali (2018), the revised Borrower Defense Rule included several key components empowering defrauded students:

- Eligibility included borrowers who had not yet entered the collection process;
- Allowing group claims to speed up loan forgiveness for borrowers victim to mass fraud such as Corinthian Colleges;
- Requiring institutions with several consecutive years of substantial borrower default rates to provide proof of financial health;
- No longer requiring students to sign pre-dispute arbitration agreements and class action waivers;
- Requiring institutions to create school discharge and teach out plans in case of sudden closure.

These new measures were met with protest from both for-profit institutions and Historically Black Colleges and Universities (HBCUs), yet the revised Borrower Defense Rule regulations were approved and released in November 2016, just days before the 2016 Presidential election. While seen as a way to empower students against sub-par higher education institutions, HBCUs and for-profit institutions objected to the Final Rule arguing it imposed too stringent regulatory requirements on certain higher-education institutions (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). With aligning goals, both HBCUs and for-profit institutions claim to cater to first-time college students and serve underprivileged populations (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.); Redd, 2020). Often facing similar criticisms as for-profit institutions such as high default rates and low graduation rates (Mitchell & Fuller, 2019), HBCUs objected to the Final Rule for similar reasons as for-profit institutions *(CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Historically, HBCUs helped lift generations of African-Americans to economic security (Mitchell & Fuller, 2019). HBCUs play a pivotal role in educating African-American families from low-income communities and first-generation college students (Redd, 2020). These institutions provide a healthy and stable environment for students that otherwise would not attend a higher-education institution or obtain a college degree (Redd, 2020). HBCUs provide an opportunity for many of these students, including those who are academically unprepared (Redd, 2020). More so, students from low-income backgrounds are more likely to struggle with financial barriers and other life stresses, such as crime and malnutrition that are associated with disadvantaged neighborhoods (Redd, 2020). These struggles and the opportunities HBCUs provide highlight the importance of sustaining these institutions, but also highlight the problems associated with the increased debt and default rates associated with them (Redd, 2020).

For HBCUs, the difficulty is in striking a balance between the need for access and ensuring accountability to their students. Typically, HBCUs are funded by federal, state, and local appropriations (Redd, 2020). HBCUs receive 54 percent of their funding from these sources (Redd, 2020). However, with recent funding cuts, there has been increased reliance on student-loan dollars as the main source to fund education (Mitchell & Fuller, 2019; Redd, 2020). The very fact of attending an HBCU can become a financial drag for many new graduates, further contributing to the student-debt crisis (Mitchell & Fuller, 2019). Many of these students are left with disproportionately high loans when compared to their peers at traditional higher-education institutions (Mitchell & Fuller, 2019). Compounding the issue, while African-American students are incurring more debt than other students, statistics show they are less likely to graduate (Mitchell & Fuller, 2019). While 29 percent of White borrowers fail to complete their degree, 39 percent of African-American borrowers fail to complete their degree, resulting in long-term struggles with debt and increased student-loan default rates (Mitchell & Fuller, 2019).

Student loan debt also affects the parents of HBCU students (Redd, 2020). A higher percentage of African-American parents rely on Parent PLUS loans to assist in paying tuition (Redd, 2020). These types of loans require the parent to commit to repayment, and there is little underwriting to determine if parents have the means and ability to repay (Jin & Darbhamulla, 2019). As this type of loan is granted to any qualifying applicant, these loans tend to have a higher default risk when applied to HBCUs (Jin & Darbhamulla, 2019). In 2011, the Obama administration tightened Parent PLUS loan requirements; however, it soon reversed the move in 2014 after protests from schools, including HBCUs, claiming the heightened requirements would prohibit access for some students and force others to drop out (Mitchell & Fuller, 2019). HBCUs are in a *Catch 22*, in that they need access to Federal student loan dollars to function; however, this increased need draws scrutiny and criticism related to educational value and student-loan default rates akin to for-profit institutions.

Another issue intertwined with HBCUs and student loan debt is the trend toward performance-based funding. Performance-based funding is the idea that states should allocate funding based on institutions meeting educational targets (Redd, 2020). Educational targets include graduation rates, credit attainment, and course completion (Redd, 2020). This policy is detrimental to the HBCU model (Redd, 2020). While performance-based funding is touted as a means to incentivize institutions to succeed, the demographic and goals of HBCUs can frustrate this policy (Redd, 2020). Funding based on educational metrics miss the point of HBCUs as a means of opportunity for disadvantaged students. Evaluating the success of an HBCU may lead to decreased funding, resulting in the need for increased student loans, thus perpetuating a debt cycle (Redd, 2020). Because of the need for Federal dollars and decreasing Federal funding, HBCUs are increasingly strained to fulfill their goals (Redd, 2020), and the Final Rule places increased stress that threatens these institutions (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Education policies such as decreasing funding and performance-based funding have caused increased reliability for students to pay for their education through student loans (Redd, 2020).

With the election of Donald Trump, Betsy DeVos was appointed Secretary of the DOE. While the new regulations were to go into effect July 2017, the Trump administration challenged their implementation pushing back the date until July 2018, and then postponing them indefinitely (Ali, 2018). Coinciding with the DOE's actions, in an effort to judicially restrict the revised regulations, multiple lawsuits were filed (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.); *Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016); *New York Legal Assistance Grp. v. DeVos*, No. 20 Civ.1414 (S.D.N.Y., 2020); *Bauer v. DeVos,* 325 F. Supp. 3d 74 (D.D.C. 2018)).

Despite these lawsuits, in July 2018, the DOE issued a Notice of Proposed Rulemaking soliciting a response to its newly revised regulations to the Borrower Defense Rule. The new rules essentially negated all of the previously proposed rules and severely limited the protections afforded to students (Ali, 2018). According to The Institute for College Access & Success (TICAS), the differences between the 2016, and 2018, rules would reduce student loan forgiveness by $13 billion dollars (TICAS, 2018). TICAS (2018) estimated the 2016 rules would provide $15 billion dollars in relief, while it estimated the 2018 rules would reduce that to $2 million.

Chapter 4 - Borrower Defense Litigation

Administrative law is an area that both drives and reacts to student loan policy considerations. The following cases are illustrative of litigated cases involving the Borrower Defense Rule. The cases represent various defenses associated with administrative law related to Borrower Defense as codified in U.S. Code (20 U.S.C. § 1087(e)(h)) and the Code of Federal Regulations (34 C.F.R. § 685.206). These cases depict legal challenges based on administrative or statutory law ranging from defenses related to eligibility, determinations of dischargeability, direct challenges to statutory authority, and allegations under the Administrative Procedure Act related to arbitrary and capricious law making.

Price

In *Price v. United States Department of Education* (2016), Phyllis Price was a 52-year-old student who graduated from the University of Phoenix and sought to have her student loan debt discharged through a borrower-defense provision. At the time of the lawsuit, Price owed around $36,868.00, her loan was in default, and her wages were being garnished (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). However, Price did graduate from the program. Price sought a discharge of her student debt by filing a False Certification Discharge Application with her loan servicer (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). This type of defense is based on the borrower's ineligibility to qualify for Federal student loans. In this case, Price did not graduate from high school, nor did she receive any equivalency degree. This requirement is a condition precedent for Federal student loan aid (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). Rather, upon applying to the University of Phoenix, the evidence showed the university's loan representative advised

Price to falsify her status as a high-school graduate in order to obtain tuition funds through student loans (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)).

Ultimately, the Court determined Price was eligible for a complete discharge due to her ineligibility, and it ruled in Price's favor during a Motion for Summary Judgment (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). The Court reviewed the applicable statutes and determined a student's eligibility to borrow is falsely certified by the school if the borrowing student did not meet the statutory eligibility conditions, including a high school diploma and ATB requirements (34 C.F.R. § 682.402(e)). ATB, which stands for "ability to benefit," is a standardized test, approved by the DOE that allows a student to obtain student loans without having a high-school diploma or equivalent. Fulfilling the ATB requirement was the only way Price would have been eligible for student loans (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). More so, Congress provided, if a "student's eligibility to borrow under this part was falsely certified by the eligible institution ... then the Secretary shall discharge the borrower's liability on the loan. ..." (20 U.S.C. § 1087(c)(1); *Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)).

In reviewing the evidence and the plain meaning of the statute, the Court determined it was quite clear that Price neither obtained a high-school diploma, nor qualified under an ATB test, and her loan should be discharged and any garnishment reimbursed. However, the Court felt the need to elaborate on the DOE's other arguments. First, the DOE alleged Price's student debt should not be discharged because she graduated and would receive a windfall should she not have to pay back her loans. The Court's harsh tone reverberates in its response, when it stated:

> The implicit policy argument—that Price should not be permitted the windfall of benefitting from a degree without paying for it—rests on the fallacious assumption that Price has benefitted in any way from her degree. Price is doing essentially the same job as before she enrolled, and any psychic benefit from achieving a degree is more than offset by eight years of fending off debt collectors. (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925, 934 (S.D. Texas, 2016))

Next, the Court frowned on the DOE's assertion that Price self-certified her status as a high-school graduate. The Court again repeated eligibility for Federal student loans is fixed by statute, and self-certification is not a defense to, nor a prerequisite for reliance on eligibility requirements (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)). Nothing in the statute allows schools to rely on self-certification, or similar unsupported statements when certifying a student's loan eligibility. Lastly, the DOE stated the University should have been able to rely on her fictitious graduation date as a basis for certification. However, the evidence showed Price was truthful regarding her high-school status, and her admissions officer instructed her to falsify her application (*Price v. U.S. Dept. of Educ*., 209 F. Supp. 3d 925 (S.D. Texas, 2016)).

Bauer

In *Meaghan Bauer v. Elisabeth DeVos, Secretary, U.S. Department of Education* (2018), Bauer filed suit against the DOE for its repeated, unlawful delay of implementing the 2016 Final Rule, based on pressure from the for-profit sector. Ultimately, the court determined the DOE's delay was arbitrary, capricious, and contrary to law; however before that ruling, and while delaying the implementation of the 2016 Final Rule, the DOE began the negotiated rule-making process for the current borrower defense regulations. But rather than relying on the 2016 Final

Rule as a point of beginning, it treated the 2016 Final Rule provisions as a nullity and refused to allow any discussion of its elements going forward, thereby depriving the negotiators of meaningful opportunity to participate in the process (*Bauer v. DeVos,* 325 F. Supp. 3d. 74 (D.D.C. 2018)). After negotiations concluded, the DOE moved forward with a Notice for Proposed Rulemaking (NPRM) refusing to accept the 2016 Final Rule as current law. After close of the NPRM, but before the implementation of the current borrower defense rule, the *Bauer* Court determined the DOE's delays were procedurally flawed, arbitrary, and capricious (*Bauer v. DeVos,* 325 F. Supp. 3d. 74 (D.D.C. 2018)). The court then ordered the 2016 Final Rule to be in effect (*Bauer v. DeVos,* 325 F. Supp. 3d. 74 (D.D.C. 2018)).

Just a year after the *Bauer* Court's order, the DOE put forth the 2019 Final Rule, which went into effect July 1, 2020. The 2019 Rule contains provisions that are more detrimental to students than the 2016 Final Rule (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). Additionally, this lawsuit focuses more on for-profit higher education and the protections afforded by the 2016 Final Rule that were stripped by the 2019 Final Rule. The 2019 Final Rule greatly relaxed the safeguards put in place in 2016, despite mountains of evidence of the harm that unscrupulous schools had caused student borrowers and Federal taxpayers (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). The 2019 Final Rule shifts the burden to students to become "informed consumers," essentially blaming the victims of fraud for being defrauded (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)).

The 2019 Final Rule also changed borrower defense provisions. According to the complaint, the 2019 Final Rule imposes Herculean standards for obtaining borrower defense relief, adding both procedural and substantive hurdles for students (*Bauer v. DeVos,* 332 F. Supp. 3d. 181 (D.D.C. 2018)). It eliminated provisions of the 2016 Final Rule that required higher-educations institutions to allow students access to judicial remedies and the ability to proceed as a class in order to participate in Federal student loan programs. It also imposed a shorter statute of limitations to assert borrower defenses, even when defending against collection proceedings, despite this issue not being raised in the NPRM (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)).

The complaint further alleged the 2019 Final Rule creates a standard for borrower defense that will be nearly impossible for students to meet (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). The average student borrower will not be able to navigate the extremely burdensome application process, the standard of relief is much higher, and it requires borrowers to submit more evidence (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). Further, students will no longer be able to assert claims on a group basis, and they will be less likely to be able to proceed in class actions (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)).

Based on the foregoing, *Bauer* argued the DOE failed to comply with the procedures required by law for the following reasons: 1) It failed to recognize the 2016 Final Rule's current status or allowing discussion of its elements in the negotiated rulemaking; 2) It failed to conduct new negotiated rulemaking and notice-and-comment procedures after the 2016 Final Rule went into effect; and 3) It unpredictably departed from the NPRM with respect to the statute of limitations for defensive claims (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). Lastly, the 2019 Final Rule's inconsistencies, unsupported conclusions, and unexplained reversals are evidence its adoption was arbitrary and capricious. Accordingly, plaintiff asked the court to allow the 2016 Final Rule to be in effect (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)). Having found the DOE's actions violated the APA, the Court set aside the DOE's efforts to postpone the 2016 Final Rule (*Bauer v. DeVos*, 332 F. Supp. 3d. 181 (D.D.C. 2018)).

Sweet

Theresa Sweet v. Elisabeth DeVos, Secretary, U.S. Department of Education (2019) was a class action suit filed on behalf of a class of thousands of student loan borrowers that sought to have their loans discharged based on the Borrower Defense Rule. These students attended various for-profit schools and were waiting on a decision regarding their discharge based on the Final Rule.

On April 10, 2020, the parties filed a motion for preliminary approval of a Settlement Agreement promising nearly 170,000 class members that the DOE will provide final decisions on their pending claims within 18 months, and where appropriate, relief within 21 months of the agreement's effective date (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). The Court acknowledged that not all class members may be entitled to discharge, but stated the students deserved an answer either way, and the DOE's "stonewalling" of responses was improper (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). The Court noted, for 18 months, the DOE refused to provide decisions, mainly based on the need for "backbreaking effort" and lack of manpower (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). Then suddenly, the DOE began issuing denial decisions at "breakneck speed" albeit with insufficient evidence and without meaningful explanation (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). The DOE's denial notices did not explain the evidence it reviewed or the law it applied, nor did it provide any analysis.

The Court found the borrowers' redress to any denial particularly disturbing. According to the DOE, for reconsideration the borrower must explain why the DOE improperly denied the application and provide any evidence that demonstrates why the DOE should approve the claim based on the law set forth in the denial (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). The Court asked, without any meaningful analysis of the evidence under the law, how might a borrower articulate such bases for reconsideration? (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). Finalizing its holding, it concluded it is impossible to argue with an unreasoned decision (*Sweet v. U.S. Dept. of Educ.*, 2019 WL 5595171). Therefore, on October 19, 2020, the Court issued an order denying the settlement and ordering the parties to continue with litigation.

Manriquez

The case of *Calvillo Manriquez v. DeVos,* (2019) involved about 110,000 student borrowers who attended for-profit Corinthian Colleges. On May 25, 2018, the Court had ordered a preliminary injunction to stop the DOE from collecting on student loans that were paid to Corinthian Colleges. After the collapse of Corinthian Colleges, the Final Rule allowed certain student loan debt to be forgiven. Prior to 2017, the DOE had used the "Corinthian Rule" to determine eligibility for loan forgiveness. Under the "Corinthian Rule," it was assumed Corinthian Colleges had misrepresented its job placement rates, and any borrower who submitted an attestation form establishing membership in a class was eligible for loan forgiveness (*Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018)).

However, in 2017, the DOE adopted a new method to calculate any "educational benefit" students received as a factor when determining if their loans were dischargeable loans under the Final Rule (*Calvillo Manriquez v. DeVos*, 411 F. Supp. 3d 535 (N.D. Cal. 2019)). This new method was known as the "Average Earnings Rule." The "Average Earnings Rule" used a formula to determine the amount of "educational benefit" received, and this number would act as a set off against any discharge under the Final Rule (*Calvillo Manriquez v. DeVos*, 411 F. Supp. 3d 535 (N.D. Cal. 2019)). The DOE determined that many of the borrowers would not be eligible for discharge using this new calculation (*Calvillo Manriquez v. DeVos*, 411 F. Supp. 3d 535 (N.D. Cal. 2019)). Based on this new calculation, the DOE resumed collection of student loans, notifying borrowers of its change in criteria. In response to this change, borrowers filed litigation seeking a preliminary injunction to stop the DOE's collection of Corinthian Colleges' loans (*Calvillo Manriquez v. DeVos*, 411 F. Supp. 3d 535 (N.D. Cal. 2019)). The Court granted the preliminary injunction, however the DOE continued collection of some of the loans.

On October 24, 2019, the Court found U.S. Secretary of Education Betsy Devos and the U.S. Department of Education in contempt of court for failure to comply with the preliminary injunction. The Court ordered the DOE to pay $100,000 in sanctions and provide monthly status reports showing the DOE's compliance with the preliminary injunction (*Calvillo Manriquez v. DeVos*, 411 F. Supp. 3d 535 (N.D. Cal. 2019)).

Federal Trade Commission (FTC)

Federal Trade Commission v. The University of Phoenix, Inc., (2019) is an example of student-loan litigation resolved through a quick settlement. On December 10, 2019, the Federal Trade Commission (FTC) filed a complaint against the University of Phoenix, and its parent group Apollo Education Group, Inc., alleging misleading and deceptive advertising practices related to its alleged business connections' corporate partners and post-graduation employment opportunities (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)). The complaint further alleged the University of Phoenix specifically targeted current and former military members and Hispanics in its promotional materials to take advantage of guaranteed student aid (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)).

The University of Phoenix was the largest recipient of post-9/11 G.I. Bill benefits since the program's inception totaling $2.1 billion (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)). On the same day the FTC filed the complaint, the University of Phoenix agreed to a record settlement of $191 million, paying $50 million to the government for consumer refunds and cancelling $141 million in student debt held by students lured in by the specified deceptive ads, while making no admission of wrongdoing (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)).

The University of Phoenix paid the settlement without conducting any formal legal discovery, including depositions, motion practice, or court appearances. Often such quick settlements are indicative of the desire to avoid additional bad publicity that may emerge throughout the course of litigation. In 2021, the University of Phoenix posted annual revenue of $436.41 million dollars (Dun & Bradstreet, 2021).

California Association of Private Post-secondary Schools (CAPPS)

The lawsuit brought by the California Association of Private Post-secondary Schools (CAPPS) contains a thorough discussion of the legal and policy considerations related to the Final Rule and its amendments (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Founded in 1985, CAPPS is a non-profit association advocating for private post-secondary education (CAPPS, 2021). Its members consist of about 300 for-profit, non-profit postsecondary, religious exempt and approved only institutions (CAPPS, 2021). According to CAPPS, the private post-secondary education sector is the most diverse, yet least well-known areas of higher education (CAPPS, 2021). Curricula in this sector are designed for the non-traditional student and focus on a faster pace, flexible schedule, and targeted learning objectives directed toward the student's career goal (CAPPS, 2021).

In this lawsuit, CAPPS sought to declare the revised Borrower Defense Rule, or Final Rule, as it is referred to in the Complaint, invalid, and further enjoining any enforcement of the

Final Rule or accompanying regulations. The majority of CAPPS' schools are accredited and participate in Federal financial aid programs under Title IV of the Higher Education Act (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS alleged its member schools provide necessary educational opportunities to a diverse student body, and its schools train future nurses, ultrasound technicians, emergency medical technicians, electricians, and other necessary vocations (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Further, CAPPS claimed the majority of its member schools were smaller institutions averaging less than 400 students with only one or two locations, and CAPPS' member schools routinely serve non-traditional students particularly those with low-income, older, yet first-time college students, and minorities (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS raised the following issues with the Final Rule and its accompanying regulations in its Complaint: 1) The Final Rule exceeds the DOE's authority under the Higher Education Act of 1965; 2) it is arbitrary and capricious under the Administrative Procedure Act; and 3) it violates the United States Constitution.

CAPPS argued for a declaratory determination by the Court, and it framed these three issues arguing that, as a whole, the Final Rule will have adverse effects on both for-profit and traditional schools, particularly to the detriment of non-traditional students who will be faced with a lack of educational opportunities (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

In short, the passage of the Final Rule will force the closure of many for-profit institutions and make conducting operations so tedious and risk-laden that the for-profit sector will basically cease to operate on any meaningful scale. CAPPS points out the important need for-profit institutions serve to non-traditional students, despite being among the most "highly regulated entities both in California and nationally" (*CAPPS v. Devos*, No. 1:117-CV-00999-

RSM (D.D.C.)). More so, CAPPS further points out, "The graduation rates of some for-profit institutions are well above 50% - as high as or higher than those of many four-year public colleges" (Bienen, 2010, para. 4). Given the important role of for-profit institutions, the means and implementation of the Final Rule serves no valid purpose, and the Final Rule was unfairly tailored to place unnecessary and un-vetted restrictions on the for-profit sector.

Violation of statutory authority under the Higher Education Act of 1965

Title IV of the Higher Education Act of 1965 (HEA) was enacted to assist in providing benefits to students who otherwise could not afford the cost of higher education (20 USC §1070(a)). Among the benefits to assist students, familiar loan programs such as Federal Direct Loan Program, Perkins Loans, and Pell Grants are included in Title IV of the HEA. The number of students taking advantage of Title IV funds is quite large. According to the National Center of Educational Statistics (2017), for the academic year 2016-2017, 82.8 percent of students used some form of financial aid. Given the robust participation in Title IV funding, Congress strictly regulates the disposition and use of Title IV funds through statutory laws. For example, Congress requires higher-education institutions that receive Title IV funds to comply with accreditation requirements and must be legally authorized within the state to provide higher-education instruction (20 USC §§1001(a)(2)(a)(5)).

Additionally, Congress also provided statutory remedies against higher-education institutions that failed to comply with Title IV requirements. For example, the HEA allows the Department of Education (DOE) to take action against a higher-education institution upon a determination that an eligible institution has engaged in substantial misrepresentation of its educational program, its financial charges, or the employability of its graduates (20 USC § 1094(c)(3)(A)). The DOE's remedies include suspending or terminating a higher-education institution's eligibility status for Title IV loans or imposing a civil penalty not to exceed $25,000 for each violation (20 USC § 1094(c)(3)(A)(B)).

The HEA also provided additional safeguards for students to assist in managing their student loan debt. Specifically, the HEA provided student defenses to the collection of student loan debt as well as codifying several student-loan forgiveness programs. To raise a defense to student loan debt, the common interpretation allowed students to raise defenses only after collection was initiated. "The borrower may assert as a defense against repayment for any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State Law" (34 CFR § 685.206(c)(1)). In other words, the student would have to be in default and facing collection prior to asserting a defense available under this section.

As to loan forgiveness plans, according to the HEA (20 § 1087e(m)), the DOE is authorized to cancel the balance of principal and interest due for borrowers who have dedicated 10 years to public service while making timely payments. Known as the Public Service Loan Forgiveness plan (the "PLSF"), it was created in 2007, to encourage students to enter areas of public need such as public defenders. There is also similar loan forgiveness authority for teachers and for service in areas of National need. However, these programs are under additional scrutiny due to their inconsistent and seemingly arbitrary applications. Recent data from the DOE shows that over 99% of requests made under the PLSF were denied, the majority due to no fault of the borrower (Turner, 2018).

Based on the foregoing, CAPPS asserts the HEA already adequately addresses the important policy considerations regarding higher-education oversight and Title IV funds while providing protections for students and a means to adequately manage student debt. More so, CAPPS points out the provisions in the Final Rule such as loan repayment rates, arbitration restrictions, and class action waivers are not addressed anywhere in the HEA, and the Final Rule improperly goes beyond the Congress' intentions in drafting the HEA such that the Final Rule is in violation of the HEA's provisions.

Among the primary reasons for CAPPS' objection to the Final Rule is the manner and method by which its provisions were adopted, resulting in an over-broad rule, beyond the HEA's purview, based in large part on limited-stakeholder input. Of the 16 stakeholders representing the negotiating committee, only one group, consisting of two individuals, represented for-profit institutions (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Further, arbitration provisions and class-action waivers were not included in the original notice as topics for negotiated rulemaking (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The negotiating committee failed to reach a consensus; however, the DOE continued forward with the process, and it released a draft of the proposed regulations in about three months (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The DOE also announced its intention to finalize the Final Rule by November 1, 2016, about a week before the Presidential election.

Within the short turnaround time, the Final Rule received over 10,000 public comments. Interested parties included both for-profit and traditional schools, including Historically Black Colleges and Universities, legislators, and individuals (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS argued the Final Rule was implemented November 1, 2016, despite disregarding the typical comment period and the Office of Management and Budget's (OMB) 90-day review period as allowed by executive order. Given the Final Rule was expected to have a $14.9 billion dollar impact, it was pushed through the OMB in just 44 days, resulting in what

CAPPS described as "midnight regulation" (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS argues the Final Rule enacts four changes that exceed the scope of the HEA's statutory authority. First, the DOE improperly provided for additional borrower defenses, including creating an affirmative defense for borrowers (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Second, the DOE imposed new requirements related to a higher-education institution's financial responsibility (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Third, students' loan-payment rates must be disclosed to prospective students. Fourth, higher-education institutions are prohibited from including or enforcing arbitration or class-action waivers in enrollment agreements (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

According to CAPPS, the HEA only authorized a borrower defense when a proceeding to collect on a loan had already been instituted against a borrower, such as a wage garnishment, or tax offset proceeding (34 CFR § 685.206(c)(2012)). However, the Final Rule allows students a preemptive cause of action against a school prior to entering default or collection proceedings (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Additionally, CAPPS alleged the Final Rule changes the standard by which a student may establish a viable borrower defense (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The Final Rule allows for raising a borrower defense claim when a non-default, contested judgment is obtained against the institution based on any state or Federal law, obtained in either a court or administrative proceeding, if the borrower demonstrates a breach of contract by the school, or if the borrower establishes a material misrepresentation by the school on which the borrower reasonably relied to his or her detriment (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). More so, the DOE will not rely on established legal precedent when weighing borrower-defense claims, but it will review on a case-by-case basis (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS further alleged the Final Rule created a new "group borrower defense" similar to allowing a class-action suit against an institution, and the DOE may bring this action on behalf of students regardless if the students have sought any form of debt relief (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). In short, the DOE has created a rebuttable presumption as to any student's standing to participate in a claim against the institution in question (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Among other key changes included in the Final Rule, CAPPS cites to changes in financial responsibility provisions required for Title IV institutions. In the past, there was a set criteria for determining a school's financial well-being. According to 20 USC § 1099(c)(1), an institution was deemed financially responsible if it was able to provide the services described in its official publication, provide necessary administrative support, and meet its financial obligations including refunds and reimbursements to the Secretary of Education for any liabilities incurred. The DOE used a ratio-based formula to evaluate an institution's "total financial circumstances" 20 USC § 1099(c)(2).

The Final Rule creates new provisions that would greatly affect a higher-education institution's ability to function by placing fatal restraints on its financial stability (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The Final Rule requires higher-education institutions obtain a letter of credit for at least 10 percent of its Title IV receipts for the last fiscal year, should a "triggering event" occur. Among triggering events are failing to meet the 90/10 rule, having two cohort-default rates of 30 percent or greater, and, for publicly-traded institutions (generally for-profit schools), being warned by the Securities and Exchange Commission (SEC) that it may suspend trading on the school's stock, failing to timely file certain SEC filings, or being notified that a school's stock is not following exchange guidelines or the stock becomes delisted (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS alleged that something as benign as a for-profit institution that filed a late quarterly report would suffice for a "triggering event" under the Final Rule (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Additionally, the 90/10 rule, which only applies to for-profit institutions, measures the ratio of a higher-education institution's funding from Title IV funds compared to other sources such as direct tuition payments (34 CFR § 668.28(c)). Under the Final Rule, failure of the 90/10 test results in a "triggering event," despite that a for-profit institution must fail two consecutive years per current statute (34 CFR § 668.28(c)(1)).

Once a "triggering event" occurs, the DOE recalculates the higher-education institution's composite score. The composite score uses three ratios derived from a higher-education institution's financial statements that include a private reserve ratio, equity ratio, and net income ratio (34 CFR § 668.171). Should a for-profit institution's composite score drop below 1.0, it would be required to obtain a letter of credit for 10 percent of the institution's Title IV receipts (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). While the composite score is already used as a measuring stick under current regulations, CAPPS asserts that the new requirements under the Final Rule will gravely affect the ability of for-profit institutions to operate financially (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

For example, if a state of Federal agency sues a higher-education institution, after 120 days, the amount of any loss calculated is as pled in the complaint, without any actual damage calculation. The same determination as to damages is also made if a higher-education institution is sued by a private individual (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Essentially, the DOE calculates damages similar to a strict-liability standard whereby an institution is held liable for the full amount of damages, regardless of the merit or ultimate result of the suit.

Other "triggering events" that require recalculating the composite score include requiring a "teach-out" plan from an accrediting agency, the failure of a for-profit's gainful employment program, the withdrawal of an owner's equity stake in the for-profit institution, and, lastly, if the DOE determines there is an event that will have a *materially adverse effect* on the financial conditions, business, or results of the operations of the higher-education institution (81 Fed. Reg. 75926). CAPPS points out that the Final Rule is silent as to any guidance or standard by which the DOE will determine what constitutes a *materially adverse event* (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). More so, the DOE can require "any additional amount" reasonably expected based on the circumstances presented by the risks posed for the higher-education institution (81 Fed. Reg. 75926). Should this amount be higher than the 10 percent threshold of Title IV funds, the higher-education institution may argue the amount requested by the DOE is unnecessary to protect, or contrary to the Federal interest (81 Fed. Reg. 75926). However, a hearing officer no longer has the ability to overturn the DOE's finding as unreasonable. Previously, the DOE used a reasonableness standard.

CAPPS argues that requiring a letter of credit to cover this type of demand would essentially put the higher-education institution out of business (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Additionally, there is no opportunity for the institution to contest the letter of credit requirement, except for narrowly-tailored grounds (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Lastly, affected higher-education institutions would be required to provide a warning to current and prospective students regarding its uncertain financial status, which would have an adverse effect on enrollments and operations (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Additionally, under the Final Rule, only for-profit institutions would be required to provide a loan repayment rate warning in its promotional materials (81 Fed. Reg. 75926). The warning must read: "US Department of Education Warning: A majority of recent students loan borrowers at this school are not paying down their loans" (34 CFR 668.41). This warning is required should a for-profit school's median borrower fail to reduce the outstanding loan balance of each loan by at least one dollar after three years (81 Fed. Reg. 75926). More so, public and non-profit schools with similar repayment rates are not required to furnish this notice (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS points out the decision to apply the loan repayment rate warning provision only to for-profit institutions was based on erroneous data (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)); Mahaffie, 2017). Nevertheless, this requirement remains under the Final Rule. The DOE will determine the form, place, and manner by which the notice must be presented, and it must be prominent, clear, and conspicuous (81 Fed. Reg. 75926). The DOE may also require a for-profit institution to modify its promotional and web sites to comply with this requirement (81 Fed. Reg. 75926). Lastly, even if students are slowly repaying their loans under a DOE-approved loan repayment program such as an income-driven repayment plan, this would not affect the calculation for the notice requirement (81 Fed. Reg. 75926).

The Final Rule also limits the use of arbitration as a means to resolve disputes between affected borrowers and for-profit institutions (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS alleges the Final Rule prohibits the for-profit institution from entering into a pre-dispute agreement with the student requiring arbitration in the event of a borrower-defense claim (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). In addition, the Final Rule prohibits for-profit institutions from obtaining agreements requiring students to waive class-action lawsuits (34 CFR § 685.300(e)). While CAPPS does not elaborate on the benefits of arbitration agreements or class-action waivers for for-profit institutions, there is open criticism regarding arbitration agreements and their fairness to consumers (Public Citizen, 2019). Often arbitration requires substantial up-front costs, limits class-action lawsuits, requires a venue favorable to the business, and allows the business to choose the arbitrator (Public Citizen, 2019). All these remedies provide an advantage to the for-profit institution over the borrower.

Legal Analysis of the Borrower Defense Rule

CAPPS alleges the Final Rule exceeds the DOE's authority under the HEA, violates the Administrative Procedure Act (APA), and is unconstitutional under the United States Constitution (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The DOE is granted authority to regulate higher education based on statutory authority granted by laws passed by congress. Every department must regulate within the confines of its statutory authority, and in this circumstance, the DOE's authority is derived from the HEA. Under the HEA (§ 455), the DOE is granted authority to regulate borrower defense regulations. In the Complaint, CAPPS engages in a statutory analysis arguing the DOE greatly expanded its power under §455 of the HEA. All of the Final Rule's elements are challenged as being beyond the plain reading of the DOE's authority under the HEA. The borrower defense provisions, the financial responsibility provisions, the loan repayment rate provisions, and the arbitration waiver provisions all exceed the DOE's statutory authority (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). In each instance, CAPPS challenges the DOE's interpretation of the HEA and argues the Final Rule exceeds the scope of its authority.

For example, the DOE's authority for adopting the Final Rule is rooted in its ability to specify the acts or omissions of a higher-education institution that may allow a borrower to assert a defense to repayment (20 USC § 1087e(h)). When statutes are challenged, courts tend to interpret statutes based on the *plain meaning*. If the *plain meaning* of the text is evident, this is the foremost interpretation of the statute by the courts (Eskridge & Frikey, 1990). Analyzed using the plain meaning of statutory construction, CAPPS states the HEA already provides for defenses available to borrowers but does not allow for the creation of affirmative causes of action that may be brought by students, as a plaintiff, against a higher-education institution (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). According to CAPPS, the DOE's adoption of the entirety of the Final Rule is based on misplaced statutory authority. When Congress wants to authorize the DOE for certain actions, such as cancelling debt, it does so explicitly, and the Final Rule's provisions are not explicitly contained with the HEA (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

In addition to an extra-statutory interpretation of the HEA, CAPPS also argues the Final Rule is arbitrary and capricious under the Administrative Procedure Act (APA). Arbitrary and capricious, in this context, is based on an appellate standard of review. The APA sets forth the standards governing judicial review of decisions made by federal administrative agencies. (*Dickinson v. Zurko*, 527 U.S. 150, 152 (1999)). Pursuant to the APA, agency decisions may be set aside only if arbitrary, capricious or otherwise not in accordance with law. (5 U.S.C. § 706(2)(A)). Under this standard, the regulation must articulate a rational connection between the facts found and the conclusions made. A court may reverse under the arbitrary and capricious standard only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise (*Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010)).

Based on this standard of review, CAPPS argues the borrower defense provisions, the financial responsibility provisions, the loan repayment rate provisions, and the arbitration waiver provisions are arbitrary and capricious and should be found invalid (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). For example, throughout the Complaint, it is argued the DOE routinely provides no meaningful explanation, no link to existing jurisprudence, and its logic for the Final Rule is unreasoned (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). For instance, the DOE provided no explanation for expanding borrower defenses to affirmative causes of action (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). To the contrary, the DOE essentially creates new jurisprudence by reviewing borrower defense claims on a case-by-case basis, rather than relying on established procedures and legal precedent (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). More so, the decision to place borrower defense claims within the DOE's purview eliminates due process and procedural protections that are ordinarily available in a court of law (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS argues the Final Rule creates substantial evidentiary limitations. Examples include defendants not being entitled to receive all the documents the DOE reviewed to determine potential liability, hearings are discretionary rather than mandatory, and witnesses cannot be compelled so defendants may not be able to confront their accusers (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Of further importance, the Final Rule allows unequal treatment between traditional and for-profit education institutions when determining a key factor in borrower defense (*CAPPS v.*

Devos, No. 1:117-CV-00999-RSM (D.D.C.)). The DOE is able to make an opinion regarding the "value" of student's education when reviewed against a substantial misrepresentation defense. This could have a substantial impact on students' debt forgiveness. For example, the DOE provides a scenario where a student at a small, traditional liberal arts college claiming the institution misrepresented itself would not prevail under a borrower defense because the DOE would deem his or her education "valuable," while a for-profit institution would be held liable (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The DOE does not provide any guidance, insight, or reasoning for any factors it will use when making this determination (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS also asserted additional due process violations against the Final Rule's adoption process. Specifically regarding "triggering events," the DOE failed to provide notice of several "triggering events" that greatly affect a higher-education institution's ability to adjust its structure for increased risk (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Among key "triggers" are allowing the DOE to require increased financial protections should it expect a significant number of borrower defense claims against a higher-education institution (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). This created substantial fairness and due process concerns (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Essentially the DOE has the authority to determine a higher-education institution's value and potential risk without any predetermined guidelines.

In addition, CAPPS argues the financial responsibility provisions are arbitrary and capricious (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Of particular note are the regulatory consequences related to pending a lawsuit. Under the Final Rule, if a lawsuit is filed, 120 days are allowed before regulatory consequences go into effect. The most significant regulatory issue is the assumption that a defendant will lose the suit, and it is further assumed the damage award would be the full amount of costs and fees received by the institution. While civil suits may take years to culminate while discovery is undertaken and motions are heard, this quick timeline is unprecedented in case management (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). What the DOE fails to acknowledge are the subtleties within the legal system. The majority of cases are not ripe for a summary judgment motion until well after 120 days, and in some cases, legal strategy dictates a motion for summary judgment is not even filed. This is particularly relevant because claims against educational institutions are often ripe with issues of fact that are not suitable for summary judgment (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Further, in addition to restricting litigation strategy, requiring higher-education institutions whose suits survive past 120 days will require those institutions to obtain a costly letter of credit putting the defendant at an extreme disadvantage. Plaintiffs, whether private parties or State governments, could bring tremendous settlement pressure due to financial constraints during the preliminary stages of litigation (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Institutions could be compelled to settle even meritless lawsuits to comply with the Final Rule's regulations, and the imposition of these regulations places the parties on such uneven footing that very integrity of the American litigation system is under threat (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Treating all speculative lawsuits in the same fashion undermines due process and is arbitrary and capricious (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Additionally, many of the Final Rule's provisions only affect for-profit institutions. For example, several severe "triggers" such as the 90/10 rule provision and Loan Repayment Rate Warning only apply to for-profits. Other measures, such as the gainful employment and default rate triggers, will greatly affect for-profits institutions more than traditional institutions (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS argues this is all the more troubling given that for-profit institutions have a larger percentage of low-income and minority students (NCES, 2011). CAPPS argues the repayment rate regulations punish higher-education institutions that encourage students to utilize the DOE's own income-sensitive repayment plans and would irrationally punish students seeking to go into public service (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS argues the DOE provides no explanation why these regulations should not also apply to traditional institutions thus rendering them unfair, arbitrary, and capricious (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Lastly, the arbitration waiver is arbitrary and capricious because the DOE failed to weigh or discuss the benefits of individual arbitration (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS argues the DOE relied upon a CFPB study regarding the negative consequences of arbitration for borrowers, however this study was based on credit card defaults, reloadable prepaid cards, payday loans, mobile wireless contracts, and private student loans (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). CAPPS further argues Federal student loans pose an entirely different risk than those financial products analyzed in the CFPB study, and the DOE's correlation and resulting waiver of arbitration and class-action remedies in the Final Rule are arbitrary and capricious (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). For example, the default interest charged by credit card companies is typically much smaller than that on a defaulted student loan debt, and this affects the higher-education institution's risk calculation of costs and benefits of individual litigation (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). In short, the stakes are much higher and litigation costs would be substantially higher in litigation rather than arbitration. As such, any meaningful determination as to the need to waive arbitration needs additional research (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS further argues the DOE's class-action waiver provision is contradictory on its face. Because many for-profit institutions require a student's waiver of any class-action lawsuit, the DOE's position is that class-action provisions are vital to ensuring borrowers can collectively hold for-profit institutions accountable (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). However, CAPPS argues that a ban on class-action lawsuits will not provide additional relief to borrowers as it is difficult for many borrowers to meet the prerequisites to maintain a proper class (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Lastly, the Final Rule is challenged on United States Constitutional grounds. In addition to the numerous statutory and administrative issues, the Final Rule violates the Due Process Clause, Article III, and a higher-education institution's Seventh Amendment right to a civil jury trial (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). In this sense, Constitutional Due Process describes procedural "fairness" in determining a wrong or cause of action. For example, due process concerns often involve the following issues: an unbiased tribunal, notice of the proposed action and the grounds asserted for it, opportunity to present reasons why the proposed action should not be taken, the right to present evidence, including the right to call witnesses, the right to know opposing evidence, the right to cross-examine adverse witnesses, a decision based exclusively on the evidence presented, opportunity to be represented by counsel, and a requirement that the tribunal prepare a record of the evidence presented, and a requirement that the tribunal prepare written findings of fact and reasons for its decision (Strauss, n.d.).

The Borrower Defense provisions violate due process because the DOE is responsible for both prosecuting and hearing borrower-defense claims, thereby depriving higher-education institutions of the right to be heard by a fair and impartial magistrate (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). More so, these provisions allow the DOE to adjudicate a private right. The right to recover for fraud or contract violations against the higher-education institution is a private cause of action to be determined by a jury (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). Article III establishes the power of the judiciary to settle disputes and the Seventh Amendment preserves the right to a jury trial. By shifting ultimate authority to the DOE, the Final Rule divests affected higher-education institutions of Constitutionally-protected rights (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

Due process issues also affect the financial responsibility provisions and the arbitration and class action provisions. By placing significant consequences, such as assumed damages, regulatory enforcement measures, such as requiring a letter of credit, imposing regulatory triggers, and the inability to challenge regulatory triggers, simply on the mere pending status of a lawsuit, with no opportunity to be heard, violates due process (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). As applied to contracts already in existence, the arbitration and class action provisions that are applied retroactively further violate due process (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

CAPPS also argues the repayment rate provisions in the Final Rule violate the First Amendment by compelling speech. In addition to protecting freedom of speech, the First Amendment also prohibits the government from compelling others to speak. CAPPS argues that requiring a warning to students regarding repayment rates is effectively a government fiat dictating the form, place, manner, and precise language in violation of First Amendment principles (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). The DOE would require this warning in all promotional materials and require posting on the institution’s website. The DOE could change the criteria whenever it wanted and establish its own determination of what is prominent, clear, and conspicuous (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)). These types of compulsions result in both over-inclusive and under-inclusive regulation, and they are precisely the type of forced speech that is suspect under a First Amendment analysis (*CAPPS v. Devos*, No. 1:117-CV-00999-RSM (D.D.C.)).

New York Legal Assistance Group (NYLAG)

The New York Legal Assistance Group (NYLAG) filed a case involving the Borrower Defense Rule in New York on February 19, 2020. In *New York Legal Assistance Group (NYLAG) v. Elisabeth DeVos, in her official capacity as Secretary of Education, and United States Department of Education*, (2020), the plaintiff filed a four-count complaint alleging various violations of the Administrative Procedures Act (APA). The complaint alleged the DOE violated the APA's legal provisions related to negotiated rule making, notice and comment rule making, logical outgrowth, and arbitrary, capricious decisions contrary to law (*New York Legal Assistance Grp. v. DeVos*, No. 20 Civ.1414 (S.D.N.Y., 2020)). Of note, this lawsuit cites to both the *CAPPS* lawsuit and *Bauer* line of cases as precedent for the DOE's history of APA violations and the appropriate remedies (*New York Legal Assistance Grp. v. DeVos*, No. 20 Civ.1414 (S.D.N.Y., 2020)).

Status of Litigation and the Final Rule

On October 17, 2018, the United States District for the District of Columbia denied CAPPS injunction thus allowing the Final Rule to go into effect. Touted as an enormous victory for borrowers and students, the denial of the injunction opened the door for many students to proceed with borrower defense claims. However, on August 30, 2019, the DOE finalized revised borrower defense regulations, and the Court moved the litigation to January 10, 2020, to ultimately determine if the new regulations rendered the suit moot. In the meantime, CAPPS filed an amended complaint challenging only the arbitration and class action provisions. On January 10, 2020, the Court granted summary judgment to the DOE, effectively upholding those provisions of the Final Rule (*CAPPS v. Devos*, 436 F. Supp. 3d 2020 (D.D.C.)).

The latest borrower defense regulations went into effect July 1, 2020, but the scope of litigation surrounding student loan debt and higher education will likely continue to broaden. The DOE released the following information regarding its current regulations on borrower defense. According to Secretary DeVos, this final rule corrects the wrongs of the 2016 rule through common sense and carefully crafted reforms to hold higher-educations institutions accountable while treating students and taxpayers fairly (Department of Education Press Release, 2019). Among the provisions of these revised regulations:

- Grant borrowers the right to assert borrower defense to repayment claims against institutions, regardless of whether the loan is in default or in collection proceedings.
- Maintain the current rule's preponderance of the evidence standard for all borrower defense to repayment claims.
- Allow borrowers ample opportunity to file defense to repayment claims – three years from either the student's date of graduation or withdrawal from the institution.
- Create streamlined and fair procedures, regardless of the borrower's current repayment status, that ensure basic due process for all parties.

- Give students the ability to allege a specific amount of financial harm and to obtain relief in an amount determined by the Department, which may be greater or lesser than their original claim amount.
- Extend the closed school discharge window from 120 days to 180 days, ensuring that students have a meaningful opportunity to obtain relief if they cannot complete their programs due to school closures.
- Reduce precipitous closures by encouraging institutions to close only after the completion of well-planned teach-outs that allow students a reasonable opportunity to finish their programs.
- Allow students to choose between accepting an institution's offer of a teach-out opportunity or submitting a closed school discharge to the Department.
- Provide fair, clear, and verifiable financial triggers for recalculating an institution's financial responsibility composite score and triggering additional security to protect taxpayers.
- Update composite score calculations to reflect changes to Financial Accounting Standards Board (FASB) accounting standards.
- Provide taxpayers with a net federal budget savings over the 2020-2029 loan cohorts of $11.1 billion, including $9.8 billion for changes to the defense to repayment provisions and $1.3 billion for changes related to closed school discharges. (Department of Education Press Release, 2019, para. 4)

According to Cooper (2019), the new Final Rule properly addresses the previous shortcoming of the previous borrower-defense regulations in that it more closely aligns with the true intent of a borrower defense – as a defense in rare cases of serious fraud, and it protects taxpayers. Rather than being touted as a back door means to alleviate student loan debt, the new regulations narrow the definition of fraud such that higher-education institutions are not subject to frivolous lawsuits that may endanger their well-being (Cooper, 2019). The Final's Rules view of fraud stipulated that any statement by a higher-education institution with a tendency or likelihood to mislead under the circumstances could form a successful basis for a lawsuit for fraud (Cooper 2019). Even legitimate higher-education institutions could be held subject to this broad interpretation, and taxpayers would have to pick up loan discharge costs not met by the schools, thereby greatly increasing the deficit (Cooper, 2019).

The Trump administration's version of the rule embraces a more reasonable standard (Cooper, 2019). To qualify for a loan discharge under the borrower-defense rule, colleges must knowingly make fraudulent statements, or make those statements "with reckless disregard for the truth." Moreover, borrower-defense applicants must show actual financial harm (Cooper, 2019). Additionally, Cooper (2019) argued the borrower defense revisions also fix one of the biggest problems in the preliminary rule, issued by the Trump administration in 2018. That rule required borrowers to default on their student loans before seeking relief under borrower defense, creating the wrong incentives for students (Cooper, 2019). Default might saddle borrowers with thousands of dollars in additional fees, and it incurs administrative costs for the federal government. Further, garnishment against borrowers has already commenced, despite the possibility of a defense. Additionally, unlike the Final Rule, the new rule does not require the DOE to penalize schools subject to a frivolous lawsuit (Cooper, 2019). Under the current rule, action against a higher-education institution will only be taken if a lawsuit is successful (Cooper, 2019).

However, Cooper (2019) acknowledged some criticism of the new rule. The rule requires students file a borrower-defense claim within three years of leaving school. Arguably, the DOE included this provision to align with records-retention rules for institutions, but it is possible that fraud may not surface until several years after students leave the school in question (Cooper, 2019). This occurred in the case of defunct for-profit giant Corinthian Colleges.

In addition, other criticisms of the new rule include removing the existing automatic process to cancel debt for students whose schools suddenly closed, forcing individuals to apply for a discharge rather than relying on a group-discharge system, for groups subject to similar misrepresentation claims, and denying students access to their transcripts once a claim is made (Walsh, Cao, & Mishory, 2019). Further, the new rule increased the standards to prove misrepresentation, requiring borrowers to show that the institution made misleading statements knowingly or with reckless disregard for the truth (Walsh et al., 2019). It is the borrower's burden to show that inability to find employment is a result of misleading claims by the higher-education institutions rather than from other causes, and that the borrower's financial harm was due to higher-education institution's misrepresentations rather than other factors such as poor job performance or health issues (Walsh et al., 2019).

Perhaps the most damaging to students is the change in allowing higher-education institutions to force students into signing pre-dispute arbitration agreements, as well as class action waivers as requirements for enrollment. Walsh et al. (2019), argue this creates confidentiality issues that have enabled a history of hiding systemic abuses from public view. Currently, it remains unclear if the DOE will revisit the current version of the Final Rule.

Current Trends in Borrower Defense

Even with the change in Presidential administration, there will likely continue to be growth in student loan debt litigation in some form or fashion. Candidates have readily accepted student loan debt as a key platform provision that can be used to ignite a base of voters (Kreighbaum, 2019). According to a 2019-Newsy/Ipsos poll, 85 percent of student borrowers support loan forgiveness, and 55 percent of respondents who have paid off their loan support forgiveness (Kreighbaum, 2019). The issue of how to best deal with student loan debt has become mainstream and will continue to evolve just as the total student loan debt will continue to increase. As these issues gain increased traction and public reaction, legal remedies will also continue to evolve. Legal remedies such as the borrower-defense rule, suing the DOE directly, and bankruptcy forgiveness are ripe legal areas with no shortage of clients. To date, the Biden administration's reaction to the student-loan crisis indicates a willingness to explore student loan debt relief options (Seddiq, 2021).

Chapter 5 - Bankruptcy and Other Student Loan Debt Relief Litigation

Student loan debt litigation is an area that both drives and reacts to student loan policy. The arena of student loan debt and bankruptcy law, once thought to be severely limited, is slowly broadening (Bernardo, 2015). The evolution and growth of student loan debt has led to increased discussion regarding the validity of the current state of bankruptcy law. In fact, attorneys that practice in debt relief and debtor's rights are expected to review all possible discharge options, including the bankruptcy potential for each client (First, 2017).

The history of bankruptcy as it relates to student loan debt begins in 1976, with an amendment to the Higher Education Act of 1965 (White, 2017). Prior to 1976, student loans were dischargeable in bankruptcy (White, 2017). However, in 1978, the Bankruptcy Code adopted the amended student-loan caveat whereby student loans could only be discharged after a five-year period, unless the court determined the debtor suffered an *undue hardship* (White, 2017). The next major change occurred in 1990, when Congress, under the Crime Control Act of 1990, extended the time for mandatory repayment to seven years before a discharge could be granted (White, 2017). Then in 1998, Congress removed the seven-year requirement, and student loans were essentially non-dischargeable in bankruptcy; however, the *undue hardship* exception still remained as the sole means to determine a student-loan discharge (White, 2017).

Additionally, Bankruptcy courts have the ability to discharge student loan debt based on disability or if the loans were for another purpose besides education. For bankruptcy purposes, borrowers are disabled if they are a veteran with proof of disability from the Veteran's Administration, if receiving Social Security Income (SSI) or Social Security Disability Insurance (SSDI) pursuant to an award from the Social Security Administration (SSA), or if a doctor certifies the disability (34 CFR § 685.213). The doctor must further aver that the borrower cannot engage in gainful activity because of an impairment that is expected to result in death, has lasted for a continuous period of not less than 60 months, or can be expected to last for 60 months (34 CFR § 685.213).

The following cases are illustrative of litigated cases that have contributed to student loan policy as it now stands, as well as cases filed in reaction to established loan policy, particularly related to bankruptcy, in an effort to drive change.

The Brunner Test

In *Brunner v. New York State Higher Education Services Corporation* (1985), Marie Brunner sought to discharge approximately $9,000.00 in student loans. She graduated with a Bachelor of Arts degree in 1979, and she completed a Master's Degree in Social Work in 1982. Within nine months of the loans coming due, Brunner filed for Chapter 7 bankruptcy with the Southern District of New York Bankruptcy Court seeking a student-loan discharge (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr. S.D.N.Y. 1985)). A Chapter 7 bankruptcy allows for the complete discharge of a borrower's debt, subject to certain exceptions. (Of note, this same court recently upheld the *Brunner Test's undue hardship* requirement finding the *undue hardship* requirements satisfied)(*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

The lower court found Brunner met the undue hardship prongs and discharged her student loan debt; however, the lender appealed the decision (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr. S.D.N.Y. 1985)). In its appellate decision, the Court overruled the lower court, setting aside the discharge and judicially establishing the *Brunner Test* as a means to determine eligibility for a student loan discharge (*Brunner v. New York State*

Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987)). In reaching its conclusion, the Court analyzed the *undue hardship* standard.

Established through case law, the *Brunner* Test remains the standard to determine *undue hardship*. According to *Brunner v. New York State Higher Education Services Corporation* (1987), the *Brunner* Test for *undue hardship* must meet the three following criteria:

> 1. The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> 2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loans, and;
>
> 3. The debtor has made good faith efforts to repay the loans (*Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987))

Given the *Brunner* parameters, many bankruptcy judges feel constrained to act appropriately, particularly in difficult cases that should require more judicial discretion (Bernardo, 2015). However, in what can be interpreted as a radical shift, the United States Supreme Court has affirmed a student-loan bankruptcy discharge in a chapter 13 bankruptcy. (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

Espinosa

Espinosa is a Supreme Court case involving student loan debt and Chapter 13 bankruptcy (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). A Chapter 13 Bankruptcy is a debt restructuring bankruptcy where a portion of debt is paid according to a plan approved by creditors and the court. If the plan is completed, the remainder of the debt is discharged forever (*Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993)).

Espinosa obtained four Federally guaranteed student loans in a principal amount of $13,250.00. In 1992, he filed a Chapter 13 bankruptcy allowing a debtor to develop a repayment plan over a period of time after which remaining debts are discharged (*Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993)). Espinosa included only the principal amount in his repayment plan, stating the remainder of interest would be discharged upon completion of the plan. In accordance with bankruptcy procedure, a notice of the plan was sent to Espinosa's lender, United Student Aid Funds, Inc., and it filed a proof of claim in the amount of $17,832.15 that included the accrued interest. However, United did not object to the plan, nor did it object to Espinosa's failure to file a motion called an adversarial proceeding to determine the validity of the plan (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

Ultimately, the Bankruptcy Court confirmed the plan in Espinosa's favor without holding an adversarial proceeding or making a finding of undue hardship. Espinosa completed the plan, and the Court discharged the student loan interest (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). Three years later, on behalf of United, the Department of Education commenced efforts to collect on the interest, and Espinosa filed a motion asking the Court to enforce its discharge order and directing the DOE and United to cease and desist any further collection efforts (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). United responded and filed a Federal Rule of Civil Procedure 60(b)(4) motion seeking to set aside as void the Bankruptcy Court's order confirming Espinosa's plan.

Typically, final judgments can only be challenged under limited circumstances (*U.S. Aid Funds, Inc*. v. *Espinosa*, 559 U.S. 260 (2010)). Under Federal Rule of Civil Procedure 60(b)(4), a final judgment may be challenged if it is void (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). United made two arguments in favor of the Court's order being void. First, it alleged the Court's order was in violation of the bankruptcy code because it discharged the debt without making a finding of undue hardship, typically done in an adversarial proceeding. Second, it argued its due process rights were violated because Espinosa did not serve it with a summons and complaint as required in an adversary proceeding (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). More so, United's only recourse was to file a 60(b)(4) motion as the time to object through an appeal had long expired.

The Court determined that the Bankruptcy Court's order discharging the interest was not void and ruled in favor of Espinosa (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). The Bankruptcy Court's order was a final judgment. Ordinarily, a court's order is not subject to review once the time for appeal has passed; however, rule 60(b)(4), provides an exception to this finality in a limited set of circumstances, such as challenging a void judgment (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). However, the Court elaborated that a judgment is not simply void because it is erroneous (*Hoult v. Hoult*, F.3d. 1 (1st Cir. 1995)). Rather, 60(b)(4) applies when a judgment is premised on a jurisdictional error or a violation of due process whereby a party is deprived the notice an opportunity to be heard (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

The Court noted that United did not argue the Bankruptcy Court lacked jurisdiction, and the facts as presented are not jurisdictional in nature (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). Requiring a finding of *undue hardship* is a precondition to a discharge and is not jurisdictional in nature. In addition, the requirement that an *undue hardship* finding must be made in an adversarial proceeding is a procedural rule rather than jurisdictional (*U.S. Aid Funds,* *Inc. v. Espinosa*, 559 U.S. 260 (2010)). Any due process violation was related to depriving United of a right granted by a procedural rule. United failed to object to this deprivation and failed to file a timely appeal, instead having to rely on the limited application of 60(b)(4) (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

The Court stated Constitutional due process requires notice "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v. Central Hanover Bank and & Trust*, 339 U.S. 306, 314 (1950)). Under these circumstances, Espinosa provided actual notice to United. Espinosa provided United his bankruptcy plan, he filed a proof of claim, yet United did nothing to avail itself of its rights at that time. As such, Espinosa more than satisfied the notice requirements under a due process analysis (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

Notwithstanding the Court's determination, both United and the DOE further argued that judgment defects related to bankruptcy findings of *undue hardship* should be expanded to be encompassed by rule 60(b)(4) protections (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). The Bankruptcy Code as codified in 11 U.S.C. § 5239(a)(8) states student loan debts guaranteed by governmental units are not dischargeable unless a finding of *undue hardship* is determined by the court. United argued this language created a self-executing limitation such that any bankruptcy order is void without an *undue hardship* finding (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). The Court disagreed reiterating that the *undue hardship* requirement is neither jurisdictional or nor violates due process (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). Rather, the bankruptcy court must make an *undue hardship* finding even if creditors do not request one, but it does not render an order void simply because the court did not undertake the *undue hardship* analysis for the purposes of rule 60(b)(4).

Of note, the Court delved deeper into the issue of the *undue hardship* requirement and adversarial proceedings. The issue is whether a court when presented with a debtor's plan that fails to include an adversarial proceeding should confirm the plan unless a creditor objects (*U.S. Aid Funds, Inc*. v. *Espinosa*, 559 U.S. 260 (2010)). Some lower courts had followed the rationale that a creditor must object to the debtor's plan in order to trigger the *undue hardship* analysis, but the Court rejected this requirement (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). However, the Court made the point that there is nothing stopping a creditor from stipulating to the *undue hardship* requirement thus promoting more efficient settlement (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). The Court was silent as to why a creditor would knowingly stipulate to an action that would deprive it of funds. Lastly, the Court stated a bankruptcy court must make an independent determination of undue hardship, despite no creditor objection, before confirming a debtor's plan. (*U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)).

Marcotte

In *Marcotte v. Texas Guaranteed Student Loan Corporation* (2011), the Court's review of the *Brunner* test elements also allowed for a student loan discharge; however, the facts of *Marcotte* are demonstrative of the intense scrutiny most courts follow (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). *Marcotte* is a South Carolina Chapter 7 bankruptcy case. A Chapter 7 bankruptcy allows for the complete discharge of a borrower's debt, subject to exceptions such as student loans, and unlike the Chapter 13 bankruptcy, does not require any court-sanctioned plan (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

On February 4, 2010, David Marcotte filed for bankruptcy seeking to discharge the remaining balance of his student loans. At the time of default, the remaining balance was $8,755.58. The Court weighed the evidence of Marcotte's health and financial status as well as his past performance in paying his loans and determined the loans should be discharged pursuant to *Brunner (Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

For background, Marcotte was severely injured in a car accident in 1996. He suffered permanent injuries to his spinal cord, but despite his injuries, in 2002, Marcotte obtained a bachelor's degree in accounting. During the course of his studies, he obtained student loans, and after graduation, began repaying them in a timely manner. He worked for six years and made payments of $100 a month for that entire time, but eventually his pain grew too much, and he was unable to continue working *(Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

At the time of his bankruptcy filing, the Court reviewed his financial history and status. He is single, has no dependents, and lives with his parents rent free (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). His only sources of income are from a state disability fund and social security disability benefits totaling approximately $10,000 a year. After review of his budget, including medical expenses, food, clothing, transportation, insurance, and the loan payment, the Court determined he had a monthly budget deficit of approximately $558.00 (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). However, after the bankruptcy filing, Marcotte purchased a 1998 Jeep Wrangler for $6,800 to allow transportation to his doctors' appointments. He purchased the car using $3,800 he had saved and taking the remainder as a loan from his sister. He also has a 401K account with approximately $11,200.00. Under these circumstances, Marcotte sought a discharge of his student-debt *(Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

The Court undertook the *Brunner* analysis as required by legal precedent (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). While the Court acknowledged that *undue hardship* is not defined by Congress, under legal precedent, debtors seeking a student loan discharge bear the burden of proving they meet all three factors of the undue hardship test (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). More so, all three prongs must be met, and if one is not, any inquiry ends, and the debtor is not eligible for a discharge (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). The Court described the *undue hardship* test as a heightened standard designed to protect the integrity of the student loan program. The test must be strictly construed such that equitable concerns or other extraneous factors may not be considered in its dischargeability analysis (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). Texas Guaranteed only contested one prong of the *undue hardship* standard stating Marcotte did not make a good-faith effort to repay the loan (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

Despite only one contention, the Court analyzed all three *Brunner* prongs. To determine the first prong, the Court reviewed Marcotte's finances. To satisfy the first prong, Marcotte must be able to maintain a minimum standard of living. The Court reviewed his current budget as well as the potential for future earnings. This included his financial reliance solely on Social Security Disability Income totaling approximately $1,142.00 per month (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). When necessary medical expenses were deducted, his remaining expenses were approximately $525.00, excluding any payment made toward his student loan. More so, the Court was persuaded that Marcotte's situation was greatly aided by the charity of his parents. He lived with them, paid no rent, and they supplemented his food costs. However, Texas Guaranteed argued Marcotte had funds in his 401(k) that could be used to pay down his student loan debt (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

In its analysis, the Court reviewed case law from previous circuits, finding precedent that payments made in furtherance of a retirement account can compromise the *undue hardship* requirement (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). Essentially, courts have held that saving for the future does not rise to the level of importance of paying down one's student loan debt. Nevertheless, given Marcotte's extreme status, it relied upon the fact that Marcotte had ceased funding his 401(k), and it determined his meagre balance was necessary to provide for future necessities (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

The second prong of *Brunner* requires a determination that the debtor's financial situation will persist for a significant amount of time (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). This prong is at the heart of the *Brunner* test, and it is intended to be demanding, requiring a certainty of hopelessness that the debtor will be unable to pay his or her student loans (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). More so, courts have even concluded having a low paying job does not in and of itself satisfy the second prong of the *Brunner* test, as long as the debtor is satisfied with the current position and is not actively seeking higher-paying employment (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). Devoid of this stance is any meaningful commentary regarding lack of opportunity and realistic expectations related to quality of life.

Fortunately, for Marcotte, his current circumstances exhibited a *certainty of hopelessness*, and his future prospects were so limited, the Court determined he met the second prong (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). Marcotte's circumstances were so dire due to his constant, intense pain, his recurring and worsening disability, and his stagnant financial status, that the Court allowed him to retain his meagre 401(k), without paying anything toward his student loan (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). The Court determined that any value in requiring Marcotte to divest his retirement fund in favor of his student loan was outweighed by his dismal circumstances (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

The last prong of *Brunner* requires that a debtors show good-faith efforts to repay their loans (*Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)). Debtors must prove every effort to maximize income and minimize expenses (*Educational Credit Management Corporation v. Frushour,* 433 F.3d 393 (4th Cir. 2005)). Also, debtors may not willfully or negligently cause their own default, rather the default must be due to factors beyond their control (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). This analysis looks at both the debtor's current status, as well as past behavior, to determine a good-faith basis for repayment. The Court reviewed Marcotte's decision to consolidate his loans as favorable as well as his attempts to make payments; however, it scrutinized his purchase of the Jeep for transportation after filing the bankruptcy case. Courts have held that debtors that make purchases that are not necessary to maintain a minimum standard of living indicate a lack of good faith thus failing *Brunner*'s third prong. Expenses deemed excessive include cell phone, internet, cable television, gym membership, and monthly recreational expenses totaling $132.02 (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). However, in Marcotte's case, the Court determined his use of the Jeep was for transportation for doctors' visits, and it was more a necessity than an expense, thus establishing good faith under *Brunner*.

As such, after weighing all the *Brunner* prongs, the Court upheld Marcotte's student-loan discharge (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). The Court weighed the following in Marcotte's favor: (a) Marcotte made an effort to keep employment despite his injuries; (b) he attempted to maximize his income as long as possible; (c) he attempted to repay his loans for six years; (d) he minimized his daily living expenses by living with his parents; (e) his physical challenges and circumstances were no fault of his own; and (f) he consolidated his loans (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

The Court did not provide great weight to Marcotte's purchase of the Jeep or his 401(k), despite its discretion to do so (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)). Certainly, these assets would benefit the creditor; rather, the Court stated the Bankruptcy code does not require the debtor to live in abject poverty before a student loan may be discharged (*Marcotte v. Brazos Higher Educ. Serv. Corp., Texas Guar. Student Loan Corp.*, 455 B.R. 460 (Bankr. D.S.C. 2011)).

While this Court felt that Marcotte was not living a life of abject poverty, its use of adjectives such as "dire" and "dismal" to describe his lifestyle and financial condition do provide insight into a Court's reasoning regarding student loan discharge. In doing so, the idea of abject poverty or utter hopelessness as a precursor to obtaining a discharge of student loan debt has pervaded the legal landscape in bankruptcy law (Bernardo, 2015).

Cases similar to *Marcotte* have been adding to the precedent of Bankruptcy law to the point the *Brunner* test has been stretched to the extreme for the past 32 years (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). *Rosenberg v. New York* (2018) is a New York Chapter 7 Bankruptcy case where the Chief Bankruptcy judge discharged Rosenberg's student loan debt applying a straightforward and simple application of the *Brunner* test.

Rosenberg

Kevin Rosenberg first obtained student loans in August of 1993, where he earned an undergraduate degree at the University of Arizona in History. Upon graduation, he entered the United States Navy where he served for five years. After completing his tour of duty, in 2001, Rosenberg decided to attend law school, and he enrolled in the Cardozo Law School at Yeshiva University in New York City. He attended from 2001 to 2004, taking out additional loans to cover the cost of tuition. After graduation in 2005, Rosenberg consolidated his student loans bringing the principal amount to $116,464.75 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). As of November 19, 2019, the total balance including interest was $221,385.49 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). On March 12, 2018, as a *pro se* litigant, Rosenberg filed for Chapter 7 bankruptcy.

All parties agreed there were no issues of material fact in dispute, and the matter was ripe to be determined through a summary judgment motion (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). As such, the parties submitted briefs, and the Court made its determination allowing a discharge of the entire student loan debt. The Court used the *Brunner* test in reaching its determination (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). The Court addressed precedent set by *Brunner* stating the high bar set by the *Brunner* analysis is not the result of *Brunner*, but rather subsequent results of courts' interpretation of *Brunner* (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

The Court addressed often relied upon precedent, specifically the "certainty of hopelessness" dicta, stating this element did not apply to *Brunner*, as it was not used until six years later (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Nevertheless, courts have continued to cite to a "certainty of hopelessness" when evaluating student loan debt (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Of note, other types of debt do not receive similar scrutiny. As such, *Brunner* has risen to mythic proportions such that borrowers attempting to discharge student loan debt in bankruptcy are deemed to be engaging in bad faith per se, rather than availing themselves of the spirit of the bankruptcy code as intended (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). While *Brunner* attempted to discharge her student debt after only seven months, the majority of borrowers have been struggling with high student debt for many years (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Rather than continue to perpetuate the *Brunner* myth, the Court applied the *Brunner* test as originally intended. This is not to be seen as any break from precedent, but rather a legal interpretation based in original intent (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

Under *Brunner*'*s* first prong, the Court analyzed Rosenberg's current income and his ability to maintain a minimum standard of living (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr. S.D.N.Y. 1985)). Despite obtaining a law degree, Rosenberg current employment was not in the legal field, but consisted of starting his own business in adventure tourism. Rosenberg's monthly income was determined to be $2,456.24, and his expenses were $4,005.00, resulting in a monthly deficit of -$1,548.74 at the time of filing (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). No creditor objected to Rosenberg's financial disclosures.

As Rosenberg's student loans were in default, he owed the current balance due of $221,385.49, plus interests and costs (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Based on Rosenberg's financial disclosures, he is unable to pay the balance of his student loans (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Of note, and not discussed in the Court's Order, Rosenberg had attempted to negotiate an amicable settlement, including an alternate payment plan with student loan creditor, but it refused to enter into any negotiations (Chung, 2020). However, the Court did note that Rosenberg was not eligible for a repayment plan under current law (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Once a loan is in default, the only way to rehabilitate the loan from its default status is to agree in writing, to make nine voluntary, reasonable, and affordable monthly payments (as determined by your loan holder) within 20 days of the due date, and make all nine payments during a period of 10 consecutive months (Federal Student Aid, 2020). Any garnishment or Federal tax withholding will remain in effect, despite any effort to make rehabilitation payments (Federal Student Aid, 2020). Given Rosenberg's negative income, and his inability to repay his loans, the Court determined he met *Brunner*'s first prong (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

In the second prong of *Brunner*, courts must consider whether additional circumstances exist that indicate the debtor's state of affairs will continue for the repayment period (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr. S.D.N.Y. 1985)). The Court noted that *Brunner* contains no explicit finding that the debtor is disabled, elderly, his state of affairs are going to persist for eternity, or that his current state of affairs was brought on by his choice (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Rosenberg's repayment period has ended, as the creditor accelerated the loan after default. As such, the Court determined his circumstances satisfy *Brunner*'s second prong (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

As to *Brunner's* third prong, the Court evaluated Rosenberg's good-faith efforts to repay his student loans (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr.

S.D.N.Y. 1985)*; Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Once again, the Court relied on a strict reading of *Brunner*, refusing to expand any analysis further than Rosenberg's past actions related to repayment. *Brunner* states the court must look at whether the debtor *has made* good-faith efforts to repay the loan (*Brunner v. New York State Higher Educ. Servs. Corp.*, 46 BR 752 (Bankr. S.D.N.Y. 1985)). Any analysis regarding debtor's reasons for filing bankruptcy, the amount of debt, or attempts to consolidate are superfluous facts unrelated to *Brunner's* third-prong analysis (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

Rather, the Court examined Rosenberg's loan-payment history. The loans were in forbearance from 2005 to 2015, at which time the loan went into an income-based repayment plan for a year (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). Prior to the default, the Court determined he missed only 16 payments in the 13 years since the loan was originated in 2005 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). In the first year of the repayment plan, Rosenberg paid $229.31 on May 26, 2015; $500.00 on August 14, 2015; $300.00 on October 14, 2015; $346.55 on November 3, 2015; $458.62 on January 2, 2016; and $249.42 on February 21, 2016 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). After the repayment plan ended, the loan again went into forbearance; however, Rosenberg continued to make payments towards the loan. On April 19, 2016, Rosenberg paid $700.00, on July 18, 2018, he paid $50.00, and on September 25, 2016, he made a payment of $50.00. When the loan transitioned into a standard repayment plan, he made a final payment of $100.00 on February 19, 2017 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). He subsequently went into default whereby the loan was satisfied by the grantor on January 8, 2018 (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)).

The Court determined he made 10 payments during the 26 months when he was required to make payments (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). His repayment rate was 40 percent. He did not merely sit back for 20 years but showed a good-faith effort at repayment by making payments when he was able, and by staying in contact with the lender, requesting forbearances on at least five separate occasions (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). As such, the Court determined Rosenberg met *Brunner's* third prong as well as the *undue hardship* standard overall and discharged his student loans (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). The creditor has filed an appeal with the United States District Court that remains pending.

The *Rosenberg* decision was made by the Chief Justice for New York's Southern District Bankruptcy Court. It is important to note this is not a binding decision across the United States, but it is a substantial departure from the way courts have interpreted the *undue hardship* standard in the past. It is unknown if this decision will influence other courts, or if this is just a mere outlier in student loan bankruptcy law. Critics have described Southern District as a well-respected court (Krauss, 2020). Just as every landslide begins with a pebble, every sweeping legal reform can be traced back to a single case, and there is little doubt creditors will be calling on special interest and legislators in an effort to stay any further adverse determinations.

McDaniel

Subsequent to the *Rosenberg* decision, a Colorado Bankruptcy Court recently affirmed a Chapter 13 bankruptcy appeal against Navient. In *Byron Patterson McDaniel, Jr.; Laura Paige McDaniel v. Navient Solutions, LLC* (2020), the Court upheld a discharge of $200,000.00 of private student loan debt. Laura McDaniel attended Lakeland College from 2004 to 2007. In addition to Federal student loans, Laura McDaniel also took out multiple Sallie Mae student loans called Tuition Answer Loans. These loans helped to pay additional expenses related to her education, but were not explicitly for cost of attendance. As such, Tuition Answer Loans are not "qualified education loans" as defined in the Bankruptcy Code (*In re McDaniel*, 590 B.R. 537 (Bankr. D. Colo. 2018)). In 2010, the McDaniels, jointly, filed an amended Chapter 13 bankruptcy plan, listing Navient's Tuition Answer Loans as an "unsecured Class Four claim or as follows: deferred until end of plan" (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). The amended plan defined Class Four claims as "allowed unsecured claims not otherwise referred to in the Plan" (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). However, the amended plan did not indicate whether certain Class Four claims, deferred claims, or educational-loan debts were excepted from discharge (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). Navient did not object to the plan; however, it did timely file claims for its Tuition Answer Loans.

As required under a Chapter 13 filing, the McDaniels completed their bankruptcy plan in five years and sought to have remaining unsecured debts discharged. In 2015, the bankruptcy court issued its final order stating that debts for most student loans were not discharged (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). At the time of discharge, the McDaniels had paid over $27,000.00 to Navient for its Tuition Answer Loans, and for the next two years, the McDaniels paid an additional $37,460.00 to Navient.

In 2017, the McDaniels asked the Court to reopen its bankruptcy case alleging the Navient loans had been fully discharged and seeking damages for improper debt collection practices (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). Navient objected and filed a Motion to Dismiss the McDaniel's allegations, which the court denied. The Court granted Navient leave to appeal its Motion to Dismiss denial, and the appellate court subsequently denied its appeal, ultimately affirming the bankruptcy court's determination and discharging the remaining balance of Navient's loans.

The crux of the McDaniels' argument was that the Tuition Answer Loans were not "qualified education loans" under 11 U.S.C. § 523(a)(8)(B) because they "were not made solely for the 'cost of attendance.'" Rather, that type of loan was for additional expenses related to education; however, no matter how it was described, the Court did determine that a Tuition Answer Loan is a "student loan," thus affirming the Court's discharge of student loans in a bankruptcy proceeding (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Navient's argument alleged its loans were non-dischargeable under 11 U.S.C. § 523(a)(8)(A)(ii) because they constitute "an obligation to repay funds received as an educational benefit" (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). According to 11 U.S.C. § 523(a)(8)(A)(ii), unless excepting such debt from discharge would impose an *undue hardship* on the debtor and the debtor's dependents, for an obligation to repay funds received as an educational benefit, scholarship, or stipend, the debt is not dischargeable. The Court rejected Navient's argument holding that the plain language of 11 U.S.C. § 523(a)(8)(A)(ii) establishes that educational loans are not obligations to repay funds received as an educational benefit

(*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). Of note, Navient's loans were private loans and were not funded to pay for cost of attendance.

The Court's analysis is dependent on a statutory interpretation and the meaning of plain language as it relates to the Bankruptcy Code. The Court compared both 11 U.S.C. § 523(a)(8)(A)(i) and 11 U.S.C. § (a)(8)(A)(ii). In its decision, the Court stated the statutory terms within 11 U.S.C. § 523(a)(8), particularly the words "obligation to repay funds received as an educational benefit" and "educational loan" mean separate things (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). In § 523(a)(8), Congress, in writing the code, used both "educational benefit" and "educational loan" within the context of the Code. However, "loan" only appears in section (A)(i)(an educational benefit overpayment or *loan* made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution), while section (A)(ii) does not include reference to a "loan," but rather only "educational benefit" (an obligation to repay funds received as an educational benefit, scholarship, or stipend).

The Court, referencing precedential legal analysis for statutory interpretation, determined the absence of the word "loan" from section (A)(ii), meant Congress did not intend for loans to apply to this section (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). The Court elaborated, stating no normal speaker of English would say a student loan is an obligation to repay funds received as an educational benefit (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). The Court then reviewed the history of the term *educational benefit* within precedential jurisprudence, determining that reference to an *educational benefit* is akin to a health benefit, unemployment benefit, or retirement benefit. The definition of "benefit" implies a payment, gift, or service that ordinarily does not need to be repaid (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Relying on the doctrine of *noscitur a sociis*, the Court held that it was Congress' intent that an *educational benefit* is not a loan under the Bankruptcy Code, and Navient's loans were subject to discharge. Translated as "it is recognized by its partners," in legal parlance, *noscitur a sociis* assists in narrowing the meaning of a word. The doctrine stands for the proposition that a word is known by the company it keeps, such that it limits to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress. (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Section 11 U.S.C. § (a)(8)(A)(ii) describes obligations, such as an *educational benefit*, scholarship, or stipend, that may require repayment; however, these obligations, as stated, do not include a loan, which is required to be repaid (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). More so, applying the doctrine of *noscitur a sociis*, the Court determined there was a common quality within the terms *educational benefit*, scholarship, and stipend such that the terms signify granting, rather than borrowing, and therefore, repayment is not required (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). Further, should Congress have required repayment in section (A)(ii) it would have included "loan" within the section, thus grouping like-minded words together (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Based on the above reasoning, the Court concluded that under a correct statutory reading the phrase, "an obligation to repay funds received as an educational benefit," creates a conditional grant of funding for education similar to a stipend and scholarship, rather than a loan of funds for education (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Section (A)(ii) was designed as a discharge exception for funds that were tied to service obligations, which are an entirely different a category from loans (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). In this sense, the Court viewed Navient's loans should not be treated as loans, per se, but rather as an educational benefit, which is dischargeable under the Bankruptcy Code (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). The Court further note, of course, should Congress disagree with the Court's interpretation, it is free to clarify by passing additional legislation (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)).

Additional Bankruptcy Developments

As further evidence in the hope of changing jurisprudence regarding bankruptcy, the American Bankruptcy Institute's Commission on Consumer Bankruptcy issued revised recommendations making it easier for debtors to discharge student loan debt (Berman & Keshner, 2019). The Bankruptcy Code, enacted in 1978, got its last major update in 2005 (Berman & Keshner, 2019). At that time, student loan debt was so small it was not listed in the Federal Reserve's monthly reports on consumer debt (Berman & Kushner, 2019). Among some of the recommendations, the Commission suggests key policy changes such as allowing certain debts to be dischargeable after seven years, and it encourages judges to revisit the *undue hardship* standard (Berman & Kushner, 2019). The Commission (American Bankruptcy Institute, 2019, p. 1) summarized its student-loan recommendations as follows:

Table 2
ABA student-loan recommendations

Issue	Recommendation
Student Loans	Student loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it. The Commission recognizes that recent graduates should generally be required to repay government-made or guaranteed student loans, but it recommends statutory amendments to discharge student loans that are • made by nongovernmental entities; • incurred by a person other than the person receiving the education; • being paid through a five-year chapter 13 plan; or • first payable more than seven years before a chapter 7 bankruptcy is filed. In addition, the Commission recommends administrative procedures and interpretations of current law to facilitate reasonable relief from student loan indebtedness.

In addition to changes in the Bankruptcy Code, new businesses specializing in student debt and bankruptcy are also emerging. Reset Button is a new company seeking more proactive litigation as related to student loan debt and bankruptcy (Crook, 2020). According to Iuliano (2012), only one percent of bankruptcy filers attempt to discharge their student loans. Under the right circumstances, courts are more willing to discharge student loan debt than most people, lawyers included, believe, and debtors need to be encouraged to include student loan debt in bankruptcy filings (Iuliano, 2012).

Based on his research, Villanova law professor Jason Iuliano, and co-founder Rob Hunter, created Reset Button to assist in paring debtors with lawyers experienced in obtaining student-loan discharges (Crook, 2020). When customers use Reset Button, they provide their financial and factual circumstances, and customers are paired with litigation attorneys to assess their case that is then compared with previous successful precedent, (Crook, 2020). Reset Button also offers a “Fresh Start” guarantee where it will pay the legal fees if the customer’s debt is not successfully discharged (Crook, 2020).

Chapter 6 - Additional Student-debt litigation

Apart from the bankruptcy landscape, there are also other developing issues regarding student loan debt policy. The following cases illustrate collateral issues related to student loan debt policy.

It seems the DOE was under constant scrutiny as a Federal judge recently held the DOE Secretary in contempt of court. A judge in the Northern District Court of California held that DeVos must pay a $100,000 fine stemming from violations of a court order to stop collection on loans to defrauded students from Corinthian Colleges (Nadworthy & Kementz, 2019). Despite the court order discharging the loans, the DOE continued to demand collection of 16,000 borrowers, even garnishing wages or seizing tax returns (Nadworthy & Kementz, 2019). The DOE claimed it was a mistake and stated any affected borrower has since been made whole, however the rarity of a court holding a cabinet member is rare and worthy of note (Nadworthy & Kementz, 2019).

The DOE is also the defendant in a class-action lawsuit over improper wage garnishment in violation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (*Barber v. DeVos*, 2020). The named plaintiff is Elizabeth Barber, but the class includes over 285,000 people that were affected by the DOE's failure to follow the CARES Act's requirements. The complaint alleges violation of the Administrative Procedure Act, and seeks damages including declaratory relief, reimbursement of garnished wages, attorneys' fees, and costs.

Barber

In 2010, Barber attended Nazareth College studying psychology; however, she is currently working as a home health aide earning about $20,000 per year (*Barber v. DeVos*, 1:20-cv-01137-CJN (D.D.C. 2020)). In 2019, she defaulted on her student loan, owing approximately $10,000, and the DOE began to garnish her wages on December 12, 2019. From January 2020 to present, the DOE garnished 12 percent of her paycheck (*Barber v. DeVos*, 1:20-cv-01137-CJN (D.D.C. 2020)). Under the HEA, and the Debt Collection Improvement Act, the DOE has the authority to garnish a federal student loan borrower's wages without a court order (20 U.S.C. § 1095(a), 31 U.S.C. § 3720(D)). This effectively allows the DOE to garnish wages through an administrative proceeding rather than obtaining a court judgment like every other debt in the United States. In 2018, the DOE garnished over $840 million using this expedited process (Student Defense, 2020). Essentially, when it pertains to a student loan and wage garnishment, a debtor is denied due process of law. In 2018, the DOE reported it garnished over $840 million from student loan borrowers (*Barber v. DeVos*, 1:20-cv-01137-CJN (D.D.C. 2020)).

According to the four counts of the complaint, the DOE violated the CARES Act by continuing to garnish wages despite the March 27, 2020, mandate to suspend all involuntary collection, including wage garnishment, of defaulted Direct and FFEL loans currently held by the DOE (*Barber v. DeVos*, 1:20-cv-01137-CJN (D.D.C. 2020)). The DOE has taken the position that this is merely an oversight, and any improper garnished wages will be returned; however, given the dire financial circumstances of many of those affected, this created further hardships and the return of funds may be too late to make any meaningful difference.

Public Service Loan Forgiveness Program

The Public Service Loan Forgiveness program (PSLF) has also received criticism. In 2017, when the first borrowers became eligible, 99 percent of applicants were denied forgiveness (Minsky, 2020). In March of 2020, the DOE released the latest statistics for the PSLF, and the results showed little improvement. According to the DOE's Federal Student Aid report (2020), out of 174,495 PSLF applications submitted and processed to date, the DOE approved 3,174. This represents a 1.8 percent approval rate, or an increase of .08 percent since the program's inception. The DOE's management of the PLSF has been criticized for failing to provide important, relevant information to borrowers qualifying for forgiveness (Minsky, 2020). Review of the PSLF determined many servicers gave incorrect information about the type of loan that qualified, or the type of repayment plan that was eligible for forgiveness (Minsky, 2020). As a result, many borrowers dutifully paid expecting to have their loans forgiven only to find out they were not eligible and were denied for the benefit.

University of Phoenix Settlement

Lastly, there are examples of higher-education institutions opting for early settlement rather than engaging in protracted and expensive litigation. For example, the University of Phoenix recently settled a case for $191 million, at the outset of the Federal Trade Commission's filing of a complaint against the for-profit university. The complaint alleged the University of Phoenix relied heavily on advertising to attract students, including specific ads targeting military and Hispanic students (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)). The ads highlighted high-level employers such as Microsoft, Twitter, Adobe, and Yahoo!, and gave the false impression that the University of Phoenix had working relationships with those companies to create job opportunities for its students and tailor its curriculum for such jobs (*FTC v. the Univ. of Phoenix, Inc., and Apollo Educ. Grp., Inc.*, 2:19-cv-05772-ESW (D. Ariz. 2019)).

The FTC filed the complaint December 10, 2019, and that is the same day the Stipulated Order was entered by the court. The order cancels $141 million in student debts owed to the university by people who enrolled from October 2012 through the end of 2016 (Chappell, 2019). However, this sum does not apply to federal or private loans, and discharging those loans must be evaluated through other borrower defense provisions such as the Borrower Defense Rule (Chappell, 2019).

Chapter 7 - Conclusion

The amount of student loan debt continues to rise, and there is nothing to suggest this trend will change (Education Data, 2021). After review of the relevant case law, policy positions, and trends within the literature, three prominent factors emerge when considering the future of student debt relief. The steady increase in student debt poses a challenge that must be at the forefront of policy considerations as it impacts economic, legal, and political issues from the highest level on down.

Economic factors continue to affect students and impact the economy at large (Nocera, 2020). While the COVID-19 pandemic has put even greater strain on the economy, student debtors were feeling economic hardship well before the pandemic. According to Nocera (2020), student loan reform is as much about creating economic stimulus as it is forgiving debt. Because of high student loan debt, many millennials have been unable to buy a first home, take a low-paying job, start a new business, and get sustainable credit (Cornelius, 2015; Nocera, 2020). From a macro-economic perspective, high student loan debt prevents millions of young people from participating in the economy on any meaningful level, thus impacting the economy as a whole (Cornelius, 2015; Nocera, 2020).

Legal factors are also important to understanding any student debt reform. Economic hardship and uncertainty have led to an increase in student debt litigation, and courts are now reviewing what seemed be established precedents in bankruptcy law (*Rosenberg v. New York State Higher Educ. Serv. Corp.*, Case No. 18-09023, (S.D.N.Y. Bankr. 2018); *McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10th Cir. 2020)). With courts fashioning rulings expanding on established law, and the potential for new Borrower Defense Rules, the legal landscape for student debt relief through litigation may be a viable avenue. The passage of bankruptcy reform laws has seen an increase in supporters (Nocera, 2020). The suggestion of allowing a student-loan discharge, absent the *undue hardship* standard, would strike a balance between those in favor of student loan forgiveness and those against it. Bankruptcy reform would force the government, or private lenders, to better underwrite loans, ensuring the ability to pay (Nocera, 2020). Those borrowers deemed unable to afford certain loans could augment underwriting requirements by participating in improved graduated repayment plans (Nocera, 2020).

Additionally, review of the current case law reveals a shift in the precedent related to the *undue hardship* rule (*Rosenberg v. New York State Higher Educ. Serv. Corp*., Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). While only a few courts have acknowledged this rationale, it is more than have done within the last 50 years. Additionally, courts are willing to push reasoning beyond what was expected in previous decisions (*McDaniel v. Navient Solutions*, LLC, 973 F.3d 1083 (10^{th} Cir. 2020); *Rosenberg v. New York State Higher Educ. Serv. Corp*., Case No. 18-09023, (S.D.N.Y. Bankr. 2018)). These decisions alone tend to show a substantial shift, at least in the view of some courts. It is too early to determine if the bankruptcy court's reasoning was based on the Trump administration's positions, or if those cases were mere outliers. However, recently, Democratic senators proposed a new law restructuring the Bankruptcy Code and allowing the forgiveness of student loan debt. The bill seeks to treat student loan debt like any other debt dischargeable in bankruptcy and may be promising given the current state of the senate under Democratic control (Minsky, 2021). Nevertheless, it is reasonable to suggest that a favorable environment for student loan debt relief, whether in the form of loan forgiveness, lower interest rates, or increased repayment programs, would have an impact on student loan litigation.

Lastly, with the bleak outlook that for the first time in American history the millennial generation will be worse off than their parents (Luhby, 2020), the need for student loan reform has necessarily become an important political issue, and many are looking to the current administration to pass some form of reform (Minsky, 2021). On March 1, 2021, President Biden confirmed Miguel Cardona as Secretary of the DOE, replacing the controversial Betsy DeVos (Minsky, 2021). Upon his confirmation, Cardona issued a statement summarizing his leadership goals as student centered, renewing a focus on streamlining financial aid access while easing the burden of student debt, and responsibly managing taxpayer dollars (Department of Education, Press Office, 2021). Cardona further stated student loan debt would be a priority in this administration, but no mention was made of amending the Final Rule or specifics related to reform (Minsky, 2021). In addition to the DOE Secretary, other groups have also been vocal about the need for student loan reform. Congress has endorsed cancelling up to $50,000 of student loan debt through executive order (Seddiq, 2021). This type of relief is touted as a means to help the struggling economy due to the Covid-19 pandemic (Seddiq, 2021), but the implications are far greater to struggling students and other groups have pushed for student debt relief (Minsky, 2021).

At the state level, 17 attorneys general, collectively representing about 100 million Americans, signed a letter to Congress in support of student loan cancellation (Minsky, 2021). The letter focuses on the struggle to enforce consumer protection laws and references the difficulty that borrowers have in navigating opaque and confusing repayment laws (Attorneys General, 2021). More so, the letter describes inadequate remedies for default that unfairly affect people of color (Attorneys General, 2021). Cancelling $50,000 of student debt would provide reparations for predatory lending practices that have disproportionately harmed people of color, while boosting the struggling economy and allowing a clean slate for millions of Americans overwhelmed by student debt (Attorneys General, 2021).

In addition to the government sector, over 325 organizations supported a letter to the President voicing concerns over student debt. Organizations from sectors such as civil rights, community groups, consumer rights advocates, health, climate, labor unions, and student advocacy groups called for executive action to cancel student debt, citing similar concerns as the other groups, such as racial inequality, boosting the economy, increasing public support, and positively impacting health outcomes (Americans for Financial Reform, 2021).

These concerns are not limited to public sector groups, and over 1,100 academics endorsed a letter to the President supporting student debt relief. Published in the *Chronicle of Higher Education*, the letter points out racial disparity in student loan debt as well as inefficiencies in Income Driven Repayment Plans (IDR plans) (Chronicle of Higher Education, 2021). These proponents suggest cancelling student debt through an executive order is a progressive policy that eliminates the need for students to jump through bureaucratic hoops like qualifying for an IDR plan or a loan forgiveness program (Chronicle of Higher Education, 2021). Tax reform legislation would be able to "claw back" cancellations for students not entitled to the benefit due to a higher income (Chronicle of Higher Education, 2021).

There is also increased public support for student debt reform. Various polls show public support for some form of student debt reform. Over 63 percent of Americans support cancelling at least $20,000 in student debt during the pandemic (Lake Research Partners & Chesapeake Beach Consulting, 2020). Another poll showed 67 percent would support some form of widespread student loan forgiveness, and only 26 percent believed student loan debt should not be forgiven at all (Winter, 2020).

The use of Executive Orders is another area where student loan debt policy is being considered. While still very early into his first term, President Biden has openly discussed forgiving a portion of student debt, but his early suggestions are far short from what his critics think is needed (Misky, 2021). President Biden has voiced support to immediately cancel $10,000 of student loan debt (Seddiq, 2021). In response, critics have suggested cancelling up to $50,000 of student loan debt through an executive order (Seddiq, 2021), but the President is reluctant to go that far (Minsky, 2021). However, both President Biden and other stakeholders agree something needs to be done with student debt (Minsky, 2021). This type of relief is touted as a means to help the struggling economy due to the COVID-19 pandemic (Seddiq, 2021), but the implications are far greater to struggling students and other groups have pushed for student debt relief (Minsky, 2021). Of note, there has been no discussion if the cancellation of debt would be off the principal amount or merely the interest amount, thereby providing a windfall to lending institutions.

To date, student debt reform has come in the form of executive orders. Executive orders for loan forbearance have been implemented to stay payments for most student loans. As of March 13, 2020, under the Trump administration, executive orders addressed the looming status of the 1.6 trillion-dollar debt as all student loans were put into a six-month emergency forbearance due to the Covid-19 pandemic (Seddiq, 2021). On his first day in office, President Biden extended the forbearance to September 2021(Seddiq, 2021).

Given this breadth of factors, making policy considerations is exceedingly complex. The Federal government’s adoption of stimulus polices totaling over $2 trillion can be argued as a response to unprecedented circumstances related to the pandemic; however, at least currently, the economic, social, and political impact have yet to be determined. As student loan debt relief is acknowledged as means to mitigate the pandemic's effects on the economy (Seddiq, 2021), this type of stimulus would more than cover the existing student loan debt and could be another policy determination in reacting to the pandemic. Particularly given the implementation of a second and third stimulus, it is interesting to contemplate the impact of wiping out student loan debt as an impact to spur the economy versus the push toward continued stimulus payments. There remains little doubt the future of student loan debt will remain of the utmost concern to all stakeholders. One thing remains constant, whether student-loan reform occurs through political or judicial means, there appears to me no consensual solution, and the debt continues to grow, currently at an annual rate of 23.6 percent, or 513 percent faster than the United States gross domestic product (Education Data, 2021).

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