JUBILEE UNDER TEXTUALISM

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INTRODUCTION

The idea of federal student loan "jubilee"—widespread loan forgiveness carried out by the executive without additional action by Congress—continues what one scholar has called its "march from the margin of policy debates to the center."[1] In 2019, presidential candidates Bernie Sanders and Elizabeth Warren called for the cancellation of student loans, but they did not explicitly say that the executive branch should do the forgiving. Sanders's and Warren's plans either called for action by Congress or were silent.[2]

In 2020, two legal analyses defending the lawfulness of jubilee appeared.[3] Warren linked to one of them on her campaign website[4] and pledged to "use existing laws on day one of my presidency to implement my student loan debt cancellation plan."[5] Since then, calls for executive forgiveness have grown ever louder. A congressional resolution calling on President Biden to use executive authority garnered sixty cosponsors, including Senate Majority Leader Chuck Schumer.[6]

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1. Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. 281, 281 (2020).

2. *See* John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725, 768–69 & n.96 (2019) (discussing candidates' positions).

3. *See* Herrine, *supra* note 1; *see also* Letter from Eileen Connor. Legal Dir., Legal Servs. Ctr. Harv. L. Sch. et al., to Sen. Elizabeth Warren (Sept. 14, 2020), https://www.warren.senate.gov/imo/media/doc/Ltr%20to%20Warren%20re%20admin%20debt%20cancellation.pdf [hereinafter CLM Letter]. These analyses apparently built on 2016 work by Robyn Smith and Deanne Loonin at the National Consumer Law Center and work conducted in 2017 by Luke Herrine, a Ph.D. student at Yale Law School. *See* Andrew Marantz, *What Biden Can't Do on Student Debt*, NEW YORKER (Oct. 29, 2021), https://www.newyorker.com/news/news-desk/what-biden-cant-do-on-student-debt-and-what-he-wont-do.

4. The version posted to the website is dated January 13, 2020. *See* Letter from Eileen Connor, Legal Dir., Legal Servs. Ctr. of Harv. L. Sch. et al., to Sen. Elizabeth Warren (Jan. 13, 2020), https://assets.ctfassets.net/4ubxbgy9463z/2uD5wivUoQ0z2do0dtxMP4/26e1c137389de86cbce575e68c6f908b/Ltr_to_Warren_re_admin_debt_cancellation.pdf.

5. *My Plan to Cancel Student Loan Debt on Day One of My Presidency*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/student-loan-debt-day-one (last visited Dec. 29, 2021).

6. Adam S. Minsky, *Here's Everyone Who Wants Biden to Cancel Student Loan Debt (It's a Big List)*, FORBES (Feb. 23, 2021, 11:02 AM), https://www.forbes.com/sites/adamminsky/2021/02/23/heres-everyone-who-wants-biden-to-cancel-student-loan-debt-its-popular/?sh=45cb764241c0.f

Seventeen state attorneys general wrote to Congress in favor of jubilee.[7] There is also a robust movement in civil society for executive forgiveness: 325 public interest organizations joined one pro-jubilee letter,[8] and over 1,000 academics joined another.[9]

For his part, as a presidential candidate, President Biden supported cancelling $10,000 of student debt per borrower through federal legislation.[10] As president-elect, he expressed doubts about his authority to forgive federal student loans unilaterally;[11] advocates replied by drafting an executive order directing a jubilee for his signature.[12] In April 2021, President Biden directed the Departments of Education and Justice to collaborate on an analysis of executive authority to forgive student loans.[13] As of late December 2021, that analysis is not available. The Department did release e-mails and versions of a memorandum on the subject in August 2021 in response to a Freedom of Information Act request,[14] but all substantive analysis of widespread loan forgiveness was redacted.[15] Although some have speculated that the official review will conclude that the executive does not have the power to forgive student loans without congressional action,[16] the released e-mails may suggest otherwise.[17]

7. *Id.*

8. *Id.*

9. *Id.*

10. *See* Emily Stewart, *The Debate Over Joe Biden Canceling Student Debt, Explained*, VOX (Dec. 28, 2020, 9:11 AM), https://www.vox.com/policy-and-politics/22152601/biden-student-loan-debt-cancellation.

11. *See* Karen Tumulty, Opinion, *Trump Is Trashing the Government on His Way Out. Biden Is Confident He Can Fix It.*, WASH. POST (Dec. 23, 2020, 6:13 PM), https://www.washingtonpost.com/opinions/trump-is-trashing-the-government-on-his-way-out-biden-is-confident-he-can-fix-it/2020/12/23/c69fc9c2-4553-11eb-b0e4-0f182923a025_story.html (quoting then President-elect Biden: "[I]t's arguable that the president may have the executive power to forgive up to $50,000 in student debt . . . . Well, I think that's pretty questionable. I'm unsure of that. I'd be unlikely to do that").

12. *See Executive Order: Continued Student Loan Payment Relief During the COVID-19 Pandemic*, DEBT COLLECTIVE, https://debtcollective.org/debtcollective-flickofapen.pdf (last visited Nov. 30, 2021).

13. *See* Lauren Egan, *Biden to Review Executive Authority to Cancel Student Debt*, NBC NEWS (Apr. 1, 2021, 4:08 PM), https://www.nbcnews.com/politics/white-house/biden-review-executive-authority-cancel-student-debt-n1262791.

14. *See* Marantz, *supra* note 3.

15. *See* U.S. Dep't of Educ., Debt Cancellation Analysis Documents, Apr. 1–8, 2021, https://s3.documentcloud.org/documents/21096471/21-02311-f.pdf [hereinafter U.S. Dep't of Educ. Debt Cancellation Analysis Documents]; *see also* Aarthi Swaminathan, *Student Loan Forgiveness: Heavily Redacted Biden Administration Memo Becomes Public*, YAHOO! NEWS, Nov. 2, 2021 (linking to cited documents from sentence, "A long-awaited memo related to student loan debt cancellation is now public in heavily redacted form."). A brief unredacted part of one draft asserts that the Department has used its authority under the HEROES Act to effectuate certain "waivers and modifications" without legal challenge, including in 2020, but does not address cancellation or forgiveness. U.S. Dep't of Educ. Debt Cancellation Analysis Documents, *supra*, at 48.

16. *See* Zack Friedman, *Will Your Student Loans Get Cancelled? Legally, No.*, FORBES (May 15, 2021; 12:18 PM), https://www.forbes.com/sites/zackfriedman/2021/05/15/will-your-student-loans-get-cancelled-legally-speaking-no/?sh=3a1f39b76255 (Stating that "[b]ased on current law," the review requested by Biden "could be another setback for student loan cancellation.").

17. *See* U.S. Dep't of Educ. Debt Cancellation Analysis Documents, *supra* note 15, at 42 (memorandum co-author suggesting "we may want to directly engage with the Rubinstein memo" and "[o]ur Rubinstein countering in the original was [redacted]." The referenced "Rubinstein memo" may well be the January 2021 memorandum from the Department's Office of the General Counsel to Secretary DeVos, authored by Reed Rubinstein, that concluded that executive forgiveness was unlawful. For further discussion, *see infra* note 55.

Increasing appreciation of the problems with student loans, including the racial-justice dimension of these problems,[18] has sparked much scholarly reflection. Some have proposed relatively narrow remedies, such as raising public awareness of bankruptcy relief[19] and making such relief substantively and procedurally easier to obtain.[20] Others have offered intellectually ambitious reconceptualizations of student loan debt[21] or of the government's use of debt to achieve social goals in general.[22] But student loan jubilee stands out among all these proposals as a strikingly bold action that potentially can be taken immediately.

This Article examines two legal questions that are critical for executive loan forgiveness. The first is whether the Higher Education Act ("HEA") authorizes the executive to order a jubilee for at least some student loans.[23] Applying the textualist approach to statutory interpretation currently ascendant in the federal courts, the Article concludes the answer is probably "yes." The textual arguments against jubilee that have been offered to date are weak. The nontextual arguments, though analytically stronger, are likely to get short shrift in today's federal courts. Here, Luke Herrine, a Ph.D. student at Yale Law School, and the Harvard team previously mentioned—Eileen Connor, Deanne Loonin, and Toby Merrill ("the CLM group")—have laid out the basic case[24]: this Article's contribution is to evaluate criticisms of these authors' reasoning and to do so through a textualist lens.

18. *See* Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 132 (2020) ("Student debt plays an increasingly significant role in perpetuating the subordination of Black and Latinx people in the United States.").

19. Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 500 (2020) ("[A]ny comprehensive solution must . . . encourage individuals to assert their legal rights" to bankruptcy discharge).

20. *See* Pamela Foohey et al., Essay, *Changing the Student Loan Dischargeability Framework: How the Department of Education Can Ease the Path for Borrowers in Bankruptcy*, 106 MINN. L. REV. HEADNOTES 1, 1, 11–12 (2021) (arguing that Department should adopt a presumptive position of not contesting bankruptcy discharge of student loans); John Patrick Hunt, *Reforming Student Loan Bankruptcy Procedure*, 73 BAYLOR L. REV. 355 (2021) (proposing shifting burden of proof to creditors in student loan bankruptcies); John Patrick Hunt, *Student Loan Purpose and the* Brunner *Test*, 15 HARV. L. & POL'Y REV. 237 (2020) (proposing reformulating "undue hardship" standard applicable to student loan bankruptcies to permit middle-class lifestyles); Matthew Bruckner et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 UNIV. COLO. L. REV. 183 (2020) (proposing that Department consent to student loan bankruptcy discharge in certain situations, such as where the borrower experiences disability or prolonged poverty); Dalié Jiménez et al., *Comments of Bankruptcy Scholars on Evaluating Undue Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114 (2018).

21. *See* John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 11 (2020) (advocating abandoning debt paradigm of education finance in favor of "grant-and-tax" paradigm).

22. *See* Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1411 (2020) ("[A] progressive credit policy is necessarily limited when combined with a restrictive debt policy that does not account for how structural inequality meaningfully inhibits cash flow and reinforces and exacerbates existing social inequality."); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1099 (2019) ("Credit is fundamentally incompatible with the entrenched intergenerational poverty that plagues low-income Americans.").

23. *See* discussion *infra* Part II.

24. *See* Herrine, *supra* note 1, at 367–78; CLM Letter, *supra* note 3, at 3–6. Merrill has recently taken a position as Deputy General Counsel in the Department of Education. *See U.S. Department of Education Announces More Biden-Harris Appointees*, U.S. DEP'T OF EDUC. (July 6, 2021), https://www.ed.gov/news/press-releases/us-department-education-announces-more-biden-harris-appointees-2.

The second issue addressed by the Article arises if the Secretary of Education ("Secretary") is authorized to cancel at last some student loans. Given that assumption, the next question is whether the Secretary's jubilee authority covers all federal student loans rather than just a relatively small subset.[25] From a textualist perspective, this question likely turns on whether the Secretary's jubilee authority, or the potential use of that authority, is among the "terms, conditions, and benefits" of student loans.[26] This Article offers a qualified "yes" as the probable answer here.While others such as Herrine and the CLM group have discussed the key statutory provisions of the HEA Act,[27] this Article expands upon previous scholars' treatment.

The Article advances the debate over the executive's jubilee authority in three ways. First, it demonstrates the importance of the meaning of "terms, conditions, and benefits," and it extends the analysis of that phrase's meaning in the HEA. Second, it engages with critiques of jubilee authority, which no law review article has done to date. Third, it seeks to refocus the debate to emphasize textual arguments that are likely to be more persuasive to federal courts.

The Article proceeds as follows. Part I recounts the main argument that jubilee is authorized for all federal student loans. In brief, it runs as follows: Provisions governing one older federal student loan program, the Federal Family Education Loan Program ("FFELP"), expressly authorize the Secretary to "compromise, waive, or release"[28] federal claims and to "consent to modification" of student loan obligations.[29] The Article refers to the Secretary's power to compromise, waive, release, and modify FFELP loans as "relinquishment authority."

Assuming the Secretary has authority to forgive FFELP loans, the next question is whether that authority extends to the much larger[30] and currently active[31] Direct Loan Program ("DLP"). Two provisions of the HEA state or imply that DLP loans have, with specified exceptions, the "same terms, conditions, and benefits" as FFELP loans.[32] Following the CLM group, the Article calls these the "parity provision[s]."[33] Under the parity provisions, if the executive's relinquishment authority, or the possibility that loans might be cancelled under that authority, or both, are within the "terms, conditions, and benefits" of FFELP loans, they are also within the "terms, conditions, and benefits" of DLP loans, and the executive may unilaterally cancel loans made under that program.

25. *See* discussion *infra* Parts III–IV.

26. *See* 20 U.S.C. §§ 1087a(b)(2), 1087e(a)(1).

27. *See* Herrine, *supra* note 1, at 370–71; CLM Letter, *supra* note 3, at 3.

28. *See* 20 U.S.C. § 1082(a)(6).

29. *See id*. § 1082(a)(4).

30. As of the end of the second quarter of 2021, the total outstanding balance on FFELP loans was $238.8 billion, and the total outstanding balance on DLP loans was $1,348.3 billion. *See Federal Student Loan Portfolio Summary*, U.S. DEP'T OF EDUC., https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last updated Mar. 31, 2021) [hereinafter U.S. Dep't of Educ. Fed. Stud. Loan Summary].

31. Congress terminated the issuance of new loans under the FFELP as of June 30, 2010. *See* 20 U.S.C. § 1071(d)(1).

32. *Id.* §§ 1087a(b)(2), 1087e(a)(1).

33. *See* CLM Letter, *supra* note 3, at 3 n.5.

Part II evaluates the argument in Part I that jubilee authority exists and the criticisms of that argument. After a brief overview of the criticisms in Part II.A, Part II makes two major points. First, a committed textualist would probably reject the arguments made to date that the HEA does not authorize jubilee at all. The textualist arguments, addressed in Parts II.B and II.C, are relatively weak, and nontextualist arguments, addressed in Part II.D, would likely be disregarded given the plain language of the statute. Part II.E addresses arguments against jubilee that are based not on the HEA, but rather on the Constitution or regulations. The Article observes, based on what has appeared to date, that jubilee proponents probably have the better of these arguments. The apparent weakness of the arguments that jubilee authority is nonexistent highlights the importance of understanding what loans that authority applies to, assuming it does exist.

Part III turns to the analysis of whether jubilee power extends to DLP loans. Part III.A surveys the view of the Department of Education ("the Department") concerning whether its powers over the FFEL Program extend to direct loans. The Department has consistently taken the position that they do, but apparently it has never given an explanation for this position rooted in the statute's language. Part III.B describes judicial opinions that have addressed whether FFEL authorities cover the DLP. Although a number of courts have adopted the Department's view of the matter, and there is little contrary judicial authority, the issue does not appear to have been contested, and courts, like the Department, have not given a textually based explanation for their conclusions.

Part IV addresses whether the Department's jubilee power extends to the DLP through the parity provisions. In other words, it asks whether the jubilee power, or the prospect of its exercise, is part of the "terms, conditions, and benefits" of FFELP loans. In brief, it concludes that jubilee power probably, but not certainly, covers direct loans.

Part IV.A considers whether "terms, conditions, and benefits" is used in the parity provisions as a discrete phrase with a distinct meaning. Finding no evidence that this is the case—and finding little guidance on the boundaries of what the phrase would cover—the Article turns to the analysis of the phrase's components. Part IV.B addresses whether the prospect of relief under the relinquishment power is a "benefit" FFELP loans offer borrowers. Based on the plain meaning of "benefit" and the statute's use of "benefit" to describe loan cancellation generally, among other items, Part IV.B concludes that the opportunity to have one's loans cancelled in the exercise of relinquishment authority is probably a "benefit" of FFELP loans.

Part IV.C analyzes whether relinquishment authority is part of the "terms and conditions" of FFELP loans. The statute refers to the adjustment of repayment plans as part of the "terms and conditions" of Title IV loans. Moreover, FFELP promissory notes, in providing "information about the terms and conditions" of FFELP loans, note the possibility of loan cancellation. And contracts generally are deemed to incorporate the relevant statutory background. Accordingly, it is likely that relinquishment authority is part of the "terms and conditions" of FFELP loans.

Part IV.D addresses the possibility that relinquishment authority is a "term" of FFELP loans. Although "term" is often subsumed within "terms and conditions,"

important contract-law sources, including Corbin's leading treatise, the Restatement (Second) of Contracts, and the Uniform Commercial Code, all define "term" standing on its own. Relinquishment authority probably fits all three definitions of "term," and the HEA refers to the Secretary's authority to waive certain repayments as a "term" of an agreement. Thus, if "term" has a meaning distinct from "terms and conditions," relinquishment authority probably fits into it as well.

Part IV.E takes up the possibility that the nonexercise of relinquishment authority might be a "condition" of FFELP loans. It concludes that although such nonexercise may fit both the dictionary and the specialized contract-law meanings of "condition," that word apparently has not been used to describe the one contract party's nonexercise of its right to release the other from contractual duties.

Part IV.F considers whether relinquishment authority applies to DLP loans because it is a "term, condition, or benefit" of the FFEL Program, even if it is not a "term or condition" of FFELP loan contracts or a "benefit" of FFELP loans under the ordinary meaning of "benefit." Program "terms and conditions" typically encompass all the rules governing a program, so relinquishment authority could fit this definition. Relinquishment authority could also be a program "benefit," in the sense of financial aid provided, or potentially provided, under a program.

Part IV.G addresses two remaining textual issues with the meaning of "terms, conditions, and benefits" in the parity provisions. It demonstrates that the HEA's structure supports the idea that FFELP powers extend to the DLP. The HEA provides the Secretary with detailed, explicit authorities for operating the FFELP but not the DLP. Instead, the DLP has the parity provision, which is sensibly interpreted as filling in the gaps in DLP authorities. Finally, Part IV.G explains that not all FFELP powers can apply to the DLP, as some are specific to the FFELP's unique structure and do not make sense in the context of the DLP. Thus, "same terms, conditions, and benefits" has a limited scope of application. This is not a problem for jubilee, however, as relinquishment authority makes sense in the context of both the FFELP and the DLP.

To be sure, there are some doubts about whether relinquishment authority applies to direct loans. The statute does not appear to refer expressly and specifically to relinquishment authority as part of the "terms, conditions, and benefits" of FFELP loans. Nor does the statute expressly define that phrase or any of its constituent parts. FFELP loan "benefits" could conceivably have some technical meaning that excludes relinquishment authority. Or perhaps only executed loan forgiveness, not just the possibility of loan forgiveness, counts as a "benefit." Perhaps the fact that relinquishment authority arises from statute rather than the loan agreement excludes it from the "terms and conditions" (and the "terms," and the "conditions") of the contract. And maybe the argument based on the rules of the FFEL Program fails because those rules are not necessarily included in the "terms, conditions, and benefits" of loans made under the program.

Nevertheless, the textual case for jubilee authority over direct loans appears on balance to be stronger than the case against it. Moreover, there is no obvious reason for the Secretary's authority over DLP loans to be more limited than the authority over FFELP loans. In other words, although the argument that the Secretary's jubilee

authority extends to direct loans may not be airtight, there seems to be little affirmative reason to find that the authority does *not* extend so far.

I. SETTING THE STAGE: THE TEXTUAL ARGUMENT FOR JUBILEE AUTHORITY

Part I lays out the main argument advocates have made for the legality of jubilee. It shows that the interpretation of the statutory phrase "terms, conditions, and benefits" is crucial to the argument that jubilee authority extends to loans made under the Direct Loan Program.

Herrine[34] and the CLM authors[35] have laid out a straightforward textual argument that the executive has the power to cancel student loans without further congressional action. They point out[36] that the Higher Education Act of 1965 ("HEA") provides as follows, granting the power to "compromise," "waive," "release," and "modify" certain student loans ("relinquishment authority"):

> (a) In the performance of, and with respect to, the functions, powers, and duties vested in him by this part, the Secretary may—
>
> . . . .
>
> (4) subject to the specific limitations in this part, *consent to modification, with respect to* rate of interest, time of payment of any installment of principal and interest or any portion thereof, or *any* other *provision* of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;
>
> . . . .
>
> (6) enforce, pay, *compromise, waive, or release any* right, title, *claim*, lien, or demand, however acquired, including any equity or any right of redemption.[37]

The power, "with respect[] to the functions, powers, and duties" of title IV, part B of the HEA to "waive . . . or release any . . . claim . . . however acquired" would seem to include the power to cancel student debt. The powers to "compromise" claims and "modif[y] . . . any . . . provision of any note or other instrument evidencing a loan" also seem likely to authorize loan cancellation, although this conclusion may be more debatable. Thus, the grant of relinquishment authority

34. *See* Herrine, *supra* note 1.

35. *See* CLM Letter, *supra* note 3.

36. *See* Herrine, *supra* note 1, at 342; CLM Letter, *supra* note 3, at 3. Others have discussed these provisions in connection with the Department's authority to consent to discharge of student loans in bankruptcy. *See* John Patrick Hunt, *Consent to Student Loan Bankruptcy Discharge*, 95 IND. L.J. 1137, 1179–80 (2020) [hereinafter Hunt I].

37. 20 U.S.C. §§ 1082(a)(4), (a)(6) (emphasis added). The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision . . . under title IV of the [HEA] as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Id.* § 1098bb(a)(1). Given the Covid-19 emergency, it is possible that this provision could also provide a basis for loan cancellation.

seems to be an unambiguous and explicit grant of authority to cancel loans within its scope.

The more difficult issue is determining just what those loans are. Relinquishment authority arguably is limited to loans made under the Federal Family Education Loan Program, which has not made new loans since 2010.[38] Thus, relinquishment authority may not extend to loans made under the still active and much larger[39] Federal Direct Loan Program.

Relinquishment is authorized "[i]n the performance of, and with respect to, the functions, powers, and duties, vested in [the Secretary] by this part[.]"[40] The reference to "this part" in the quoted text is to Part B of Chapter 28, Subchapter IV of the U.S. Code, titled "Federal Family Education Loan Program" and containing rules for the FFELP.[41] Part D of the subchapter, which governs the Direct Loan Program, contains no analogous explicit grant of authority.[42] (The Article refers to these as Part B and Part D of Title IV of the HEA, or simply as Part B and Part D.) Thus, the Secretary's relinquishment[43] authority may not extend to DLP loans.

As Herrine,[44] the CLM group,[45] and others[46] have pointed out, provisions within Part D of Title IV of the HEA arguably carry relinquishment authority over to direct loans. 20 U.S.C. § 1087e(a)(1) within Part D provides, "[u]nless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under §§ 1078, 1078-2, 1078-3, and 1078-8 of this title."[47] The enumerated sections all appear in Part B and govern FFELP loans,[48] so any item that is part of the "terms, conditions, and benefits" of all FFELP loans would be part of the "terms, conditions, and benefits" of direct loans as well.

20 U.S.C. § 1087a(b)(2), also within Part D, provides, "loans made to borrowers under this part that, except as otherwise specified in this part, have the same terms, conditions, and benefits as loans made to borrowers under section 1078 of this title, shall be known as 'Federal Direct Stafford/Ford Loans.'"[49] Although this provision

38. *See id.* § 1071(d)(1). ("[N]o new loans . . . may be made or insured under this part [*Part B of Title IV, governing the FFELP*] after June 30, 2010."); *see also infra* note 39 and accompanying text.

39. *See* U.S. Dep't of Educ. Fed. Stud. Loan Summary, *supra* note 30 (reporting that DLP loans have an outstanding balance more than five times that of FFELP loans).

40. 20 U.S.C. § 1082(a).

41. *See id.* §§ 1071–1087-4.

42. *See id.* §§ 1087a–1087j.

43. Herrine discusses potential interpretations of "compromise," "waive," "release," and "modify" that give each term a distinct meaning and avoid surplusage. *See* Herrine, *supra* note 1, at 373–75. In addition, the Restatement (Second) of Contracts provides that a "release" is a written instrument discharging a contractual duty that takes effect immediately upon delivery unless made conditional. RESTATEMENT (SECOND) OF CONTRACTS § 284 (AM. L. INST. 1981).

44. Herrine, *supra* note 1, at 370.

45. CLM Letter, *supra* note 3, at 3.

46. *See* Hunt I, *supra* note 36, at 1180–81.

47. 20 U.S.C. § 1087e(a)(1) (2021). The clause "first disbursed on June 30, 2010," *id.*, presumably reflects the fact that that was the last date under which FFELP lending was permitted. *See id.* § 1071(b).

48. *See id.* §§ 1078, 1078-2, 1078-3, 1078-8.

49. *Id.* § 1087a(b)(2)(A).

just seems to give a program a name, the Department and courts have relied on it to extend the Department's FFELP powers to the DLP.[50] At a minimum, § 1087a(b)(2) underscores the idea that DLP loans have the same terms, conditions, and benefits as FFELP loans.

Thus, if the Secretary's relinquishment authority, or the possibility of benefiting from that authority, is part of the "terms, conditions, and benefits" of FFELP loans, the authority, or the opportunity to benefit from it, apparently would also be part of the "terms, conditions, and benefits" of direct loans.[51] The Secretary would be legally authorized to order jubilee.

II. TEXTUALISM AND THE EXISTENCE OF JUBILEE AUTHORITY

Part II argues that under a textualist approach to statutory interpretation, relinquishment authority should be interpreted to cover a federal student loan jubilee, despite the objections jubilee opponents and skeptics have raised. After all, there is a strong case that authority to "waive . . . or release any . . . claim" includes the authority to order a jubilee. The part begins with a high-level overview of the critiques of jubilee authority in Part II.A, then considers textualist arguments in detail in Part II.B. Part II.C addresses the bridge between textualist and nontextualist arguments: the claim that the statute is ambiguous. Part II.D evaluates nontextualist arguments against jubilee authority that are based on the HEA. Part II.E briefly addresses arguments against jubilee authority that are not based on interpreting the HEA. This last topic is potentially quite involved, and the Article confines its discussion of that particular area to evaluating the arguments others have made to date.

A. Overview of Jubilee Critiques and Importance of Textual Analysis

The preceding section set forth the leading argument supporting the Secretary's authority to order a federal student loan jubilee. It appears that two major critiques of that argument exist. One is laid out in a memorandum prepared by the Department of Education's Office of the General Counsel for the outgoing secretary, Betsy DeVos.[52] The memorandum flatly concludes that jubilee is not authorized.[53] The other is a short piece in the *Regulatory Review* by Harvard Law School's Professor

50. *See* discussion *infra* Parts III.A–III.B.

51. *See* CLM Letter, *supra* note 3, at 3; Hunt I, *supra* note 36, at 1180–81.

52. *See* Memorandum from Reed D. Rubinstein, Principal Deputy Gen. Counsel, U.S. Dep't of Educ. Off. of the Gen. Couns. to Betsy DeVos, Educ. Sec'y, U.S. Dep't of Educ. 1–8 (Jan. 12, 2021), *reprinted in* Colin Mark, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?*, app. B (Harv. L. Sch. Briefing Papers on Fed. Budget Policy, Briefing Paper No. 74, Apr. 2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3819989) [hereinafter OGC Memo].

53. *See* OGC Memo, *supra* note 52, at 1.

Howell Jackson and his student, Colin Mark;[54] this contribution draws on another paper by Mark.[55] It presents a more nuanced analysis, identifying "considerable . . . legal risks" with proceeding "precipitously" with jubilee.[56]

Most of the criticism of the pro-jubilee argument so far has been along the lines that relinquishment authority does not extend to jubilee, rather than that relinquishment authority does not extend to all student loans issued under federal programs. For example, Jackson and Mark argue that the grant of relinquishment authority is ambiguous[57] in that it could provide either "plenary compromise authority"—or what this Article calls "jubilee authority"[58] or "constrained compromise authority."[59] The authors contend that although the boundaries of the latter "are not clearly defined," constrained compromise authority includes only the power to make individualized decisions about loan cancellation based on the borrower's inability to pay or other equitable considerations.[60] Presumably, under this interpretation of the Secretary's authority, the Secretary would thus be unable to order jubilee.

The OGC Memo, eschewing ambiguity, argues that it is clear that the HEA grants only constrained compromise authority to use Jackson and Marks' terms. The Memo asserts that U.S.C. § 1082(a)(6) "is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress."[61]

In evaluating these criticisms, textualist analyses of student loan jubilee are critical. The federal courts and the Supreme Court have turned decisively toward textualist interpretation in a process that has been going on since the late 1980s.[62] As Justice Elena Kagan stated with perhaps only slight exaggeration a few years ago, "[W]e're all textualists now."[63] At the least, textualism means that a statute's purpose

54. Howell Jackson & Colin Mark, *Executive Authority to Forgive Student Loans Is Not So Simple*, REGUL. REV., (Apr. 19, 2021), https://www.theregreview.org/2021/04/19/jackson-mark-executive-authority-forgive-student-loans-not-simple/.

55. Mark, *supra* note 52.

56. Jackson & Mark, *supra* note 54.

57. *See id.* ("The language of the HEA itself is ambiguous.").

58. *See id.* (arguing that if the Secretary has "plenary compromise authority," they can "forgive any amount of student debt, including debts of borrowers perfectly capable of repaying their loans.") (emphasis omitted).

59. *See id.* (emphasis omitted).

60. *See id.* ("[C]onstrained compromise authority" could be used only "where borrowers lack the financial capacity to service their student loans or other equitable considerations warrant debt relief.").

61. OGC Memo, *supra* note 52, at 4 (internal citations omitted).

62. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) ("[T]extualism has in recent decades gained considerable prominence within the federal judiciary"); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 6–7 (2018) ("[A]lthough the lower courts and the Supreme Court all shifted toward textualist tools starting in the late-1980s, the change was dampened and less transformative at each step further down the judicial hierarchy."); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22 (2014) ("In the Rehnquist-Roberts era, the Court has firmly forsworn its *Holy Trinity* power in favor of a more textualist approach.").

63. Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation.

cannot trump its text,[64] but the Supreme Court has gone farther than that. As Professor Tara Leigh Grove has noted, the recent Supreme Court decisions in *Bostock*[65] and *McGirt*[66] cases mark the rise of "formalistic textualism," which "emphasizes semantic context, rather than social or policy context, and downplays the practical consequences of a decision."[67] The Article discusses these cases below.[68] In general, this Article takes as its guide to textualism the treatise *Reading Law*,[69] coauthored by "the leading theorist as well as practitioner of what has been dubbed the new textualism,"[70] the late Justice Scalia. That work is cited throughout.

It might be argued that it is inappropriate to focus on the federal courts' approach to statutory interpretation because no one has standing to challenge jubilee in federal court. This appears incorrect, however. For example, federal loan servicers are compensated based on the volume of loans they service.[71] Mass elimination of federal loans would therefore seem to reduce servicers' contractual compensation (to zero). The loss of benefits that a party otherwise would receive under a contract is economic injury sufficient for standing.[72] The Department documents on the legality of executive debt cancellation released in August 2021 reveal that the authors of the analysis were in fact concerned about "litigation risk."[73] And previous commentators on jubilee have cited federal case law extensively, thus recognizing the importance of the judiciary's approach to the relevant legal questions.[74]

64. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16–17 (2012).

65. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020).

66. McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020).

67. *See* Grove, *supra* note 62, at 269. Grove argues that federal judges should use this interpretive mode because it constrains them from simply following policy preferences. *See id.*

68. *See* discussion *infra* Part II.D.

69. SCALIA & GARNER, *supra* note 64.

70. William N. Eskridge, *The New Textualism and Normative Canons, Book Review:* Reading Law: The Interpretation of Legal Texts, *by Antonin Scalia and Bryan A. Garner*, 113 COLUM. L. REV. 531, 532 (2013).

71. *See, e.g.*, AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT BETWEEN DEPARTMENT OF EDUCATION AND GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., at 4 (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0012_MOD_0080_GreatLakes.pdf (providing "unit rates" for servicing federal student loans).

72. *See* Umbehr v. McClure, 44 F.3d 876, 878–79 (10th Cir. 1995), *cert. granted*, Board of Cty. Comm'rs v. Umbehr, 518 U.S. 668 (1996) (government contractor whose contract was terminated allegedly in retaliation for exercise of First Amendment rights had standing to sue, although termination was "valid" under the terms of the contract itself); 13A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3531.4 (3d ed. 2008) ("Generally, pecuniary or economic injury is a legally protected interest.").

73. *See* U.S. Dep't of Educ. Debt Cancellation Analysis Documents, *supra* note 15, at 43.

74. *See* Herrine, *supra* note 1, at 343–67 (citing federal caselaw extensively in arguing that jubilee would be an unreviewable exercise of discretion); OGC Memo, *supra* note 52, at 1–8 (citing federal caselaw throughout in support of argument that jubilee is not authorized).

B. Textual Arguments Based on the Higher Education Act

The OGC Memo announces its fealty to textualist principles[75] and acknowledges that a straightforward (or, to quote the memo, "hyperliteral,")[76] reading of the HEA supports a finding of jubilee authority. Nevertheless, the memo advances two textualist reasons the statute should not be read to authorize jubilee: doing so supposedly would (1) "swallow up and render surplusage many Title IV provisions"[77] and (2) "needlessly create" constitutional issues.[78] At least as the OGC Memo presents these arguments, neither is convincing under current law.

1. The Specific and the General

The OGC Memo argues that the Secretary cannot cancel federal student loans *en masse* because the Higher Education Act contains many specific loan cancellation provisions, and "the specific governs the general."[79] Jackson and Mark also point to the existence of targeted forgiveness, cancellation, and repayment assistance provision as a problem for jubilee authority, although they describe the issue as a "contextual" one and argue from administrative practice. They suggest that if the Secretary of Education had jubilee authority, previous secretaries would not have treated the limits on these specific programs as binding because they could have forgiven any federal student loans they wanted.[80]

The OGC Memo's argument seems misplaced. The Memo quotes at length the late Justice Scalia's opinion in *Gateway Hotel, LLC v. Amalgamated Bank*.[81] The quotation explains that the specific-versus-general canon applies when the scope of a general provision must be limited to give a specific provision some scope of operation and save it from superfluity.[82]

That idea does not apply to the relationship between relinquishment authority and more specific loan cancellation programs. That is because, with one exception to be discussed, the "specific" grants of authority the OGC cites are mandatory, while the general grant of relinquishment power is permissive. Jubilee proponents can simply argue in response that the Secretary *may* forgive all FFELP and DLP loans using the relinquishment power and *must* forgive some loans under more specific provisions. There is no need to limit the relinquishment power to save the provisions for specific cancellation programs from surplusage.

75. OGC Memo, *supra* note 52, at 2 ("The nature and scope of the Secretary's HEA authority is determined by construing the relevant statutory text in accordance with its ordinary public meaning at the time of enactment.") (citing Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020)).

76. *See* OGC Memo, *supra* note 52, at 3.

77. *Id.* at 4.

78. *Id.*

79. *Id.* at 3–4, 6.

80. *See* Jackson & Mark, *supra* note 54; *see also* Mark, *supra* note 52, at 23–24.

81. *See* OGC Memo, *supra* note 52, at 3–4; *see also* Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012).

82. *See Gateway Hotel, LLC*, 566 U.S. at 645.

Consider the citations to specific loan forgiveness programs that the OGC Memo gives.[83] One states that borrowers who meet certain requirements "shall be eligible for deferment."[84] Another provides that the Secretary "shall specify" criteria for borrowers' defense to repayment.[85] A third does not appear to exist in the current U.S. Code.[86]

Other examples of specific instructions to the Secretary to forgive certain loans, not cited by OGC in this context, include the mandates that the Secretary "shall cancel" the debt of borrowers who complete the requirements of PSLF,[87] that borrowers "shall be eligible for deferment" under certain circumstances,[88] that the Secretary "shall repay or cancel any outstanding balance" for borrowers that complete income-based repayment plans,[89] that the Secretary "shall develop and make available a simple method for borrowers to apply for loan cancellation" under TEPSLF,[90] and that the Secretary "shall discharge" certain loans when the borrower dies or becomes permanently disabled,[91] or in certain circumstances when a school closes, falsely certifies borrower eligibility, or fails to pay a refund due to a lender.[92] The pandemic-relief CARES Act might be interpreted as providing for a limited form of debt cancellation, and it does so in mandatory terms. It provides that the Secretary "shall suspend all payments due"[93] for a certain period and that interest "shall not accrue"[94] during that period.

The only clearly discretionary provision[95] the OGC Memo cites is U.S.C. § 1098(a)a, found in the HEROES Act, which provides that the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the Act as the Secretary "deems necessary" to achieve certain goals.[96] But this provision is not specific relative to the grant of relinquishment authority. It encompasses all aspects of the student loan programs ("*any* . . . provision"), not just modification or cancellation of loans. For example, the Department has used its HEROES Act authority during the Covid-19 emergency to permit accrediting agencies to conduct virtual site visits,[97] allow institutions to offer virtual classes, and allow foreign medical school graduates to receive loans

83. *See* OGC Memo, *supra* note 52, at 3.

84. 20 U.S.C. § 1087e(f)(1).

85. *See id*. § 1087e(h).

86. *See* OGC Memo, *supra* note 52, at 3 (citing 20 U.S.C. § 1094(b)(3)).

87. 20 U.S.C. § 1087e(m)(1).

88. *See id*. § 1087e(f)(1).

89. *Id.* § 1098e(b)(7); *see also id.* § 1087(d)(1)(D), (E) (Secretary "shall offer" income-driven repayment plans); *id.* § 1098e(b) (Secretary "shall carry out a program" for income-based repayment).

90. Consolidated Appropriation Act, 2018, Pub. L. 115-141, § 315, 122 Stat. 348, 752 (2018).

91. 20 U.S.C. § 1087(a)(1).

92. *See id*. § 1087(c)(1).

93. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, § 3513(a), 134 Stat. 281, 404 (2020).

94. *Id.* § 3513(b).

95. 20 U.S.C. § 1078-12(d) may be interpreted as a narrow grant of discretionary waiver authority but may be better read as a disclosure mandate. *See id.* § 1078-12(d)(1) (requiring that agreements between borrower and Secretary contain certain items).

96. *Id.* § 1098bb(a)(1).

97. *See* Federal Student Aid Programs, 85 Fed. Reg. 79,856, 79,857 (2020).

without reporting MCAT scores.[98] None of these matters has to do with the compromise, waiver, release, or modification of outstanding loans. There is no need to exclude jubilee from relinquishment authority to give effect to U.S.C. § 1098(a)a.

Thus, the existence of specific loan cancellation programs does not weigh against finding jubilee authority on the ground that the specific governs the general.

2. Avoidance of Constitutional Doubt

Statutes should be interpreted to avoid constitutional doubt,[99] and the OGC Memo suggests that this doctrine obstructs jubilee.[100] The OGC Memo suggests that jubilee raises questions under the Appropriations Clause,[101] and Jackson and Mark refer to questions raised by the Property Clause.[102] Although the doctrine of avoidance of constitutional doubt may seem nontextualist because it introduces issues that may not bear on how an ordinary user of English would understand the relevant text, authorities on the subject assure us that it is, in fact, a textualist doctrine.[103] A full first-principles analysis of the constitutional issues raised by federal student loan jubilee is beyond the scope of this Article. However, as the OGC Memo lays those issues out, it does not appear that the avoidance-of-doubt principle applies to the question of whether relinquishment authority encompasses jubilee power.

The doctrine of avoidance of constitutional doubt is irrelevant because the question here is not whether jubilee is constitutional, but rather, whether it is congressionally authorized. The avoidance doctrine would be relevant if it were unconstitutional for Congress to empower the executive to forgive debts on a widespread basis. That would be a reason to interpret the HEA not to authorize jubilee. But the OGC Memo identifies no reason that Congress may not constitutionally grant the executive jubilee authority and therefore no basis for "constitutional doubt" if Congress has in fact done so. Instead, the Appropriations and Property Clauses forbid the executive to forgive debts to the United States *without* congressional authorization.[104] If Congress has granted the executive jubilee

98. *See id.*

99. *See* SCALIA & GARNER, *supra* note 64, at 247–61

100. OGC Memo, *supra* note 52, at 2.

101. *Id.* at 1. The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" U.S. CONST. art. I, § 9, cl. 7.

102. The Property Clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2. Although Jackson and Mark do not explicitly invoke the doctrine of avoidance of constitutional doubt, their claim that a clear-statement rule applies to jubilee seems likely to be based on this principle. *See* Jackson & Mark, *supra* note 54.

103. *See, e.g.*, SCALIA & GARNER, *supra* note 64, at 247–51 (noting that a "more plausible" interpretation of the canon than that it is based on a "genuine assessment of probable meaning," is that it "represents judicial policy, a judgment that statutes ought not to tread on questionable constitutional grounds unless they do so clearly.").

104. *See* Royal Indem. Co. v. United States, 313 U.S. 289, 294 (1941) ("Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress . . . . Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be inferred from other powers so granted."); *see also* CLM Letter, *supra* note 3, at 1 (addressing this issue directly). As for the Appropriations Clause, the CLM Letter argues that Congress has expressly excluded

authority, jubilee is authorized and apparently creates no constitutional problem under the Appropriations and Property Clauses of the United States Constitution.

Both Herrine and Mark point out a different, arguably more important, constitutional problem with jubilee authority: the nondelegation doctrine.[105] That doctrine requires that Congress provide an "intelligible principle" for the executive to follow when exercising delegated legislative authority.[106]

However, as Herrine points out,[107] the nondelegation doctrine has been applied quite permissively since the New Deal era: the Supreme Court has not used it to invalidate a statute since 1935.[108] The Court has upheld broad delegations of authority, such as to set prices,[109] to regulate broadcasters "in the public interest,"[110] and to set "just and reasonable" power rates.[111] Thus, under current law, the nondelegation doctrine does not raise much constitutional doubt to avoid.

But, as Herrine observes,[112] several justices have expressed interest in revitalizing the doctrine,[113] particularly with respect to requiring clear statements to find delegations of authority to resolve major policy questions.[114] Whether and how the current Supreme Court will strengthen the nondelegation remains speculative. Notably, even if the Court does demand a clear delegation because the decision to undertake a federal loan jubilee is so momentous, the delegation of authority to "waive . . . or release any . . . claim"[115] seems clear.

C. Ambiguity and Contextual Evidence

As noted, Jackson and Mark argue that the grant of relinquishment authority is ambiguous in that it can be read to grant either "plenary" or "constrained compromise authority."[116] If the Secretary enjoys only what Jackson and Mark call "constrained compromise authority," arguably loans could be cancelled only on an individual basis, and jubilee would be unlawful.[117]

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federal student loan programs from the requirement of annual appropriations. *See* CLM Letter, *supra* note 3, at 6. Neither OGC nor Jackson and Mark rebut this contention. *See* discussion *infra* Part II.E.

105. *See* Herrine, *supra* note 1, at 398; Mark, *supra* note 52, at 27.

106. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

107. *See* Herrine, *supra* note 1, at 398.

108. *See Gundy*, 139 S. Ct. at 2130.

109. *See* Yakus v. United States, 321 U.S. 414, 420 (1944).

110. *See* NBC v. United States, 319 U.S. 190, 217 (1943).

111. *See* Fed. Power Co. v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944).

112. *See* Herrine, *supra* note 1, at 398.

113. *See Gundy*, 139 S. Ct. at 2133–42 (Gorsuch, J., dissenting) (criticizing Court's application of nondelegation doctrine in recent decades); *id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

114. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (recounting Justice Rehnquist's view that delegation of authority over major policy questions requires that Congress "expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce").

115. 20 U.S.C. § 1082(a)(6).

116. *See* Jackson & Mark, *supra* note 54.

117. *See id*.

But the text that Jackson and Mark focus on does not seem all that likely to be found ambiguous. They assert that powers to "compromise" and "modify" may not encompass jubilee, and then seem to argue that that in turn creates an ambiguity as to whether the powers to "release" and "waive" include the power to declare a jubilee.[118] But, as noted, U.S.C. § 1082(a)(6) confers the power to "compromise, waive, *or* release any . . . claim."[119] There is no indication that a waiver or release must also be a compromise or modification. Indeed, the surplusage canon counsels that each term should have a distinct meaning.[120] Thus, if some of the Secretary's powers have particular limits, that says nothing about whether other powers have the same limits.[121]

Moreover, contrary to Jackson and Mark's suggestion that cancellation may be permitted only for "can't-pay" or other special borrowers, the statute explicitly authorizes waiver or release of "any" claim. Especially given that the specific-versus-general and avoidance-of-constitutional-doubt canons do not support the argument against jubilee,[122] the statute simply does not seem to leave much room to argue that authorization to "waive" "any" "claim" is not authorization to waive any claim.

The same absence of ambiguity means that jubilee proponents need not fret over any notion that courts require a clear statement of authorization to dispose of claims owned by the United States.[123] Jackson and Mark assert that "the courts have demanded that executive authority to spend federal dollars be explicitly granted to agencies and not inferred from ambiguous statutes or by implication."[124] It is not obvious that waiving or releasing a federal claim is "spend[ing] federal dollars" in the sense Jackson and Mark use the term. After all, no federal money changes hands when the government decides not to collect direct loans.[125] But more fundamentally, the grant of authority here is clear: "may . . . waive . . . or release any . . . claim."

Presumably, Jackson and Mark argue for ambiguity in part to open the door to the "contextual"[126] arguments they present against jubilee. After all, if the statutory text is plain, there is no room for extratextual considerations.[127] Despite the

118. *See id.* (contrasting "open-ended language" of "release" and "waive" with possibly more restricted meanings of "compromise" and "modify").

119. 20 U.S.C. § 1082(a)(6) (emphasis added).

120. *See* SCALIA & GARNER, *supra* note 64, at 174–79.

121. 20 U.S.C. § 1082(a)(6) empowers the Secretary to "enforce, pay, compromise, waive, or release" claims. The broad spectrum of authorities rebuts any suggestion that "waive" and "release" should be limited by the principle of *noscitur a sociis*. *See* SCALIA & GARNER, *supra* note 64, at 195–98 (discussing principle of *noscitur a sociis*).

122. *See* discussion *supra* Part II.B.

123. *See* Mark, *supra* note 52, at 14 (executive debt forgiveness requires a "clear statutory basis").

124. Jackson & Mark, *supra* note 54.

125. Perhaps "loans" disbursed with no intention to collect might be considered disguised spending, but that does not imply that a change of mind about collecting outstanding loans is itself spending.

126. *See* Jackson & Mark, *supra* note 54 ("At least four contextual considerations . . . weigh against" finding of "plenary compromise authority").

127. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."); Voisine v. United States, 136 S. Ct. 2272, 2282 n.6 (2016) (extratextual arguments cannot succeed "if the statute is clear").

probability that the HEA is not ambiguous about granting the Secretary jubilee authority, the Article does address Jackson and Mark's contextual claims.

D. Nontextual Arguments Based on the Higher Education Act

The underlying idea of many arguments against jubilee authority is, in essence, that no one ever thought the Secretary had jubilee power, so the power must not exist. One version of this argument looks to agency interpretation and practice. Jackson and Mark argue that in administering the HEA's many specific loan cancellation programs, Education Secretaries "have always proceeded under the assumption that statutory limits" on such programs "are binding"[128] and that that assumption is incompatible with the existence of jubilee authority.

Assuming that assertion is accurate, past secretaries' attitudes here seem to reflect unexamined assumptions more than reasoned interpretations of the relinquishment provisions. It appears that no agency statements predating the recent OGC opinion affirmatively assert that jubilee is unauthorized, much less offer a defense of that view.[129] The OGC opinion itself might receive limited to no judicial deference: it was issued outside the contexts of adjudication and notice-and-comment rulemaking,[130] and judicial deference to agency statutory interpretation may be on the wane in general.[131] Even more important, the Biden administration presumably would adopt a contrary position if it were to proceed with executive forgiveness.[132] Although the letter might be persuasive without being authoritative,[133] this Article argues throughout this Part that the memorandum's position on whether relinquishment authority encompasses jubilee is not persuasive.

Jackson and Mark argue that no legislative history directly supports interpreting the statute to authorize jubilee (or what they call "plenary compromise authority") and that such an interpretation is not needed to fulfill the purpose of relinquishment

128. *See* Jackson & Mark, *supra* note 54 ("Over the years, Education Secretaries … have always proceeded under the assumption that statutory limits [on specialized loan forgiveness programs] are binding.").

129. The OGC Memo states that it memorializes advice the office gave the Secretary, perhaps as early as March 2020. *See* OGC Memo, *supra* note 52, at 1. That advice, if it was written down at all, does not appear readily available.

130. *See* United States v. Mead Corp., 533 U.S. 218, 226–30 (2000) (noting that *Chevron* applies only when agency is acting to exercise interpretive authority delegated by Congress and giving adjudication and notice-and-comment rulemaking as examples of such action).

131. *See, e.g.*, Nathan Richardson, *Deference Is Dead (Long Live* Chevron), 73 RUTGERS U. L. REV. 441, 441 (2021) ("*Chevron* is not the influential doctrine it once was and has not been for a long time . . . . In recent years, agencies have won only a handful of statutory interpretation cases . . . . Only once since 2015 has deference been outcome-determinative.").

132. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (noting justification for *Chevron* deference to agency interpretation based on political accountability of the executive). This justification suggests that courts should defer to the interpretation of the current, politically accountable, administration when the executive reverses its course.

133. *See Mead Corp.*, 533 U.S. at 220 (where *Chevron* deference to agency interpretation not available, interpretation still entitled to "respect proportional to its power to persuade"); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (agency interpretation deserves "weight" if it has "power to persuade, if lacking power to control").

authority, apparently as revealed by legislative history.[134] Such support is unnecessary where, as here, the statutory text is plain.[135]

In another example of argument apparently based on the premise that previously unappreciated implications of plain text are inherently suspect, the OGC Memo contends that interpreting relinquishment authority to authorize jubilee would "create a paradigmatic 'elephant in a mousehole.'"[136] This oft-quoted, even "tired,"[137] metaphor stands for the idea that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[138]

The OGC Memo's argument here begs the question, as the Memo does not try to show that any of the premises of the elephants-in-mouseholes maxim is met. It does not try to show that the grant of jubilee authority over FFELP loans is "vague;" in fact, "may . . . waive . . . any . . . claim" seems clear. It does not try to show that relevant provision is "ancillary;" the statutory section is titled "Legal powers and responsibilities"[139] and contains many fundamental rules of the student loan program.[140] And it does not try to show that relinquishment authority, which reportedly has been part of the student loan programs from the beginning,[141] is an "alter[ation]" of any scheme. As the Supreme Court recently asked in a different but comparable context, "where's the mousehole?"[142]

All three arguments just discussed seem to have their roots less in lack of statutory clarity than in the view that knowledgeable people generally have not in the past assumed that relinquishment authority authorizes jubilee. Jackson and Mark call the no-jubilee interpretation the "traditional" view of the HEA.[143] They question "the proposition that Congress in 1965 effectively authorized the expenditure of what could be in excess of $1 trillion of public resources over the next few years by granting the Secretary unbridled compromise authority,"[144] concluding "[t]o say the least, that grant of authority was not explicit and is far from clear."[145] The OGC Memo is less explicit on this point, but given the seemingly clear statutory text, the

134. *See* Jackson & Mark, *supra* note 54 ("[N]o direct evidence in the legislative history of the HEA" of intent to confer jubilee authority; "that interpretation would not have been necessary to achieve the efficiency goals" of providing compromise authority).

135. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020).

136. OGC Memo, *supra* note 52, at 4.

137. *See* Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1355 (2020).

138. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

139. 20 U.S.C. § 1082 (2021).

140. *See, e.g.*, *id.* § 1082(a)(1) (authorizing the Secretary to "prescribe such regulations as may be necessary to carry out the purposes of this part"); *id.* § 1082(a)(2) (authorizing Secretary to "sue and be sued" in federal court); *id.* § 1082(a)(3) (authorizing Secretary to include in federal loan insurance contracts "such terms, conditions, and covenants relating to . . . such . . . matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved.").

141. *See* Mark, *supra* note 52, at 19 (asserting that relinquishment authorization seems to have "originated a 1945 draft of amendments to the Servicemen's Readjustment Act of 1944 (the 'GI Bill').").

142. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753 (2020); *see also* Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1355 (2020) (holding relevant statutory provision "less a mousehole and more a watering hole—exactly the sort of place we would expect to find this elephant").

143. Jackson & Mark, *supra* note, at 54.

144. *Id.*

145. *Id.*

view that relinquishment authority is a "mousehole" seems to arise from the assumption that the authority has not previously been understood to encompass jubilee.

But the textualist Supreme Court deemphasizes such past assumptions about the meaning and implications of legal documents in favor of strict adherence to legal document's text.[146] Consider the Court's opinion in *Bostock v. Clayton County*,[147] which holds that discrimination on the basis of sexual orientation and transgender status violates the statutory ban on discrimination on account of "sex."[148] For the majority, Justice Gorsuch addressed the argument that "because few in 1964 expected today's *result*, we should not dare admit that it follows ineluctably from the statutory text."[149] He wrote, "That is exactly the sort of reasoning this Court has long rejected. . . . [T]he employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying behind it."[150] Putting the same point even more bluntly, Justice Gorsuch wrote, "in the context of an unambiguous statutory text, whether a specific application was anticipated by Congress is irrelevant."[151]

Likewise, in *McGirt v. Oklahoma*,[152] the Court found that under the plain meaning of relevant treaties and statutes, a reservation was established for the Creek Nation within the boundaries of Oklahoma and was never disestablished.[153] It dismissed Oklahoma's arguments that it was common knowledge that the reservation did not exist and that settled practice treated it as nonexistent,[154] finding that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear."[155] The opinion prompted a dissent to characterize the majority's decision as resting on the "improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation."[156] Again, common understandings of the meaning of legal text gave way to plain meaning.

The OGC Memo contends that it is "hyperliteral and contrary to common sense"[157] to read "the Secretary may . . . release any . . . claim"[158] as meaning that the Secretary may in fact release any claim. Before the Supreme Court's textualist majority, such arguments may fall on deaf ears.

146. *See also* discussion *supra* Part II.A.

147. *Bostock*, 140 S. Ct. at 1731.

148. 42 U.S.C. § 2000e-2(a)(1).

149. *Bostock*, 140 S. Ct. at 1750. In quoting this passage, this author does not substantively endorse the view that "few in 1964 expected today's result."

150. *Id.*

151. *Id.* at 1751 (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 at 212 (1998)) (internal quotations omitted).

152. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

153. *See id.* at 2460–69.

154. *See id.* at 2468–74.

155. *Id.* at 2469.

156. *Id.* at 2482.

157. OGC Memo, *supra* note 52, at 3.

158. *See* 20 U.S.C. § 1082(a)(6).

E. Arguments Not Based on the Higher Education Act

A final group of arguments about jubilee authority is not based on interpreting the HEA itself. For reasons of space, this Article does not analyze all these potential legal obstacles to a jubilee from first principles or primary sources. But the analyses that have been prepared to date suggest that these arguments are not particularly strong. Arguments from outside the HEA focus on the Appropriations Clause, the Property Clause, the Antideficiency Act, the Federal Claims Collections Act ("FCCA"), the Federal Claims Collection Standards ("FCCS") promulgated thereunder, and the Department's regulations adopting the FCCS. Each is addressed in turn.

The OGC Memo cites the Appropriations Clause,[159] which provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[160] The Memo does not actually develop an argument based on the clause, however. The CLM Letter argues that no specific congressional appropriations action is needed to operate and modify the federal student loan programs,[161] which apparently are entitlement programs.[162] It appears that the Department successfully expanded income-driven repayment during the Obama administration without special congressional appropriation (or other approval); those expansions were like a jubilee in that they reduced required repayments, arguably increasing the cost of the student loan programs.[163] Tellingly, Professor Jackson, who teaches a seminar on federal budget policy at Harvard Law School[164] and whose scholarship addresses entitlement spending,[165] does not argue that executive jubilee would violate the Appropriations Clause.

The Property Clause forbids executive officers from disposing of federal government property *unless* the power to do so is "conferred upon them by Act of

159. *See* OGC Memo, *supra* note 52, at 1.

160. U.S. CONST. art. I, § 9, cl. 7.

161. *See* CLM Letter, *supra* note 3, at 6; 2 U.S.C. § 661c(c)(1) (annual appropriation requirement for federal loans and guarantees does not apply to "a direct loan or guarantee program that constitutes an entitlement (such as the guaranteed student loan program)").

162. *See* U.S. DEP'T OF EDUC., STUDENT LOANS OVERVIEW: FISCAL YEAR 2013 BUDGET REQUEST, at R-28 (2013), http://www2.ed.gov/about/overview/budget/budget13/justifications/r-loansoverview.pdf ("The student loan programs . . . were authorized as entitlement programs in order to meet student loan demand").

163. *See* Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1699–1700 (2017). The estimated increases in the federal budget deficit due to the IDR expansions were accounted for through "re-estimation" of program cost. *See id.* n.100. Congress has provided "permanent indefinite authority" for re-estimates of the cost of federal direct loans and loan guarantees. *See* 2 U.S.C. § 661c(d); *see also* CLM Letter, *supra* note 3, at 6.

164. *See* Howell E. Jackson, *Briefing Papers on Federal Budget Policy* (current through Apr. 2021), https://scholar.harvard.edu/briefingpapers/home (collecting papers written for Professor Howell E. Jackson's seminar on Federal Budget Policy, which includes Mark's *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?*); *see* Mark, *supra* note 52.

165. *See, e.g.*, FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson, eds., 2009); Howell E. Jackson, *Accounting for Social Security and Its Reform*, 41 HARV. J. ON LEGIS. 59 (2004) (arguing for accrual accounting treatment of Social Security entitlement); Howell E. Jackson, *Reply*, 41 HARV. J. ON LEGIS. 221 (2004) (replying to responses to *Accounting for Social Security*).

Congress or is to be implied from other powers so granted."[166] The affirmative argument for jubilee authority concedes that jubilee must be congressionally authorized and contends that it is congressionally authorized. The Property Clause's requirement of congressional authorization does not appear to add anything to the analysis.

The Antideficiency Act forbids spending without an appropriation[167] and actually criminalizes knowing or willful unauthorized spending.[168] As Herrine notes, this provision apparently duplicates the proscription in the Appropriations Clause.[169] Moreover, reportedly no one has ever been prosecuted under the Antideficiency Act.[170]

The FCCA, the default statute governing the collection of federal claims, provides that agencies must "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency."[171] But the FCCA probably applies only where there is no separate grant of statutory settlement authority to the agency,[172] and the pro-jubilee contention is that the HEA's relinquishment provision is such a separate, specific grant.

Assuming the HEA does authorize jubilee, the most significant legal obstacle to immediate action by order of the Secretary seems to be the Department's own claims collection regulations.[173] These regulations state that "[t]he Secretary uses" the [FCCS] "to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department"[174] and that, as to debts arising under Title IV student loan programs, "under the provisions of [the FCCS], the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount."[175] If the Department must follow the FCCS in cancelling student loan debt, that could be a problem for jubilee, because the FCCS provide that

166. Royal Indemnity Co. v. U.S., 313 U.S. 289, 294 (1941) (cited in CLM Letter, *supra* note 3, at 1).

167. *See* 31 U.S.C. § 1341(a)(1)(A)–(B).

168. *See id*. § 1350.

169. *See* Herrine, *supra* note 1, at 400. The Antideficiency Act also requires apportionment of appropriations "available for obligation for a definite period" to avoid a deficiency. 31 U.S.C. § 1512(a). This apparently means that agencies are supposed to plan their spending to avoid running out of money. This requirement does not seem relevant in the context of permanent appropriations.

170. *See* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1154 & n.413 (2021).

171. 31 U.S.C. § 3711(a)(1).

172. *See* Federal Claims Collection Act, Pub. L. No. 89-508, § 4, 80 Stat. 308, 309 (1966) ("Nothing in this Act shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his [sic] existing authority to settle, compromise, or close claims."); *see also* Herrine, *supra* note 1, at 379 & n.290 (collecting additional authorities); Mark, *supra* note 52, at 15 & n.97 (collecting additional authorities).

173. *See* Jackson & Mark, *supra* note 54 ("The fourth challenge confronting the proponents of plenary compromise authority stems from the Education Department's own regulations").

174. 34 C.F.R. § 30.70(a)(1) (2021). The quoted provision has a single exception relating to certain claims arising from improper spending by "a recipient of a grant or cooperative agreement." *See id.* §§ 30.70(a)(1), (b).

175. *Id.* § 30.70(e)(1).

"[f]ederal agencies shall aggressively collect all debts" arising out of their activity[176] and authorize compromise only on limited bases.[177]

The CLM Letter argues that these regulatory provisions do not interfere with jubilee,[178] but it is not clear that the authors' arguments would carry the day given the regulations' apparently clear language. Herrine observes that even if the regulations cabin authority to "compromise" claims under § 1082(a)(6), they do not speak to authority to "modify" under § 1082(a)(4)[179] (or, it would seem, to "waive" or "release" claims under § 1082(a)(6)). This argument could well prevail, especially given that the canon against surplusage suggests that the grants of power to "compromise," "waive," "release," and "modify" each is given a distinct, nonidentical scope.[180] But absent a persuasive explanation of why strict standards are appropriate for compromise authority and not for a waiver, release, or modification authority, some might not find the distinction convincing.[181]

However, even if the regulations do forbid executive jubilee, the Department can amend them, as both Herrine[182] and Jackson and Mark[183] point out. The Department might have to go through a notice-and-comment rulemaking process to do so,[184] but if the Secretary were committed to jubilee, the need for rulemaking would probably only delay adoption of the policy, not prevent it.

III. JUBILEE AUTHORITY OVER DIRECT LOANS: EXISTING INTERPRETATIONS

As just discussed, critics of jubilee authority have focused on arguing that authority to "waive . . . or release any . . . claim" does not include jubilee power. But the more serious question of HEA interpretation seems to be whether jubilee power

176. *See* 31 C.F.R. § 901.1 (2021).

177. The permissible bases relate to the debtor's ability to pay and the government's ability and cost to collect. *See id.* § 902.2(a)(1)–(4) (2021). If the Department's regulations obligate it to follow the FCCS, that obligation seems to be a significant hurdle, even though it might be argued that jubilee is compatible with the FCCS because one or more of these bases apply to most or all federal held student loans. *See* CLM Letter, *supra* note 3, at 5–6.

178. The CLM Letter argues that: (1) reading the regulations to limit compromise authority is contrary to their background and purpose; (2) the regulations actually contradict the FCCS, so compliance with the FCCS must not be required; (3) the FCCS do not apply on their own terms because the Secretary enjoys independent settlement authority; (4) the regulations do not bind the Secretary to follow FCCS because their language is precatory and no regulations are needed to implement the Secretary's relinquishment authority; and (5) the FCCS themselves may in fact authorize jubilee. *See* CLM Letter, *supra* note 3, at 5–6.

179. Herrine, *supra* note 1, at 383.

180. *See* SCALIA & GARNER, *supra* note 64, at 174–79.

181. Herrine also argues that the regulations apply only to claims on defaulted loans, appealing to the generally accepted meaning of "collections" in debt enforcement. *See* Herrine, *supra* note 1, at 383. It is not clear from the face of the regulations that they are limited to "collections" in that sense, however.

182. *See id.* at 386; *see also id.* at 383–84 (arguing that FCCS do not restrict the Attorney General's plenary authority to compromise or cancel debts, so that that officer could order jubilee).

183. *See* Jackson & Mark, *supra* note 54 (recommending that executive loan forgiveness be addressed through "through the rulemaking process," which could "clarify the extent to which the Secretary intends to be governed by the requirements of the FCCA going forward.").

184. *See id.* (addressing jubilee "through the rulemaking process" could "clarify the extent to which the Secretary intends to be governed by the requirements of the FCCA going forward.").

extends to DLP loans. As noted,[185] the simplest argument in favor of this proposition would be that relinquishment power, or the opportunity to benefit from relinquishment power, is part of the "terms, conditions, or benefits" of FFELP loans.

In some ways, the inquiry into whether relinquishment power covers the DLP is a mirror image of the inquiry into whether jubilee power exists, covered in Part II. As shown there, the conventional wisdom is that jubilee power does not exist, but the text of the statute suggests that it does. By contrast, the conventional wisdom is that relinquishment power does extend to the DLP, but the textual support for this proposition is less strong (although the conventional wisdom here is probably right in the end).

Perhaps because no one seems to have questioned the application of the Secretary's powers over the FFEL program under Part B of Higher Education Act Title IV to direct loans issued Part D of Title IV, neither Jackson and Mark nor the OGC Memo spend much time on the issue. Jackson and Mark do not appear to address it at all.[186] The OGC Memo seems to contradict itself on the matter. At one point, it expresses doubt that cancellation authority is a "term, condition, or benefit" of FFELP loans;[187] at another, it asserts that "[t]he Secretary's general powers in 20 U.S.C. § 1082(a)(6) also apply to the William D. Ford Federal Direct Loan Program under Part D of Title IV." [188]

This next Part surveys how courts and the Department have interpreted the parity provisions to date. The Department has been consistent in its position that the parity provisions carry its FFEL Program powers over to the Direct Loan Program. The courts have for the most part gone along with this interpretation, which does not seem to have been challenged. This near-uniform body of precedent certainly boosts the argument that jubilee is lawful, but it is not as persuasive as it could be, because it appears that neither the Department nor the courts have explained their conclusions.

A. Department Interpretations

Agencies' interpretations of the statutes they administer are probably becoming less important to federal courts, keeping in line with the overall turn toward textualist interpretation.[189] Nevertheless, the Department's view of whether its statutory authorities relating to FFELP loans carry over to DLP loans merits discussion, both because jubilee proponents have mentioned it[190] and because courts might find the

185. *See* discussion *supra* Part I.

186. Mark's individually-authored paper does argue briefly that it is "possible that the HEA does not provide the Department of Education with the same authority over Direct Loans" that it possesses over FFELP loans. Mark, *supra* note 52, at 16.

187. OGC Memo, *supra* note 52, at 4 n.3 (asserting that conclusion that relinquishment authority applies to DLP loans through parity provision is "debatable because the Secretary's general power to compromise or waive claims under the FFEL program is neither a term nor a condition not a benefit of FFEL program loans.").

188. *Id*. at 3 (citing 20 U.S.C. § 1087a(b)(2)).

189. *See* discussion *supra* Part II.D.

190. *See* CLM Letter, *supra* note 3, at 3 & n.5; Herrine, *supra* note 1, at 370–71, 370 n.264. Herrine also appeals to Congress's overall purpose in ending FFELP lending and replacing it with direct lending to argue that that body probably did not confer less authority to settle or waive DLP claims than to settle or waive FFELP claims. *Id.* at 371 n.265. Especially in combination with the lack of any apparent reason for such a selective

Department's interpretation persuasive. It seems that the Department consistently has treated its relinquishment authority as applicable to the Direct Loan program through the parity provisions, although it has not always stated the point directly. It does not appear, however, that the Department has given a reasoned explanation for why the parity provisions import compromise authority into the Direct Loan Program.

In 2016, the Department stated explicitly that U.S.C. § 1082(a)(6), from Part B, is "applicable to Direct Loan claims by virtue of" U.S.C. § 1087e(a)(1).[191] Separately, as Herrine has pointed out, the Department stated in the course of proposing rules governing collections in the Direct Loan Program, "section 432(a) of the HEA [20 U.S.C. § 1082(a)] authorizes the Secretary to enforce or compromise a claim under the FFEL program; section 451(b) [20 U.S.C. § 1087a(b)] provides that Direct Loans are made under the same terms and conditions as FFEL Loans."[192] This quotation further suggests that the Department's position has been that Part B compromise power carries over to direct loans.

The collection regulations themselves reinforce this view. In those regulations, the Department asserts the authority to "compromise a debt in any amount . . . if the debt arises under . . . the William D. Ford Federal Direct Loan Program."[193] As authority for this provision, the Department cites U.S.C. §§ 1082(a)(5) and (6), as well as § 1087a.[194] Because U.S.C. § 1087a is the only provision of Part D cited, and because it does not in itself authorize loan compromise, the citation seems to assert that U.S.C. § 1087a(b)(2) incorporates the settlement authority of §§ 1082(a)(5) and (a)(6) by reference.[195]

As the CLM Letter points out, the Department has relied on the parity provisions to import specific grounds for discharge from the FFELP to the Direct Loan Program.[196] Part B of the HEA, which governs the FFELP, expressly provides for discharge for death,[197] total and permanent disability,[198] school closure,[199] false

restriction, Herrine's argument seems persuasive. But textualist courts might be reluctant to resolve the question on the basis of such a broad legislative purpose.

191. *See* Student Assistance General Provisions, 81 Fed. Reg. 75,926, 75,930 (Nov. 1, 2016). The Department miscited 20 U.S.C. § 1087e as the nonexistent "20 U.S.C. 1078e(a)(1)." *Id.* The quoted statement was part of the Department's explanation of its rules on collection from schools when a student loan borrower has a defense to repayment. *Id.* at 75, 929-30.

192. *See* Herrine, *supra* note 1, at 370–71; Student Assistance General Provisions, 81 Fed. Reg. 39,330, 39,368 (June 16, 2016).

193. 34 C.F.R. § 30.70(e)(1) (2021).

194. *See id*. § 30.70 (discussing statutory authority).

195. The regulations also cite former U.S.C. § 1221e-3(a)(1) as a source of authority. This provision conferred on the Secretary the general power to "make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation, and governing the applicable programs administered by the agency of which he [sic] is head." 20 U.S.C. § 1221e-3(a)(1) (1993). Congress amended the provision in 1994, but the same general grant of authority to regulate is now found in 20 U.S.C. § 1221e-3 (which now has no subdivisions). *See* 20 U.S.C. § 1221e-3, Amendment Notes. Thus, it appears that the Department did not rely exclusively on powers carried over from Part B to promulgate the collection regulations.

196. *See* CLM Letter, *supra* note 3, at 3 & n.6.

197. 20 U.S.C. § 1087(a)(1).

198. *Id*.

199. *Id.* § 1087(c)(1).

certification of borrower eligibility,[200] and refunds due to a lender but not paid by the borrower's institution.[201] Part D of the HEA, governing the Direct Loan Program, contains no analogous provisions. Nevertheless, the Department adopted regulations for the Direct Loan Program that provide for discharge in all these instances. In doing so, it cited 20 U.S.C. § 1087a *et seq.* for authority.[202] U.S.C. § 1087a is the first § of Part D, so § 1087a et seq. appears to refer to Part D. Given that Part D does not in so many words provide for the discharges in question, it seems that the Department relied on the parity provisions of Part D for authority.

The same appears to hold for the Department's policy on consent to discharge student loans in bankruptcy. In discussing its policies in this area, the Department stated that it "follows the same . . . analysis" for direct loans as for FFELP loans.[203] Given the absence of settlement rules in Part D, the Department presumably relies on the parity provisions here as well.

The Department's view that FFELP settlement authority carries over to direct loans shows up in Delegation EA/EN/68, which delegates to the Chief Business Operations Officer, Business Operations, and Federal Student Aid, the authority to "enforce, compromise, waive, and write off the collection of claims of the Department against individuals who have current student loans . . . or grant overpayments held by the Department."[204] It does so under "those provisions of the Higher Education Act of 1965 that authorize the collection and compromise, waiver, and write-off" of Department claims arising out of the obligation to repay student loans, presumably referring to the relinquishment provision.[205] The delegation does not exclude direct loans and presumably includes them, given the unqualified language of the delegation and the importance of direct loans. Thus, the Department again seems to assert that relinquishment authority applies to direct loans.

As noted, agency interpretations may be persuasive even if they are not entitled to deference.[206] Here, however, the Department has not given a reasoned explanation of its views of the parity provisions, so a court might not give the Department's interpretation much weight.[207]

200. *Id*.

201. *Id*.

202. *See* 34 C.F.R. § 685.212 (2021). The provisions also cite 20 U.S.C. § 1070g as a source of authority, but 1070g does no more than define certain terms. *See* 20 U.S.C. § 1070g. It does not on its face authorize any action.

203. Memorandum from Lynn Mahaffie, Deputy Asst. Sec'y for the Off. of Postsecondary Educ., U.S. Dep't of Educ., *Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings* (July 7, 2015), https://fsapartners.ed.gov/sites/default/files/attachments/dpcletters/GEN1513.pdf.

204. Delegation of Authority – Federal Student Aid (FSA), *Collection and Compromise of Claims Against Individuals Under the Federal Student Aid (FSA) Programs*, U.S. DEP'T OF EDUC. (Nov. 9, 2009), https://www2.ed.gov/about/offices/or/delegations/fsa.html.

205. *Id*. at 1.

206. *See supra* note 133 and accompanying text.

207. *See* discussion *infra* Part II.D.

B. Judicial Interpretations

On at least three occasions, courts have affirmed that the Department's compromise power under Part B of Title IV of the Higher Education Act, specifically U.S.C. § 1082(a)(6), applies to direct loans. However, none of the opinions explains the basis for this interpretation.

In *Weingarten v. DeVos*,[208] the court held that the Department had unreviewable discretion, deriving from U.S.C. § 1082(a)(6), to forgive or not to forgive direct loans. The court stated: "[t]he Department has 'what is known as Compromise and Settlement Authority, which allows [it] to compromise or waive any title or claim.' This authority covers Federal Family Education Loans and Direct Loans alike.[209] The plaintiffs argued that the Department should have exercised its discretion to forgive direct loans[210] because of loan servicer misconduct.[211] The court found that U.S.C. § 1082(a)(6) governed the compromise of direct loans and conferred on the Department unreviewable discretion to exercise or not exercise this power.[212]

In *Vara v. DeVos*,[213] the court noted that the Department had canceled the direct loans of a student who had filed a borrower defense application.[214] The court observed that the Department did not contend that it had "discharged" the borrower's loans through the borrower defense process, "suggesting" that Department acted under its U.S.C. § 1082(a)(6) authority.[215]

In *McCain v. United States*,[216] the Court of Federal Claims treated the Department's settlement authority under U.S.C. § 1082(a)(6) as applicable to a direct loan. The borrower in that case had a Federal Direct Consolidation Loan,[217] a loan made under the Direct Loan Program.[218] The borrower argued that the government had offered to accept a particular amount in full satisfaction of the debt and that she had accepted.[219] In response, the government did not argue that the Secretary lacked authority to settle direct loans. Instead, it contended that no contract existed because the servicer employee who made the offer acted outside the scope of delegated authority.[220] In the course of doing so, the government affirmatively argued that the

208. 468 F. Supp. 3d 322, 338 (D.D.C. 2020).

209. *Id.* at 328. As support, the court cited the complaint, which asserted that the Department's power under U.S.C. § 1082(a)(6) applies to direct loans through U.S.C. § 1087a(b)(2). *Id.* (quoting pages 91–92 of plaintiff's complaint).

210. *See* Complaint at 295, Weingarten v. DeVos, 468 F. Supp. 3d 322 (D.D.C. 2020) (No. 02-056) (asserting that plaintiff took out direct loans to fund her education).

211. *Weingarten*, 468 F. Supp. 3d at 331–32.

212. *Id.* at 338.

213. No. 19-12175-LTS, 2020 U.S. Dist. LEXIS 112296, at *1 (D. Mass. June 25, 2020).

214. The opinion does not specify that the borrower had direct loans, but the Department's filings do establish that. *See id* at *41.

215. *Id.* at *44 n.11.

216. No. 10-264C, 2011 U.S. Ct. Fed. Claims LEXIS 1107, at *1, *5 (Fed. Cl. June 17, 2011).

217. *Id*.

218. *Id.* at *5 n.6; *see* 20 U.S.C. § 1087e(a)(2)(C).

219. McCain v. United States, No. 19-12175-LTS, 2011 U.S. Ct. Fed. Claims LEXIS 1107, at *15 (D. Mass June 25, 2020).

220. *Id.* at *20–*25.

Secretary and authorized delegates have the power to compromise direct loans.[221] The court accepted this apparently undisputed framing, writing:

> [A]ny offer to compromise and settle a student loan debt must be authorized and approved by the Secretary of Education, or his authorized delegates, in accordance with sections 432(a) and 468 of the Higher Education Act of 1965 [20 U.S.C. §§ 1082(a) & 1087hh], which authorize the Secretary of Education to collect, write-off, and compromise claims of the [Department of Education] against individuals arising from their obligation to repay current or defaulted student loans held by the [Department of Education].[222]

The court ultimately agreed with the government that there was no contract because the servicer employee acted outside the scope of delegated authority.[223]

Student loan servicers are commonly sued for violating state consumer protection statutes, and they commonly defend by arguing that federal law preempts the state statute at issue.[224] A number of courts have stated in this context that the parity provisions make Part B statutory or regulatory provisions governing servicers applicable to servicing of direct loans.

For example, in the recent case of *Lawson-Ross v. Great Lakes Higher Education Corp.*,[225] the Eleventh Circuit observed in the course of discussing the FFELP and Direct Loan programs together, "[t]he HEA also imposes obligations on student loan lenders and loan servicers,"[226] citing the parity provisions.[227] It went on to discuss various disclosure requirements that U.S.C. § 1083 (Part B) imposes on servicers, apparently treating them as equally applicable to direct loans.[228] The implication is that FFELP disclosure requirements apply to direct loans through the parity provisions. *Lawson-Ross* followed a Seventh Circuit decision from the preceding year that likewise treated the disclosure requirements of U.S.C. § 1083 as applicable to direct loan servicers through the parity provisions.[229]

221. The government argued that "Sections 432(a) [20 U.S.C. § 1082(a)] and 468 [20 U.S.C. § 1087hh] of the Higher Education Act of 1965 authorize the Secretary to collect, write-off, and compromise claims of the Department of Education ("DoE") against individuals arising from their obligation to repay current or defaulted student loans held by the DoE." Defendant's Supplemental Authority in Support of its Motion to Dismiss, in Part, and Its Motion for Partial Summary Judgment at 1, McCain v. United States, 2011 U.S. Ct. Fed. Claims LEXIS 1107 (June 17, 2011) (No. 10-264C). Given that the only loan at issue in the case was a direct loan, the government was necessarily asserting the power to compromise direct loans under the cited authorities.

222. *McCain*, 2011 U.S. Ct. Fed. Claims LEXIS 1107, at *19–*20.

223. *Id*. at *23–*25.

224. *See* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101, 1105, 1114 (2021) (discussing consumer-protection litigation against student loan servicers and servicers' preemption defenses).

225. 955 F.3d 908 (11th Cir. 2020).

226. *Id*. at 912. Although the court discussed both the FFELP and DLP in its opinion, it appears that none of the loans at issue in *Lawson-Ross* were made under the DLP. *Id.* at 913–14.

227. *See id*. at 912 n.2.

228. *See id*.

229. *See* Nelson v. Great Lakes Educ. Loan Servs., 928 F.3d 639, 643 (7th Cir. 2019) (describing 20 U.S.C. § 1083 disclosure requirements as applicable to "servicers" generally immediately after noting that, under 20

District courts have reached similar results. In *Student Loan Servicing Alliance v. District of Columbia*,[230] a case involving the District of Columbia's authority to impose a local licensing regime on federal student loan servicers, the court cited U.S.C. §§ 1082, 1087a, and 1087e together in support of the proposition that "[t]he HEA and its implementing regulations govern certain procedures that loan servicers must follow and standards they must meet in servicing federal student loans."[231] In a pair of cases concerning preemption of state consumer protections against harassing servicer conduct, *Hunt v. Sallie Mae, Inc.*[232] and *Weber v. Great Lakes Education Loan Services*,[233] courts held that regulations governing the conduct of FFELP servicers applied equally to direct loan servicers.[234] In both cases, the court cited the parity provisions for this proposition.[235]

The parity provisions have on occasion been interpreted even more aggressively. In *Chae v. SLM Corp.*,[236] the Ninth Circuit held that by enacting U.S.C. § 1087e(a)(1), "Congress created a policy of inter-program uniformity . . . . Congress's instructions to the DOE on how to implement the student-loan statutes carry this unmistakable command: Establish a set of rules that will apply across the board."[237] The court found that this congressional policy of uniformity is so powerful that, far beyond simply making FFELP rules applicable to the Direct Loan Program, it actually preempts the application of state consumer protection laws to servicing of FFELP loans.[238] Other courts have found that state-law consumer protection claims are not preempted without questioning application of the uniformity principle across federal student loan programs.[239] A purely textualist court might not be persuaded that relinquishment authority extends to direct loans based on such a high-level appeal to legislative purpose, however.

By way of contrary authority, apparently only one case suggests that the Department's Part B powers do not carry over to direct loans. In *Pennsylvania Higher Education Assistance Authority v. Perez*, the court cast doubt on whether the

U.S.C. § 1087e(a)(1), direct loans have the same terms, conditions, and benefits as FFELP loans). The named plaintiff in *Nelson*, a putative class action, apparently had only FFELP loans. *See id.* at 641 (referring to plaintiff's "federally insured loans"). It is not clear from the opinion whether the putative class included members with DLP loans.

230. 351 F. Supp. 3d 26 (D.D.C. 2018).

231. *Id.* at 39 (internal citations omitted).

232. No. 6:13-cv-00500-AA, 2014 U.S. Dist. LEXIS 23825, at *1 (D. Or. Feb. 23, 2014).

233. 13-cv-00291-wmc, 2013 U.S. Dist. LEXIS 106266, at *1 (W.D. Wis. July 30, 2013).

234. *See Hunt*, 2014 U.S. Dist. LEXIS 23825, at *5; *Weber*, 2013 U.S. Dist. LEXIS 106266, at *10 ("Eventually, Congress ordered that these same regulations [Part 682.411] would govern third-party collections for the Federal Direct Program . . . ."). The applicability of Part 682.411 to direct loans was undisputed in *Hunt*, 2014 U.S. Dist. LEXIS 23825, at *5.

235. *See Hunt*, 2014 U.S. Dist. LEXIS 23825, at *5; *Weber*, 2013 U.S. Dist. LEXIS 106266, at *10.

236. 593 F.3d 936 (9th Cir. 2010).

237. *Id.* at 945.

238. *Id.* ("Permitting varying state law challenges across the country, with state law standards that may differ and impede uniformity, will almost certainly be harmful to the FFELP").

239. *See, e.g.*, Pennsylvania v. Navient Corp., 967 F.3d 273, 292-94 (3d Cir. 2020); Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908, 919 (11th Cir. 2020); Nelson v. Great Lakes Higher Educ. Corp., 928 F.3d 639, 651 (7th Cir. 2019). For its part, the Department has embraced the logic of *Chae*. *See* Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619, 10,621 (Mar. 12, 2018).

Secretary's "general powers" to operate the FFEL program, conferred under U.S.C. § 1082(a), apply to direct loans.[240] In that case, the court considered whether the consent-to-suit provision of U.S.C. § 1082(a)(2), rather than the broader waiver of sovereign immunity under the Administrative Procedure Act, applied to a servicer's lawsuit against the Department.[241] The court observed that the Secretary had contracted with the servicer under Part D, and that it "ha[d] not found . . . language incorporating into Part D the Secretary's 'general powers,' including the consent-to-suit language of section 1082, from Part B."[242] The court did not squarely hold U.S.C. § 1082 inapplicable, however, and supplied an alternative basis for its decision.[243] It subsequently vacated the decision on other grounds.[244]

Thus, the prevailing view among judges appears to be the same as that at the Department: the parity provisions carry the Secretary's powers relating to the FFEL Program over to the Direct Loan Program. Indeed, treatise authors take the same view.[245] But, like the Department, the courts have not explained exactly how the parity provisions accomplish this transfer.

IV. JUBILEE AUTHORITY OVER DIRECT LOANS: TEXTUAL ANALYSIS

As just discussed, it appears that neither the Department nor any court has given a reasoned argument explaining what attributes of the FFEL Program are "terms, conditions, or benefits" of FFELP loans and therefore applicable to direct loans through the parity provisions. This Part presumes that textualist courts are likely to demand such an account and addresses arguments that relinquishment authority, or the possibility of benefiting from such authority, is or is not part of the "terms, conditions, and benefits" of FFELP loans.

In addition to the language and structure of the statute and dictionary definitions, this Part uses judicial decisions and the Department's regulations as a form of persuasive authority. It cites them as examples of how certain users of legal English of (presumably) at least ordinary proficiency have understood the relevant words and phrases, and no more. For example, the Article does not assert that the federal courts would defer to Department interpretations of the HEA for any reason other than those interpretations' persuasiveness.[246]

240. 416 F. Supp. 3d 75, 96 (D. Conn. 2019).

241. *Id.*

242. *Id.*

243. *Id.* at 96–97. The court found that even if U.S.C. § 1082(a)(2) applied, it permitted the declaratory relief the plaintiff sought as to "the only issue in this case."

244. *See* Pa. Higher Educ. Assistance Auth. v. Perez. 457 F. Supp. 3d 75, 90 (D. Conn. 2020) (finding that APA waiver of sovereign immunity did not apply because plaintiffs did not state a claim).

245. *See, e.g.*, 1A CONSUMER CREDIT LAW MANUAL § 12.06 n.2 (2020) (suggesting that parity provision authorizes Secretary to adopt closed-school discharge rules for direct loans despite absence of express authorization in Part D to do so); 1A DEBTOR-CREDITOR LAW § 12.06 n.1 (2021) (same).

246. *See, e.g.*, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1474 (2020) (explaining that, even where the courts do not defer to agency interpretation under *Chevron* doctrine, "we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical

By way of preview, the leading arguments Part IV puts forth for the proposition that relinquishment authority extends to the DLP are as follows. First, the possibility of enjoying loan forgiveness because of the Secretary's exercise of relinquishment authority is a "benefit" of FFELP loans under the ordinary dictionary meaning of "benefit;" the Act calls loan forgiveness a "benefit" of FFELP loans [247] and (2) the Secretary's relinquishment authority is part of the "terms and conditions," or is a "term," of FFELP loan contracts; the Act calls the Secretary's power to adjust payments part of the "terms and conditions" of Title IV loans and calls the Secretary's power to waive repayment under certain Title IV agreements a "term" of those agreements.[248]

Key additional support for the proposition that relinquishment authority is part of the "terms and conditions" or is a "term" of FFELP loan contracts comes from the facts that the possibility of forgiveness was written into FFELP promissory notes as well as that the "terms" of contracts include, as Corbin put it, all "rules of law affecting the operation of the language used."[249]

Other potential arguments that relinquishment authority applies to DLP loans are that nonexercise of the authority is a "condition" of the borrower's duty to repay[250] and that relinquishment authority is part of the "terms, conditions, and benefits" of a FFELP loan by virtue of being part of the terms, conditions, and benefits of the FFEL *Program*, even if relinquishment authority is not part of FFELP loan *contracts*.[251] Less authority speaks to these possibilities, so this Article discusses them more briefly.

Finally, the statutory structure also supports the proposition that relinquishment authority carries over to the FFEL Program.[252] Apart from the parity provisions, the DLP portion of the HEA explicitly grants the Secretary few powers relative to what the portions covering the FFEL and Perkins portions grant. It stands to reason that the parity provisions close the gap by extending the Secretary's FFELP powers to the DLP.

There is room for doubt. The Act does not explicitly provide that relinquishment authority, per se, is part of the "terms, conditions, and benefits" of FFELP loans, and the Department apparently has never said as much. The HEA does not define "terms, conditions, and benefits," "terms and conditions," "terms," "conditions," or "benefits," and it seems to use various phrases interchangeably to refer to the elements of student loans, making an unambiguous reading hard to pin down. There is room to argue that only completed loan forgiveness, and not the mere possibility of forgiveness, is actually a "benefit," or that "benefit" is used in some specialized sense that excludes jubilee. There is also room to argue that the Department's relinquishment authority, a statute-created attribute of a party rather than an

experience, and its familiarity with the interpretive demands of administrative need" (internal citations omitted)).

247. *See* discussion *infra* Part V.B.

248. *See* discussion *infra* Parts V.C. –V.D.

249. 8 CORBIN ON CONTRACTS § 30.6.

250. *See* discussion *infra* Part V.E.

251. *See* discussion *infra* Part V.F.

252. *See* discussion *infra* Part V.G.

agreement-created attribute of a deal, is not part of the "terms and conditions" of FFELP loan contracts.

Nevertheless, on balance, the case that relinquishment authority does extend to the DLP appears to be the stronger one. This is not least because the HEA itself seems to provide little affirmative reason to find that the Secretary enjoys vastly greater authority over FFELP loans that end up in the federal government's hands than over loans the federal government made in the first place.

Before diving into the statute, a word on legislative history is in order. Disdain for legislative history is a hallmark of textualist statutory interpretation,[253] and the legislative history of U.S.C. §§ 1087a(b)(2) and 1087e(a)(1) seems unilluminating in any event. It appears that the only discussion of the provisions in the legislative history is in the House report on the budget bill that contained them. It simply summarizes the statutory text, explaining, "[e]ach of these direct loans would have, unless otherwise specified, the terms, conditions, benefits and amounts of its corresponding guaranteed loan under the Federal Family Education Loan program."[254]

The statutory phrase "terms, conditions, and benefits" may consist of one, two, or three elements. The single-element interpretation would be that "terms, conditions, and benefits" is a set phrase with a distinct meaning.[255] Part IV.A addresses this possibility.

The two-element interpretation would be "terms, conditions, and benefits" consists of "terms and conditions" on the one hand and "benefits" on the other. Part IV.B discusses "benefits" and Part IV.C addresses terms and conditions. The three-element interpretation would be that each of "terms," "conditions," and "benefits" has a distinct meaning. Parts IV.D and IV.E address "terms" and "conditions" as discrete items. Part IV.F considers the possibility that relinquishment authority might be part of the "terms, conditions, and benefits" of the FFELP program, even if not of FFELP loan contracts. Part IV.G addresses statutory structure and the scope of applicability of "same terms, conditions, and benefits."

A. "Terms, Conditions, and Benefits" as a Phrase

A definition of "terms, conditions, and benefits" as a discrete phrase seems elusive, so a one-element interpretation of the phrase seems unlikely: to find the meaning of the whole, we must look to the meanings of the constituent parts. The only uses of "terms, conditions, and benefits" in the statutory text of the U.S. Code

253. *See* SCALIA & GARNER, *supra* note 64, at 369–91 (arguing against "[t]he false notion that committee reports and floor speeches are worthwhile aids in statutory construction").

254. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, 107 Stat 312 (1993).

255. Courts have recognized, for example, that the phrase "educational benefit" in 11 U.S.C. § 523(a)(8) has a meaning distinct from "a benefit that is educational in nature," as one might imagine from interpreting the two words independently. *See* McDaniel v. Navient Sols. LLC (*In re* McDaniel), 973 F.3d 1083, 1097 (10th Cir. 2020); *see also* Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 280 (2019) (suggesting the distinction between these two meanings).

appear to be in the student loan provisions, which do not define the phrase.[256] "Terms, conditions, and benefits" is not used in the FFELP regulations, and the research for this paper has turned up no dictionary definition of the phrase as such.

The phrase does show up frequently in judicial decisions[257] and other legal sources.[258] Setting aside its common use in "terms, conditions, and benefits of employment,"[259] it seems to have two relevant meanings. As applied to programs, "terms, conditions, and benefits" seems to mean the rules of the program.[260] As applied to contracts, the phrase seems to be used to refer to the contract in its entirety.[261] "Terms and conditions" also has both these meanings and is more

256. Search in U.S. Code Service for "terms, conditions, and benefits," LEXIS, https://plus.lexis.com/search (search U.S. Code Service, then enter "terms, conditions, and benefits"); Search in U.S. Code Service for "terms, conditions, or benefits," LEXIS, https://plus.lexis.com/search (Search U.S. Code Service, then enter "terms, conditions, or benefits").

257. A search in the LEXIS Cases database for documents containing "terms, conditions, and benefits" or "terms, conditions, and benefits" conducted on July 27, 2021 resulted in 1,063 hits. Search in U.S. Code Service for "terms, conditions, and benefits" LEXIS, https://plus.lexis.com/search (search U.S. Code Service, then enter "terms, conditions and benefits" and "terms, conditions, or benefits," then select "Cases" for the content in the search bar and click search).

258. A search in the LEXIS Secondary Materials database for documents containing "terms, conditions, and benefits" or "terms, conditions, or benefits" conducted on July 27, 2021 resulted in 253 hits. Search in U.S. Code Service for "terms, conditions, and benefits," LEXIS, https://plus.lexis.com/search (search U.S. Code Service, then enter

"terms, conditions and benefits" and "terms, conditions, or benefits," then select "Secondary Material" for the content in the search bar, then search terms, conditions and benefits" and "terms, conditions, or benefits").

259. The phrase appears most often in employment cases. Title VII forbids discrimination on certain grounds "with respect to his [sic] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2 (2021), and courts sometimes ask whether the employer's actions affected the "terms, conditions, and benefits" of the plaintiff's employment. *See, e.g.*, James v. Booz-Allen & Hamilton, 368 F.3d 371, 375 (4th Cir. 2004) (discrimination); Gunten v. Maryland, 243 F.3d 858, 867–68 (4th Cir. 2001) (retaliation). Employment seems different enough from student loans that discussions in these cases are not particularly probative. Nor has research turned up helpful discussions of the phrase in other contexts.

260. *See* Glass, Molders, Pottery, Plastic & Allied Workers Int'l Union v. Consol. Container Co. LP, No. 09-2486-CM, 2010 U.S. Dist. LEXIS 101369, at *3 (D. Kan. Sept. 24, 2010) ("[t]he terms, conditions, and benefits of the Life Insurance and Health Care Program were negotiated by the parties and are set forth in detail in Article 21 of the [collective bargaining agreement]"); Semler v. Eastbay, Inc., No. 62-CV-18-6453, 2020 Minn. Dist. LEXIS 108, at *7 (Minn. Dist. Ct., Apr. 6, 2020) (company's rules for "membership program" permitted it to "modify, add, or delete any of the membership terms, conditions, or benefits").

261. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) ("[o]ur conclusion is that the settlement has not been shown to be in any respect unlawful or improper, and hence its terms, conditions, and benefits must go forward immediately in their entirety"); Daugherty v. AAA Auto Club of Mo., No. 4:14CV1507HEA, 2015 U.S. Dist. LEXIS 62586, at *2 (E.D. Mo. May 13, 2015) ("[t]he parties have read this Arbitration Agreement and hereby voluntarily and knowingly agree to and accept all of its terms, conditions, and benefits") (quoting agreement); Scott v. Harris Interactive, Inc., 851 F. Supp. 2d 631 (S.D.N.Y. 2012), *rev'd on other grounds*, 512 F. App'x 25 (2d Cir, 2013) ("[t]he letter making the offer set forth the terms, conditions, and benefits of plaintiff's employment") (internal quotation marks and brackets omitted); *In re* Watkins, 210 B.R. 394, 400 (Bankr. N.D. Ga. 1997) (apparently using "terms, conditions and benefits" to refer to all legally operative aspects of a contract); Sarchett v. Blue Shield of Cal., 729 P. 2d 267, 271 n.7 (Cal. 1987) ("'[i]n the event of a dispute between the Contractholder or a Member and the California Physicians' Service, with respect to any of the terms, conditions or benefits of this contract, the dispute shall be settled as follows'") (quoting contract's only provision regarding dispute resolution); Jeffrey v. Auto. Club of S. Cal., No. E056224, 2014 Cal. App. Unpub LEXIS 4757, at *3 (Cal. Ct. App. July 3, 2014) ("'[t]he parties have read this Agreement and hereby voluntarily and knowingly agree to and accept all of its terms, conditions, and benefits'") (quoting contract). At least one case finds a limit on the "terms, conditions, or benefits" of a contract. When the parties agreed to arbitrate "'disputes with respect to any of the terms, conditions, or benefits of this agreement,'" and one party refused to pay an arbitration award in full, the other party's contention that the first party acted in bad

commonly used to convey them, so the Article discusses the all-rules and whole-contract interpretations in that context.

B. The Possibility of Loan Cancellation as a "Benefit" of FFELP Loans

The two-element interpretation of "terms, conditions, and benefits" is that the words refer to "terms and conditions" on the one hand and "benefits" on the other. The two-element reading finds support in provisions of Part B[262] and Title IV.[263] More generally, the two-element interpretation distinguishes between "terms and conditions" and "benefits."[264]

This section argues, consistent with the two-element interpretation of "terms, conditions, and benefits," that the opportunity to benefit from the Secretary's relinquishment authority is probably a "benefit" of FFELP loans. Support for this view comes from the HEA's use of "benefit" to describe loan forgiveness in other contexts, from dictionary definitions of "benefit," from the broad meaning generally ascribed to "benefit" in the HEA and regulations, and from how courts use the term "benefit." The case is not ironclad, however, because the HEA apparently contains no specific reference to relinquishment authority itself (or the possibility of its use) as a "benefit," and because it is arguable that only completed loan forgiveness, not the possibility of forgiveness, is a "benefit."

1. Affirmative Argument

The most straightforward argument that potential loan cancellation under the relinquishment authority is a "term, condition, or benefit" of FFELP loans is probably as follows: from the borrower's perspective, the possibility of cancellation is a desirable aspect, or advantage, of FFELP loans, and therefore a "benefit" of those loans.

The HEA's use of "benefit" supports this contention. In a provision applicable to FFELP and other federal student loans, Title IV describes "loan forgiveness" as a

faith was not covered by the arbitration clause. *See* Mansdorf v. Cal. Physicians' Svc., Inc., 87 Cal. App. 3d 412, 417 (1978).

262. *See* 20 U.S.C. § 1078-6(a)(4) ("[a] loan that is sold or assigned under paragraph (1) shall . . . be subject to the same terms and conditions and qualify for the same benefits and privileges as other loans made under this part."). This suggests that "terms and conditions" and "benefits and privileges" are distinct categories.

263. *See id.* § 1087dd(h)(1)(B) (explaining that rehabilitated Perkins loans are "subject to the same terms and conditions" and "qualify for the same benefits and privileges" as other Perkins loans); *see also* 34 C.F.R. §§ 674.53(b)(2), (c)(2) (2021) (for Perkins program, recognizing possibility that "cancellation benefits provided under this Section" may not be "included in the terms of the borrower's promissory note"); 1 EXECUTIVE EMPLOYMENT LAW: PROTECTING EXECUTIVES § 4.03 (showing "terms and conditions" of employment is distinct from "benefits" received on termination).

264. LEXIS searches performed July 27, 2021 report that over 10,000 federal court opinions have used the phrase "terms and conditions," and that over 1,300 Supreme Court opinions have used it. Search phrase "terms and conditions," select "Cases" and "Supreme Court." Natural Language Search "terms and conditions," LEXIS, https://plus.lexis.com/search (search "terms and conditions" in the search bar; select "cases"; then "narrow by court").

"loan benefit" for federal student borrowers.[265] Title IV also uses the term "benefit" to describe specific loan cancellation or forgiveness programs available to FFELP borrowers, including teacher loan forgiveness,[266] forgiveness for service in areas of national need,[267] and loan repayment for civil assistance attorneys.[268] The HEA also designates as "benefits" other loan cancellation programs outside the FFELP, such as public service loan forgiveness ("PSLF")[269] and teacher loan cancellation for DLP loans.[270] FFELP regulations and other federal student loan regulations refer to loan cancellation or repayment under various targeted programs as a "benefit."[271]

Dictionary definitions also support the proposition that the possibility of relinquishment relief from FFELP loans is a "benefit" of those loans.[272] Dictionaries unanimously define "benefit" in terms of "advantage,"[273] and it seems clear that the possibility of executive forgiveness is an advantage, in the sense of that it puts the borrower in a "superior position"[274] than the position the borrower would occupy absent the possibility of forgiveness.

Provisions of Title IV use the word "benefits" broadly, consistent with the dictionary definition of "benefit" as simply "advantage."[275] For example, the statute denotes as "benefits," provisions for no accrual of interest during active military service,[276] rehabilitation of Perkins loans,[277] and exit counseling relating to consolidation loans.

265. 20 U.S.C. § 1092(b)(1)(A)(vii)(II) (requiring that exit counseling address "the effects of consolidation on a borrower's underlying loan benefits, including . . . loan forgiveness . . ."); *see also* § 1087cc-1(a)(15) (referring to "repayment and forgiveness benefits available to borrowers of loans made under part D [direct loans]").

266. *See id.* §§ 1087e(m)(4), 1078-10.

267. *See id.* § 1078-11.

268. *See id.* § 1078-12 (2018).

269. *See id.* (including PSLF as a benefit in a Section titled "Ineligibility for double benefits").

270. *See id.* § 1087j.

271. *See* 34 C.F.R. §§ 674.53, 674.56(a)(2), 674.57(b)(2), 674.58, 674.60(a)(2) (2021).

272. Use of dictionary definitions to determine the ordinary meaning of words is a standard textualist approach. *See* SCALIA & GARNER, *supra* note 64, at 72.

273. *Benefit*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) [hereinafter AMERICAN HERITAGE] ("1.a. something that promotes or enhances well-being; an advantage"); *Benefit*, BLACK'S LAW DICTIONARY (7th ed. 1999) [hereinafter BLACK'S 7TH] ("1. Advantage; privilege"); *Benefit*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1998) [hereinafter MERRIAM-WEBSTER'S COLLEGIATE] ("2a : Something that promotes well-being: ADVANTAGE"); *Benefit*, AMERICAN HERITAGE CONCISE DICTIONARY (3d ed. 1994) [hereinafter AMERICAN HERITAGE CONCISE] ("[a]n advantage"); *Benefit*, BLACK'S LAW DICTIONARY (5th ed. 1979) [hereinafter BLACK'S 5TH] ("[a]dvantage;" "[b]enefits are something to advantage of, or profit to, recipient."); *Benefit*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) [hereinafter OED 1989] ("3. a. Advantage, profit, good. (The ordinary sense.)").

274. *Advantage*, OED 1989, *supra* note 273 ("[s]uperior position . . . [t]he position, state, or circumstance of being *in advance* or ahead of another, or having the better of him in any respect; superior or better position; precedence; superiority . . . . ").

275. *See* § 1092(b)(1)(A)(vii)(IV) (requiring that exit counseling on consolidation loans must advise borrower that "borrower benefit programs may vary among different lenders."); 34 C.F.R. § 674.42(b)(2)(iii)(D) (2021) (Perkins); 34 § 682.604(a)(2)(iv)(D) (FFELP); § 685.304(b)(4) (iv)(D) (Direct).

276. *See* 20 U.S.C. § 1087e(o)(4); *see also* 34 C.F.R. § 685.220(d)(2)(ii) (2021) (Direct Loan Program regulations).

277. *See* 20 U.S.C. §§ 1087dd(h)(1)(D), (h)(2).

The FFELP regulations likewise embrace a broad view of the "benefits" of FFELP loans. FFELP regulations designate as "benefits" eligibility for deferment,[278] the regaining of eligibility for student financial aid upon making satisfactory repayment arrangements on defaulted loans,[279] "suspension of administrative wage garnishment while attempting to rehabilitate a defaulted loan,"[280] and certain lender-specific options.[281] Direct Loan Program regulations give an expansive definition of "financial benefit" that includes "refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, [and] compromise."[282]

Outside the context of loans issued specifically under federal programs, courts commonly speak of loan modification[283] and forgiveness[284] as "benefits."[285] Even more significantly, at least one decision describes the mere possibility of loan modification as a "benefit" of the loan. In *Bertelsen v. Citimortgage, Inc*.,[286] the court described a mortgage borrower's argument as including the proposition that the borrower had "the contractual benefit of having Citi consider him for a loan modification."[287] The court disagreed that the contract provision at issue obligated Citi to consider a modification, so it "disagree[d] that the identified provision confers any benefit upon [plaintiff] Bertelsen."[288] Notably, although the notion that plaintiff-borrower Bertelsen enjoyed a contractual "benefit" was critical to the court's analysis,[289] the court did not question that the possibility of a modification would

278. *See* 34 C.F.R. § 682.405(a)(4) (2021).

279. *See id.* § 682.200 (2021), ("A borrower may only obtain the benefit of this paragraph with respect to renewed eligibility once."); *id.* § 682.200(b) (2021) (same provision for Direct Loan Program).

280. *See id.* § 682.405 (2021) (laying out the FFELP); *id.* § 685.211(f)(11)(iii) (2014) (laying out the Direct Program).

281. FFELP regulations reference "special loan repayment benefits offered on the loan, including benefits that are contingent on repayment behavior, and any other special loan repayment benefits for which the borrower may be eligible that would reduce the amount or length of repayment." *Id*. § 682.205(a)(2)(x) (2021); *see also id.* § 682.205(a)(2)(xi) (2021) (requiring disclosure of how borrowers can lose and regain a lender-provided "repayment benefit").

282. *Id.* § 685.206(e)(12) (2021); § 685.222(i)(8) (2021).

283. *See, e.g.*, Genrette v. Bank of N.Y. Mellon Trust Co., C.A. No. 19-1664 (MN), 2020 U.S. Dist. LEXIS 176179, at *8 (D. Del. Sept. 25, 2020) ("benefit of the loan modification"); Ober v. Ocwen Fin. Corp., No. 1:19-CV-01171, 2020 U.S. Dist. LEXIS 67397, at *8 (M.D. Pa. April 16, 2020) ("they continued to pay their mortgage and obtained the benefit of a loan modification agreement").

284. *See, e.g.*, Partl v. Volkswagen, AG, 895 F.3d 597, 604 n.6 (9th Cir. 2018) (describing loan forgiveness for certain plaintiffs as a "benefit[]" of a settlement agreement); Delk v. Ocwen Fin. Corp., No. 3:17-cv-02769-WHO, 2017 U.S. Dist. LEXIS 134361, at *4 (N.D. Cal. Aug. 21, 2017) (plaintiff "would have the benefit of loan forgiveness"); GPX Int'l Tire Corp. v. United States, 587 F. Supp. 2d 1278, 1290 (C.I.T. 2008) ("Commerce cannot presume that the benefit of the loan forgiveness devolved to Starbright").

285. Use of statutory language in judicial opinions is relevant to determine the "ordinary legal meaning" of the terms in question. *See* SCALIA & GARNER, *supra* note 64, at 73–74 ("when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning.").

286. CV-16-2-BU-JCL, 2017 U.S. Dist. LEXIS 53869 (D. Mont. Apr. 7, 2017).

287. *Id.* at *14.

288. *Id.*

289. Bertelsen's claim was for violation of the covenant of good faith and fair dealing, and in the court's formulation of the doctrine of good faith, the "initial inquiry" was into "whether the defendant's conduct deprived the claimant of a benefit to which the claimant was entitled under the contract." *Id*. at *11 (citations omitted); *see also* Fabito v. Wachovia Mortg., Inc., No. 11-CV-43-DMS (POR), 2011 U.S. Dist. LEXIS 29222, at *6 (S.D. Cal. Mar. 22, 2011) (alleged "benefit" of class-action settlement was entitlement "to have their loan

have been a "benefit" if plaintiff-borrower Bertelsen had in fact been contractually entitled to it.

The possibility of a benefit has been recognized as a benefit in the context of criminal plea bargains, analogous here both because such bargains are commonly analyzed under contract-law principles[290] and because one party to such bargains is the government. In *United States v. Merriweather*,[291] for example, the defendant argued that his plea agreement "offered him no benefit, that is, it was a contract unsupported by consideration."[292] The court rejected this argument, finding that the Government's "'promise to evaluate in good faith whether a defendant's cooperation warranted a substantial assistance reduction motion provide[s] sufficient consideration for his guilty plea.'"[293]

2. Counterargument

Despite these arguments, a court could conclude that the opportunity for debt cancellation under relinquishment authority is not a "benefit" of FFELP loans , such that it would carry over to direct loans. The mentions of "loan forgiveness" in the HEA may refer only to specifically designated loan forgiveness programs such as PSLF,[294] rather than to cancellation under the Secretary's general authority. It appears that most references in the HEA and regulations to loan forgiveness or cancellation as "benefits" do in fact entail such specific programs.[295] By contrast, it does not appear that any provision of the HEA or regulations explicitly refers to the Secretary's relinquishment authority, or the opportunity to benefit from that authority, as a "benefit."

Another potential counterargument is that even if loan cancellation is a "benefit," the mere possibility of loan cancellation is not. Dictionaries do supply a set of meanings of "benefit" that supports this argument. For example, the *American Heritage Dictionary* gives a definition of "benefit" as "[h]elp; aid."[296] Under these

considered for a loan modification"); Ghafouri v. JPMorgan Chase Bank, No. 50-CIV-2432, 2014 Cal. Super. LEXIS 13938, at *2–*3 (Super. Ct. Cty. of San Mateo Jan. 21, 2014) (apparently permitting plaintiffs leave to amend complaint to assert theory that bank's failure to consider them for a loan modification deprived them of contractual benefits).

290. *See, e.g.*, United States v. Rodriguez, 797 F. App'x 933, 942 (6th Cir. 2019) ("A plea bargain itself is contractual in nature and 'subject to contract-law standards.'") (citations omitted); United States v. Salazar-Alanis. 747 F. App'x 982, 983 (5th Cir. 2019) (per curiam) ("general contract principles apply to plea agreements").

291. Case No. 15-cr-40046-JPG-06, 2017 U.S. Dist. LEXIS 86734 (S.D. Ill. June 5, 2017).

292. *Id*. at *3.

293. *Id.* at *8 (citations omitted). Many decisions affirm the validity of plea agreements that leave the decision whether to seek a downward departure from sentencing based on the defendant's cooperation with prosecutors. *See* United States v. Kilcrease, 665 F.3d 924, 928 (7th Cir. 2012) (citations omitted).

294. *See* 20 U.S.C. § 1087e(m) (authorizing Public Service Loan Forgiveness program).

295. *Id*. §§ 1092(b)(1)(A)(vii)(II), 1087cc-1(a)(15), 1087e(m)(4), 1078-10, 1087e(m)(4), 1078-11, 1087e(m)(4), 1078-12, 1087e(m)(4), 1087e(m)(4), 1087j; 34 C.F.R. § 682.216(c)(12) (2021).

296. *Benefit*, AMERICAN HERITAGE, *supra* note 273 (definition 1b); *see also Benefit*, AMERICAN HERITAGE CONCISE, *supra* note 273 ("help; aid"); *Benefit*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273 ("useful aid : HELP"); *Benefit*, BLACK'S 7TH, *supra* note 273 ("[p]rofit or gain"); *Benefit*, OED 1989, *supra* note 273 ("[p]ecuniary advantage, profit, gain.").

definitions, one might argue that forgiveness itself, but not the possibility of forgiveness, is a "benefit."[297] Further to this argument, in *Harden v. Wells Fargo Bank, N.A.*,[298] the court held that an alleged promise to consider an application for a loan modification did not "confer any benefit upon Plaintiff," as "it was merely a willingness to consider Plaintiff's application."[299]

These arguments should not prevail. Although it is analytically possible to say that loan cancellation is a "benefit" only when it occurs under a targeted program rather than the Secretary's relinquishment authority, there is no apparent affirmative reason to do so. And given that some chance of getting a benefit is better than no chance of getting a benefit, it seems likely that the possibility of relinquishment cancellation is a benefit, even if the cancellation never materializes. Nevertheless, the contentions cannot be completely dismissed.

C. Loan Cancellation as Part of the "Terms and Conditions" of FFELP Loan Contracts

As noted, the HEA arguably distinguishes between the "benefits" of loans on one hand and the "terms and conditions" of the loans on the other. This section analyzes whether the possibility of executive forgiveness is part of the "terms and conditions" of FFELP loan contracts, addressing "terms and conditions" as a single concept. Subsequent sections turn to the possibility that "terms" and "conditions" are separate and discrete items.

The argument that relinquishment power is part of the "terms and conditions" of FFELP loan contracts draws support from the fact that the HEA calls the Secretary's discretion to adjust payments part of the "term and conditions" of some federal student loans and from the generally broad meaning given "terms and conditions" in the statute. Moreover, "terms and conditions" commonly refers to the totality of a contract, including discretionary powers one party enjoys under the contract. And the Secretary's relinquishment authority does appear to be written into the promissory notes used under both the FFELP and DLP.

At the same time, it appears that no statutory provision explicitly calls relinquishment authority part of the "terms and conditions" of FFELP loans. In addition, the statute uses other phrases, such as "terms, conditions, benefits, and privileges" to describe the totality of loan contracts, raising the possibility that

297. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 345 n.7 (1981) (Stevens, J., dissenting) (discussing "discretionary power" of trustees of union's national pension and welfare trust fund to "determine specific benefit levels and eligibility requirements" and "to modify the benefit plan"); DeVivo Assoc. v. Nationwide Mut. Ins. Co., 797 F. App'x 661, 662 (2d Cir. 2020) (holding "deferred compensation benefit" could be amended, terminated, modified, or altered at employer's discretion); Center v. Sec'y, Dep't of Homeland Sec., 895 F.3d 1295, 1301 (11th Cir. 2018) (under Federal Employees' Compensation Act, "The Secretary has the sole discretionary power to determine in the first instance whether to make an award of . . . benefits in a particular case") (citations omitted).

298. No. 4:14-cv-1, 2015 U.S. Dist. LEXIS 55547, at *6 (E.D. Tex. Apr. 28, 2015); *see also* Buchna v. Bank of Am., N.A., No. CV-10-00418-PHX-MHM, 2010 U.S. Dist. LEXIS 149132, at *15–*16 (D. Ariz. Oct. 25, 2010) (where the "lender is under no obligation to modify a contractually agreed upon loan," such a modification is not "a benefit that flows from the mortgage agreement.").

299. *Harden*, 2015 U.S. Dist. LEXIS 55547, at *6.

relinquishment authority could be, say, a "privilege," rather than a "term, condition, or benefit" of FFELP loans. Finally, it could be argued that the Secretary's relinquishment authority is not part of the "terms and conditions" of the loan, as it has its origins in the statute and not the loan agreement. As this section explains, the argument that relinquishment authority is part of the "terms and conditions" of FFELP loans seems to be the strongest.

1. Affirmative Argument

The HEA does not give a general definition of "terms and conditions" for federal student loans in general or FFELP loans in particular. It does, however, expressly provide that one instance of the Secretary's discretion to adjust payments is part of the "terms and conditions" of a DLP loan. In U.S.C. § 1087e, titled "Terms and conditions of loans,"[300] the statute provides, "[t]he Secretary may provide, on a case-by-case basis, an alternative repayment plan to a borrower . . . ."[301] The statute states explicitly that the discretionary power of the Secretary to adjust loans is a "term or condition" of DLP loans.[302]

Relatedly, the statute refers to the rules governing loan forgiveness as "terms and conditions."[303] Its exit counseling rules require institutions to brief students on the "terms and conditions" of "any loan forgiveness or cancellation provision of this [title]."[304] Once it is accepted that the loan forgiveness rules are terms and conditions, it is no great leap to find that they are terms and conditions of the FFELP loans to which they apply.

Other uses of "terms and conditions" in Part B of Title IV of the HEA support the contention that relinquishment authority is among the "terms and conditions" of FFELP loans. Part B provides several examples of the terms and conditions of FFELP loans.[305] These examples illustrate the breadth with which "terms and conditions" is used in the HEA, encompassing such diverse matters as repayment

300. Textualist statutory interpretation permits the use of section titles. *See* SCALIA & GARNER, *supra* note 64, at 221–24.

301. 20 U.S.C. § 1087e(d)(4); *see also* 34 C.F.R. § 685.209(b)(3)(v)(C) (2021) (implementing § 1087e(d)(4) and providing that borrower "may contact the Secretary . . . and obtain the Secretary's determination as to whether an adjustment is appropriate"); *id.* § 685.211(f)(iv)(2) (2021) (borrower's right to object to rehabilitation payment amount is part of the "terms and conditions applicable to the required series of payments").

302. 20 U.S.C. § 1087e(d)(4).

303. *Id.* § 1092(b)(1)(A)(iv) (requiring institutions to include in exit counseling, "for any loan forgiveness or cancellation provision of this title, a general description of the terms and conditions under which the borrower may obtain" relief); § 1092(d)(1) (instructing Secretary to "provide information concerning the specific terms and conditions under which students may obtain partial or total cancellation . . . ."). The command of 1092(b)(1)(A)(iv) also appears in the FFELP and DLP regulations. *See* 34 C.F.R. § 682.604(a)(2)(x)(A) (2021) (FFELP); § 685.304(b)(4)(ix)(A) (DLP); *see also* § 685.304(a)(3) (requiring entry counseling for certain direct loans to provide "comprehensive information on the terms and conditions of the loan").

304. *See* 20 U.S.C. § 1092(b)(1)(A)(iv).

305. *See id.* § 1078-3(b)(4); *see also id.* §§ 1077(a)(2)(B), 1078(j), 1094(h)(1)(C) (using "other terms and conditions" at the end of a list, suggesting the preceding items are part of the terms and conditions).

obligations[306] and schedules,[307] deferments,[308] income-driven repayment plans,[309] interest rates,[310] origination and default fees,[311] and the like.

U.S.C. § 1082(a)(3) in particular suggests that "terms and conditions" has a broad meaning in Title IV. U.S.C. § 1082(a)(3) provides that the Secretary may include in federal loan insurance contracts "such terms, conditions, and covenants relating to repayment of principal and payment of interest . . . and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved."[312] Although this provision is not entirely clear, it suggests that "terms, conditions, and covenants" can extend to any "matters" the Secretary deems relevant to the purposes of the loan program.

More general sources of ordinary meaning also suggest that relinquishment authority is part of the "terms and conditions" of FFELP loans. "Terms and conditions" is commonly used in statutes and judicial decisions to refer to the totality of a contract.[313] In particular, "terms and conditions" can include discretionary powers of one party to a contract,[314] so the fact that exercise of relinquishment power is discretionary is consistent with its status as part of the "terms and conditions" of a FFELP loan.

It might be argued that an item must be contained within a contract to be part of the "term and conditions" of that contract. For example, a private party typically has discretion not to enforce contract rights. Perhaps we would not ordinarily call that

306. *See id.* § 1078-3(b)(4)(B).

307. *See, e.g., id.* §§ 1077(a)(2)(B), 1077(a)(2)(F), 1078-3(b)(4)(D).

308. *See id.* §§ 1077(a)(2)(C), 1078-3(b)(4)(C)(i).

309. *See id.* § 1077(a)(2)(H).

310. *See id.* §§ 1078(j), 1094(h)(1)(C).

311. *See id.*

312. *See id.* § 1082(a)(3).

313. *See, e.g.*, ARIZ. REV. STAT. § 20-1119(A) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy."); FLA. STAT. § 627.419(1) (stating the same); Landrum v. Allstate Ins. Co., 811 F. App'x 606, 609 (11th Cir. 2020) ("We must 'construe the contract as written' and interpret it 'according to the entirety of its terms and conditions.'") (internal citations omitted); Saeed v. Kreutz, 606 F. App'x 595, 597 (2d Cir. 2015) ("The whole premise of Saeed's implied contract claim is that the EEO Policy established certain terms and conditions of his employment."); Fowler v. LAC Minerals (USA), LLC, 694 F.3d 930, 933 (8th Cir. 2012) ("In order to ascertain the terms and conditions of a contract, we must examine the contract as a whole") (citations omitted); Fish v. Home Depot USA, Inc., 455 F. App'x 575, 577 (6th Cir. 2012) ("[Plaintiff] Fish was provided a rental agreement with written terms and conditions (collectively, 'the Rental Agreement')"); Reliastar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 84 (2d Cir. 2009) ("Because the agreements have identical terms and conditions, . . . we refer to them collectively as the 'Coinsurance Agreements.'"). To be sure, "terms and conditions" sometimes is used to refer to a subset of a contract, with other provisions referenced separately. *See, e.g.*, FERC v. FirstEnergy Sols., Corp., 945 F.3d 431, 443 (6th Cir. 2019) (discussing "rates, terms, and conditions" of energy contracts). That usage does not seem relevant here, where no other loan provisions are mentioned.

314. *See* Johnson Controls, Inc. v. Atl. Auto. Components, LLC, No. 321172, 2015 Mich. App. LEXIS 1856, at *20 (Mich. Ct. App. Oct. 13, 2015) ("The plain and unambiguous terms and conditions of purchase gave [plaintiff] the absolute discretion to terminate the purchase order without cause with 14 days' notice." (citing Burkhardt v. Bailey, 680 N.W.2d 453 (Mich. Ct. App. 2004)); Powell v. Kramer, G.D. 14-08873, 2015 Pa. Dist. & Cnty. Dec. LEXIS 14830, at *38 (Allegheny Cty. Ct. Common Pleas May 22, 2015) ("terms and conditions" of employment agreement provided that employer could change benefits programs "in its sole discretion"); Griffin v. Long Island R.R., No. 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, at *2 (E.D.N.Y. June 5, 1998) ("terms and conditions" of employee's settlement agreement with employer included "follow-up substance testing at the discretion of" the employer).

discretion, which arguably arises from outside any contract, part of the "terms and conditions" of that party's contracts. But the discretion here is created by a statute that governs and empowers one of the contract parties, the federal government. Contracts in general and government contracts in particular typically incorporate the relevant statutory background by reference, as the Supreme Court has held.[315] Courts have found this to be the case for student loans in particular.[316] Thus, the Department's power to compromise would seem to be so incorporated, and therefore to be part of the "terms and conditions" of the loan.

The contract documents themselves further support the notion that relinquishment authority is found in the FFELP loan agreement. The possibility of waiver or modification is written directly into the Department of Education's master promissory notes ("MPNs"), which under the HEA are to "use clear, concise, and simple language to facilitate understanding of loan terms and conditions by applicants."[317]

A complete set of FFELP master promissory notes is not readily available, but the MPN for FFELP Stafford Loans in effect through July 31, 2011 contains a "Borrower's Rights and Responsibilities Statement" that "provides additional information about the terms and conditions of loans you receive" under the note.[318] The statement notes that the loans are "subject to the Higher Education Act of 1965 . . . and applicable U.S. Department of Education regulations (collectively referred to as the 'Act')," and that "any change to the Act applies to loans in accordance with the effective date of the change."[319] The Statement goes on to provide, "[t]he Act may provide for certain loan forgiveness or repayment benefits on my loans in addition to the benefits described in this MPN."[320]

315. *See* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms"); *see also* Sarmiento v. United States, 678 F.3d 147, 153 (2d Cir. 2012) (internal citations omitted) ("the provisions of [existing law] are regarded as implied terms of the contract") (construing contract between IRS and taxpayer to compromise tax liability); Illinois v. Daiwa Special Asset Corp., 337 F.3d 951, 955 (7th Cir. 2003) (internal citations omitted) ("Statutes are a source of implied contract terms"); McMoran Oil & Gas Co. v. KN Energy, Inc., 942 F.2d 765, 768–69 (10th Cir. 1991) ("terms and conditions" of sale of natural gas included whether the gas was sold in a regulated or a deregulated setting, i.e., the regulatory background of a contract is part of the "terms and conditions" of that contract); Doe v. Ronan, 937 N.E.2d 556, 562 (Ohio 2010) (where legislature adopted detailed statutes regulating employment of school employees, such contracts "must be construed as though the statutes are incorporated into the contract and become implied terms and conditions of any contract or contractual right."); 11 WILLISTON ON CONTRACTS § 30:19 (4th ed. 2021) (Unless a contrary intention is manifested, "valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract") (internal footnotes omitted).

316. *See* In re Evans, 322 B.R. 429, 435 (Bankr. W.D. Wash. 2005) ("The terms of the loans are established by the promissory notes executed by the student loan borrowers as well as federal laws and regulations.").

317. 20 U.S.C. § 1082(m)(1)(B)(i).

318. FED. FAM. EDUC. LOAN PROGRAM (FFELP), FEDERAL FAMILY EDUCATION LOAN PROGRAM (FFELP): FEDERAL STAFFORD Loan MASTER PROMISSORY NOTE (MPN) KHEAA, https://web.archive.org/web/20160322192347/https://www.kheaa.com/pdf/forms/staf_mpn_fill.pdf [hereinafter 2011 FFELP MPN].

319. *Id.*

320. *Id.*

New loans are no longer being issued under the FFELP, but the Master Promissory Notes currently used in the Direct Loan Program seem to confirm that the relinquishment authority is part of DLP loans' terms and conditions. The MPNs provide, under the heading "MPN Terms and Conditions," that "[t]he terms of this MPN are determined in accordance with the Higher Education Act of 1965" and other federal laws and regulations, as well as that terms of the loan may be "modified or waived" by the Department of Education or its servicers, as long as this is accomplished in writing.[321] It also reaffirms the connection between the HEA's provisions and the "terms" of the loan, noting that "amendments to the Act may change the terms of this MPN."[322]

2. Counterarguments

The argument that relinquishment authority is not part of the "terms and conditions" of FFELP loans rests more on gaps in the affirmative case than on independent contrary evidence. As example of such gaps, Title IV does not explicitly state that the authorities granted in §§ 1082(a)(4) and 1082(a)(6) are part of the "terms and conditions" of a FFELP loan, and the single instance where Title IV calls a discrete payment-adjustment authority part of the "terms and conditions" of a loan—U.S.C. § 1087e(d)(4), which was cited above—[323] is just one provision in a lengthy statute that contains many references to "terms and conditions."[324]

Similarly, although the MPNs refer to modification and waiver, they do not expressly refer to U.S.C. §§ 1082(a)(4) and 1082(a)(6), and the current MPN does not clearly denote the modification and waiver authority that it does reference as part

321. *MPN for Undergraduate Students*, FED. STUDENT AID, https://studentaid.gov/mpn/subunsub/landing (last visited Dec. 27, 2021) [hereinafter DLP Subsidized & Unsubsidized MPN]; *Master Promissory Note (MPN): Direct PLUS Loans, William D. Ford Federal Direct Loan Program*, FED. STUDENT AID https://studentaid.gov/sites/default/files/PLUS_MPN_508-en-us.pdf (last visited Dec. 27, 2021) [hereinafter DLP PLUS MPN]. The same provision appears in the MPNs' "Borrower's Rights and Responsibilities Statement," which "provides additional information about the terms and conditions of the loans."

322. DLP Subsidized & Unsubsidized MPN, *supra* note 321; DLP PLUS MPN, *supra* note 321; *see also* 34 C.F.R. § 685.201(c)(1) (2021) (stating that for Direct Consolidation Loans, "[t]he application and promissory note sets forth the terms and conditions").

323. *See* 20 U.S.C. § 1087e(d)(4) (providing in a Section titled "Terms and conditions of loans" that "the Secretary may provide, on a case-by-case basis, an alternative repayment plan" and shall "design[]" such plans). On the other hand, U.S.C. § 1087e(d)(4) could weigh against finding that relinquishment authority extends to jubilee in the first place. Arguably, if the Secretary has relinquishment authority over DLP loans, then the authorization in U.S.C. § 1087e(d)(4) to craft repayment plans is surplusage. This is not necessarily the case, however, as the provision also constrains the Secretary, who must "ensure that" repayment plans provided to borrowers "do not exceed" certain costs. *See* 20 U.S.C. § 1087e(d)(4). U.S.C. § 1087e(d)(4) thus can be understood as consistent with plenary relinquishment power: the provision limits that power in the specific situation of designing personalized IDR plans. Given the clear grant of authority to "waive . . . or release any . . . claim," 20 U.S.C. § 1082(a)(6) (2021), it seems unlikely that the surplusage argument would prevail.

324. According to a LEXIS search performed on July 27, 2021, sixteen different Sections of Parts B and D of Title IV mention "terms and conditions" at least once. LEXIS, https://plus.lexis.com/firsttime_(select "Statutory Codes," then "United States Code Service – Titles 1 Through 54," then click: "Title 20. Education," then Chapter 28. Higher Education Resources and Student Assistance," then click: "Student Assistance," then check both "Federal Family Education Loan Program" and "William D. Ford Federal Direct Loan Program." Then, enter "terms and conditions" in the search box and click "search." After, eliminate multiple hits for the same provision effective at different times by filtering by date).

of the "terms and conditions." In any event, a textualist court might discount the Department's use of language in an MPN, as discussed above.[325]

The HEA sometimes uses phrases other than "terms, conditions, and benefits" or "terms and conditions" to refer to the totality of the student loan relationship. As previously noted, two provisions refer to "terms and conditions" on the one hand and "benefits and privileges" on the other.[326] U.S.C. § 1082(a)(3), mentioned above, refers to "terms, conditions, and covenants."[327] Other provisions mention "terms, limitations, or conditions"[328] and "terms and conditions or provisions" of federal student loans.[329] These instances open up the possibility that the opportunity to receive cancellation under the Secretary's relinquishment authority might be a "covenant," "provision," "limitation," or "privilege" of FFELP loans without being a "term, condition, or benefit."

Two of these possibilities seem unlikely. Assuming neither party makes any promises relating to relinquishment authority, as is the case under the current MPNs, it seems unlikely that the possibility of cancellation, or the authority to cancel, is a "covenant."[330] As for "provisions," the Act suggests that the word is a substitute for "terms and conditions." In 20 U.S.C. § 1098bb, the Secretary is authorized to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act" as needed in connection with war and national emergency.[331] The same section of the Act requires the Secretary to provide notice of "the terms and conditions to be applied in lieu of such statutory and regulatory provisions."[332]

It does seem possible that the opportunity for relinquishment cancellation could be a "privilege" rather than a "benefit" of FFELP loans, but the HEA's consistent reference to loan cancellation as a "benefit," rather than a "privilege,"[333] cuts against this interpretation. The argument that nonexercise of relinquishment authority is a "condition" of the loan could conceivably support the interpretation that nonexercise is a "limitation" of the loan, but even if that interpretation were accepted, the possibility of relinquishment cancellation could still be part of the "terms, conditions, or benefits" of FFELP loans under the other arguments presented here. Moreover, there is no affirmative indication in the HEA that nonexercise of relinquishment authority as a "limitation" and not a "condition" of FFELP loans.

The common conclusion of all the counterarguments mentioned so far is that there is room to argue that relinquishment authority is not part of the "terms and

325. *See* discussion *supra* Part III.A.

326. *See* 20 U.S.C. §§ 1078-6(a)(4), 1087dd(h)(1)(B).

327. *Id.* § 1082(a)(3).

328. *See id.* § 1078-12(d)(3) (Secretary's student loan repayments under program for aid to civil legal assistance attorneys to be made "subject to such terms, limitations, or conditions as may be mutually agreed upon by the borrower and the Secretary").

329. *See id.* §§ 1094(h)(1)(A)(ii), 1094(h)(1)(C)(ii).

330. *See, e.g.*, *Covenant*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing as the only definition of covenant: "[a] formal agreement or promise, usu. in a contract or deed, to do or not do a particular act; a compact or stipulation").

331. *See* 20 U.S.C. § 1098bb(a)(1).

332. *See id.* § 1098bb(b)(2).

333. *See* discussion *supra* Part IV.B.1.

conditions" of FFELP loans. The authority is not mentioned with great specificity as being among the "terms and conditions," and it is possible that relinquishment authority could be something else – a "privilege," perhaps. But it appears that nothing in the statute affirmatively indicates that Congress excluded relinquishment authority from FFELP loan terms and conditions. The case for inclusion, though imperfect, seems the stronger one based on this evidence.

Two other counterarguments are worth mentioning. The first is that the federal government's relinquishment authority cannot be part of the "terms and conditions" of FFELP loans because the federal government at least initially was not a party to FFELP loans, which were made by private lenders.[334] The government would take over the loan only upon the happening of an event such as a default.[335] However, the promissory notes seem to answer this objection. The key provision of the FFELP MPN was the borrower's promise to "pay to the order of the lender" the amount disbursed, plus interest and other charges.[336] "Lender" in turn was defined as "the original lender and its successors and assigns, including any subsequent holder of this MPN."[337]

The final counterargument addresses the uses of "terms and conditions" in other contexts. Although the term is used to refer to discretionary powers of a party, it typically refers to discretionary powers created by the contract.[338] Perhaps this means that the Secretary's power to forgive loans is outside the contract "terms and conditions," as that power arises from statute, not contract.[339] However, this Article's research has not identified any authority affirmatively supporting this position, such as a case addressing whether and when the statutory powers of a governmental party to a contract are "terms and conditions" of that contract. Insofar as "terms and conditions" is often used for the totality of the contractual relationship, as noted above, the phrase would seem to sweep in powers to alter contract duties, no matter what their source. Finally, some definitions of "term" in the contract context include the totality of the legal relationship or the laws affecting the agreement, not limited to items that arise from the agreement itself. The following section takes up this issue.

In sum, the argument that relinquishment authority is part of the "terms and conditions" of FFELP loans is strong but not clearly dispositive. In this, it is similar to the preceding argument, that the opportunity to benefit from relinquishment authority is a "benefit" of FFELP loans.

334. *See* John Patrick Hunt, *The Development of Federal Student Loan Bankruptcy Policy*, 45 J.C. & U.L. 85, 98 (2020) [hereinafter Hunt II].

335. *See id*.

336. 2011 FFELP MPN, *supra* note 318, at 1.

337. *Id*.

338. *See* discussion accompanying *supra* note 313.

339. *See* 20 U.S.C. §§ 1082(a)(4), 1082(a)(6).

D. Loan Cancellation as a "Term" of FFELP Contracts

"Terms" and "conditions," understood as separate items joined by a conjunction, might mean something different from the phrase "terms and conditions" taken as a unit. This section addresses the possibility that relinquishment authority is a "term" of FFELP loan contracts if the word "term" is taken in isolation.

The HEA provides that the Secretary's discretionary power to waive repayment under a type of student is a "term" of the agreement. Moreover, relinquishment authority appears to meet the definitions of contract "term" offered by Corbin and by the Restatement (Second) of Contracts.[340] The UCC's definition of a contract "term" requires that the item be part of the agreement, but waiver and modification authority has been written into FFELP agreements.[341] On the other hand, relinquishment authority arises from the HEA and not from loan contracts, and that might indicate that the authority is not a contract term.

1. Affirmative Argument

The HEA does not seem to distinguish systematically between "terms" as a separate concept and "terms" as part of "terms and conditions." Indeed, the Act sometimes uses "terms" interchangeably with "terms and conditions."[342] Thus, the argument above that the possibility of cancellation is part of the "terms and conditions" of a federal student loan is also an argument that the possibility is part of the "terms" of the loans in this sense.

There is some indication from the use of the word "term" in the HEA where it stands alone, suggesting relinquishment authority is a "term" of FFELP agreements. The HEA refers to the Secretary's discretionary power to waive certain rights to recover from borrowers as a "term" of an agreement. U.S.C. § 1078-12 provides that the Secretary may enter into agreements to provide repayment assistance to civil legal assistance attorneys.[343] U.S.C. § 1078-12(d), titled "Terms of agreement," requires that agreements under the provision specify that the Secretary has the right to recover benefits provided under the agreement under some circumstances (for example, if the borrower quits a job as a civil legal assistance attorney before the term of the agreement is up).[344] The subsection provides, "the Secretary may waive, in whole in part, a right of recovery under this subsection if it is shown that recovery would be contrary to the public interest."[345] This provision is helpful for a student loan jubilee in that it seems to provide that discretionary power to waive claims, such as those

340. *See* discussion *infra*.

341. *See* discussion *infra*.

342. *See* 20 U.S.C. § 1087i-2(b). Under the title "Terms of loans," this subsection provides that one type of federal direct consolidation loan "shall have the same terms and conditions" as another type of federal direct consolidation loan. *Id*.

343. *See id.* §§ 1078-12(c), 1078-12(d).

344. *See id.* § 1078(d)(1)(B).

345. *See id.* § 1078(d)(1)(D).

under U.S.C. § 1082(a)(6), is a "term" of a student loan agreement, or at least of a student-loan-related agreement.[346]

The FFELP regulations also support the notion that loan contract "terms" include the relevant aspects of the legal environment surrounding the contract. One element of the regulations' definition of "default" is "[t]he failure of a borrower . . . to make an installment payment when due, or to meet other terms of the promissory note, the Act, or regulations as applicable."[347] This provision could be read to imply that the terms of a FFELP loan include the applicable statutory and regulatory provisions, not just the promises and conditions found in the promissory note.

Outside the specific HEA context, this Article's research has not turned up a general definition of a contract "term" in judicial decisions. Courts refer to loan forgiveness provisions of contracts as "terms" of those contracts without explicitly defining the word.[348]

Having surveyed uses of "term" that support the proposition that relinquishment authority is a "term" but do not define that word, we now turn to definitions to assess the possibility that "term" has the specialized legal meaning of "contract term." Textual interpretation calls for using technical definitions for technical terms.[349]

Along these lines, Corbin provides, "[t]he terms of a contract are all of its words, taken individually and also in phrases, clauses, sentences, paragraphs, and the rules of law affecting the operation of the language used."[350] The statutory provisions authorizing the Secretary to use relinquishment power are "rules of law," and they affect the "operation" of the promissory note's language requiring repayment in that they define when that obligation comes due. Thus, Corbin's formulation suggests that the legal powers of the Secretary to cancel FFELP loans are "terms" of those loans.

The Restatement (Second) of Contracts defines a "term" of a contract as "that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations."[351] As described, the Secretary's power to forgive loans appears to be an aspect of the "legal relations" between borrower and government. Moreover,

346. On the other hand, the provision may be unhelpful in that it expressly provides that the Secretary has the power to waive claims to promote the public interest in a single narrow context, potentially suggesting there is no general power to waive claims on this basis. A counter to this contention is that § 1078-12(d) provides what a certain type of "written agreement" must "specif[y]." *See id.* § 1078(d)(1). What this provision implies for other contexts may be merely that the Secretary need not specify the general waiver power in writing, rather than that the power does not exist.

347. *See* 34 C.F.R. § 682.200 (2021); *id* § 685.102 (2021).

348. *See, e.g.*, Johnson Reg'l Med. Ctr. v. Halterman, 867 F.3d 1013, 1018 (8th Cir. 2017) (describing a provision for loan forgiveness as a "term" of employee's recruitment agreement); Decohen v. Capital One, N.A., 703 F.3d 216, 221 (4th Cir. 2012) (describing a provision "under which a bank agrees to cancel all or part of a customer's obligations . . . upon the occurrence of specified events" as a "loan term" (internal citations omitted)); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schwarzwaelder, 496 F. App'x 227, 232 (3d Cir. 2012) ("Often the terms of the loan explicitly contemplate forgiveness.").

349. *See* SCALIA & GARNER, *supra* note 64, at 73–77.

350. 8 CORBIN ON CONTRACTS § 30.6.

351. RESTATEMENT (SECOND) OF CONTRACTS § 5 (AM. L. INST. 1981).

those legal relations "result from the set of promises" contained in the promissory note. Thus, the forgiveness power would seem to fit the terms of this expansive definition.

2. Counterarguments

Unsurprisingly, some objections to the theory that relinquishment authority is a "term" of FFELP loans are similar to objections to the theory that the authority is part of the "terms and conditions" of the loans. Again, the HEA and regulations do not explicitly refer to relinquishment authority as a "term." Again, although judicial decisions refer to loan forgiveness as a "term," it does not appear that opinions commonly describe a discretionary power to release obligations in this way. And again, these amount to the (partial) absence of evidence rather than evidence of absence.

As for legal definitions of a contract "term," the Uniform Commercial Code ("UCC") provides an arguably narrower definition than Corbin and the Restatement. The UCC defines a "term" as "a portion of an agreement that relates to a particular matter."[352] The UCC explicitly distinguishes the "agreement,"[353] or "bargain of the parties in fact,"[354] from the "contract," the "total legal obligation that results from the parties' agreement."[355] At least one dictionary defines "term" as an "element[]" of an "agreement,"[356] although other definitions embrace the more expansive view of a "term" as part of a contract.[357] While Corbin would call relinquishment authority a "term" because it is a "rule of law that affects the operation of the language used,"—and the Restatement would probably call it a term because it is part of the legal relations resulting from the agreement—the UCC would not call relinquishment authority a "term" unless that authority is part of the "agreement."

The UCC's definition may not be that threatening to jubilee authority. As noted, FFELP loan agreements have expressly provided for the possibility of modification under the Act,[358] so that relinquishment authority could fairly be called part of the "agreement."

352. *See* U.C.C. § 1-201(b)(40) (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2021).

353. *Id.* § 1-201(b)(3) (defining "agreement," "as distinguished from 'contract'"); *id.* § 1-201(b)(12) (defining "contract," "as distinguished from 'agreement'").

354. *Id.* § 1-201(b)(3); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

355. UNIFORM COMMERCIAL CODE § 1-201(b)(12) (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2021); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. b (AM. L. INST. 1981) ("[T]he word 'contract' is commonly and quite properly . . . used to refer to the resulting legal obligations [i.e., resulting from enforceable promise], or to the entire resulting complex of legal relations.").

356. *See* AMERICAN HERITAGE, *supra* note 273 ("One of the elements of a proposed or concluded agreement").

357. *See Term*, BLACK'S 7TH, *supra* note 273 ("A contractual stipulation"); *Term*, BLACK'S LAW DICTIONARY (6th ed. 1996) [hereinafter BLACK'S 6TH] ("[w]ord, phrase, or condition in a contract, instrument, or agreement which relates to a particular matter").

358. *See* discussion *supra* Part IV.C.1.

Moreover, some dictionary definitions support the Corbin-Restatement position that a "term" need not be part of the agreement itself. Merriam-Webster's Collegiate Dictionary defines "terms" as "provisions that determine the nature and scope of an agreement."[359] If "provisions" here include any and all legally operative provisions, then the terms of a FFELP loan would seem to include the Secretary's relinquishment authority. On the other hand, "provisions" may be best understood here as "provisions of the agreement." The 1990 edition of Black's Law Dictionary defines a "term" as a "[w]ord, phrase, or condition in a contract" rather than as a portion of an agreement.[360]

The strongest argument that relinquishment authority is not a "term" of FFELP loan contracts might be that relinquishment authority, being created by statute, does not "result[] from" the FFELP loan agreement,[361] even though it is referenced in and arguably part of the agreement. One response to this argument is that there is no loan to cancel without an agreement, so the existence of cancellation authority in any individual case depends on the agreement. Another reply is that the Restatement (Second) of Contracts' reference to the "legal relations" resulting from the agreement includes all legally operative aspects of the relationship between the parties that the agreement creates. This view suggests that the agreement only needs to create the relationship that contains the terms, not each and every one of the terms themselves.

E. Loan Cancellation as a "Condition" of FFELP Contracts

"Conditions" is used interchangeably with "terms and conditions" in the HEA.[362] It is striking just how often dictionaries define "term" as a "condition"[363] and vice

359. *Term*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273.

360. *Term*, BLACK'S 6TH, *supra* note 357.

361. This phrase is taken from the Restatement (Second) of Contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. b. (AM. L. INST. 1981).

362. *See* 20 U.S.C. § 1078-6(a)(4) (providing in a paragraph titled "Applicability of general loan conditions" that certain loans are subject to the "same terms and conditions" as other loans; *see also* § 1078(k)(4)(B) (providing notice of options for removing loan from default must include "[t]he relevant fees and conditions associated with each option"); *id.* § 1087-1(a)(1) (stating that reason for certain changes to program is in part "to assure that the limitation on interest payments or other conditions (or both)" on certain loans "do not impede" fulfillment of the purposes of Part B).

363. *See Term*, BLACK'S 6TH, *supra* note 357 ("Word, phrase, or condition in a contract"); *Term*, AMERICAN HERITAGE CONCISE, *supra* note 273 ("4. Often terms. A stipulation or condition"); *Term*, AMERICAN HERITAGE, *supra* note 273 ("One of the elements of a proposed or concluded agreement; a condition."); *Term*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273, ("[P]rovisions that determine the nature and scope of an agreement"); Term, OED 1989, *supra* note 273 ("8 a. pl. Conditions or stipulations limiting what is proposed to be granted or done."). The current OED elaborates: ("II. A condition or stipulation; a state or situation . . . . 6. a. A condition under which something may be done, settled, agreed, or granted; a stipulated requirement or limitation. Usually in plural; also in terms and conditions."). *Term*, OXFORD ENGLISH DICTIONARY ONLINE (2021). As is evident from the foregoing, "term" is often defined as a "stipulation." Given that the potentially relevant meanings of "stipulation" seem to be "a formulated term or condition of a contract or agreement" and "a condition stipulated for," *Stipulation*, OED 1989, *supra* note 273 (referring to definitions "4" and "5", as the definition of a "term" as a "stipulation" is not helpful here).

versa.[364] This section focuses on meanings of "conditions" that do not duplicate meanings of "terms and conditions" or "terms" discussed above.

The Secretary's decision not to exercise relinquishment authority to cancel loans could reasonably be termed a "condition" of the borrower's duty to pay. If the nonexercise of relinquishment authority is a prerequisite to the borrower's duty, then it can be seen as an event that must occur before the borrower's duty matures. Although the exercise or nonexercise of relinquishment is within the Secretary's authority, that is not a problem for this argument; it appears very unusual to refer to a party's decision not to exercise its power to release the other from the contract as a "condition."

1. Affirmative Argument

"Condition" is not defined in the HEA, but it appears repeatedly in the Act, bearing what appears to be a general meaning of "prerequisite."[365] Dictionaries define "condition" the same way.[366]

Contract law's specialized meaning of "condition" is consistent with the definition of condition as "prerequisite" but is more precise. The Restatement (Second) of Contracts provides that a "condition" in a contract is an event that must occur in order for performance under the contract to become due.[367] "Condition," when used in the phrase "condition subsequent," also can mean an event that terminates a contractual obligation that has already come due.[368]

364. RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt. a (AM. L. INST. 1981) ("Sometimes ['condition'] is used to refer to a term (§ 5) in an agreement that makes an event a condition, or more broadly to refer to any term in an agreement"); 8 CORBIN ON CONTRACTS § 30.6 ("Anyone can use the word 'conditions' to mean exactly [the terms] and nothing more.").

365. *See, e.g.*, 20 U.S.C. § 1078(c)(3)(D) (permitting guaranty agencies to put borrowers into forbearance without borrower consent "under conditions authorized by the Secretary."); *id.* § 1078-2(d)(1)(A)(i) (commencement of repayment obligation is "subject to deferral" when borrower "meets the conditions required for a deferral"); *id.* §§ 1098h(a)(1)(B), (a)(2)(A)(ii), (a)(3)(B) (requiring certain disclosures from borrowers "as a condition of eligibility" for certain loans and discharges); *see also, e.g.*, 34 C.F.R. § 674.9(j) (2021) (regaining eligibility for certain loans after default requires satisfying "one of the conditions [for eligibility]" in a particular regulatory provision); *id.* §§ 682.210(a)(4) (2021), 682.215(f) (2021) (referring to prerequisites as "conditions").

366. *See Condition*, AMERICAN HERITAGE CONCISE, *supra* note 273 ("A prerequisite."); *Condition*, AMERICAN HERITAGE, *supra* note 273 ("One that is indispensable to the appearance or occurrence of another; prerequisite"); *Condition*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273 ("[S]omething essential to the appearance or occurrence of something else: PREREQUISITE"); *Condition*, OED 1989, *supra* note 273 ("Something that must exist or be present if something else is to be or take place; that on which anything else is contingent; a prerequisite.").

367. *See* RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. L. INST. 1981); *see also* 8 CORBIN ON CONTRACTS § 30.7 ("Conditions, for our present purposes, are those *facts and events*, occurring *after the making of a valid contract*, that must exist or occur before there is a right to immediate performance." (emphasis in original)).

368. *See* RESTATEMENT (SECOND) OF CONTRACTS § 230 (AM. L. INST. 1981) (provision "that an obligor's matured duty will be extinguished on the occurrence of a specified event" is "sometimes referred to as a 'condition subsequent.'"). *Black's Law Dictionary* embraces both definitions. *See Condition*, BLACK'S 7TH, *supra* note 273 ("A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance."); *Condition*, BLACK'S 6TH, *supra* note 357 (retaining the same definition as BLACK'S 7TH); *see also Condition*,

Under these definitions, the Secretary's nonexercise of relinquishment power before a due date could be styled as a "condition": nonexercise is a "prerequisite" to the duty to pay or an event that must occur before payment comes due. Exercise of that power after payment is due could be a "condition subsequent" to the duty to pay in that such exercise would terminate the duty to pay.

2. Counterarguments

It might be argued that it makes a difference that the Secretary—the personification of one of the parties to a federal direct student loan contract—decides unilaterally whether the "condition" of nonexercise of relinquishment authority is fulfilled. Requiring payment "if I want it," for example, might be different in kind from requiring payment "if it rains on Wednesday." However, contract law recognizes as conditions events that are under the control of a contracting party; conditions that one party be satisfied with the other's performance, for example, are routinely recognized.[369]

The more serious problem seems to be that apparently no authority expressly calls one party's failure to use its power to terminate the contract or waive or release claims a "condition" of the other party's duty.[370] This is similar to the situation with "terms and conditions" and "terms," where no judicial precedent seems to address whether preexisting discretionary powers are "terms and conditions" or "terms" of a contract. It seems, however, that opinions use "condition" in a precise sense more frequently than "terms" or "terms and conditions," so the absence of authority may be more telling here.

F. Loan Cancellation as Part of the "Terms, Conditions, and Benefits" of the FFEL Program

Loans under the FFELP are not just contracts; they are also instances of the implementation of a government program. Thus, even if relinquishment authority is not part of the "terms and conditions," "terms," or "conditions" of the FFELP loan contract itself, it might be part of the "terms, conditions, and benefits" of the loan because it is part of the terms, conditions, and benefits of the program under which the loan is made. For example, consider a possible judicial finding that

AMERICAN HERITAGE, *supra* note 273 ("A provision making the effect of a legal instrument contingent on the occurrence of an uncertain future event."); *Condition*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273 ("[A[premise upon which the fulfillment of an agreement depends . . . a provision making the effect of a legal instrument contingent upon an uncertain event; *also* : the event itself") (emphasis in original); *Condition*, OED 1989, *supra* note 273 ("In a legal instrument, e.g., a will, or contract, a provision on which its legal force or effect is made to depend.").

369. *See* RESTATEMENT (SECOND) OF CONTRACTS § 228 (AM. L. INST. 1981) (providing rules for interpreting conditions of an obligor); 8 CORBIN ON CONTRACTS § 31.6 ("[A] contractor can, by the use of clear and appropriate words, make a duty expressly conditional upon personal satisfaction with the quality of performance").

370. *Cf.* 8 CORBIN ON CONTRACTS § 30.7 (asserting that although "legal capacity, offer, acceptance, consideration, and delivery are in some sense conditions precedent" to contractual rights and remedies, "[n]evertheless, it was never customary to refer to them as 'conditions precedent.'").

relinquishment authority is excluded from the contract terms and conditions, perhaps because of its statutory origin. In such a case, an argument that relinquishment authority is part of the terms and conditions of the FFEL Program could be helpful.

1. Affirmative Argument

In most instances, when "terms, conditions, and benefits" and its constituent parts appear in Title IV, the reference could be to the terms, conditions, and/or benefits of the contract, the program, or both.[371] The use of words in the statute itself thus does not help decide whether relinquishment authority is a term, condition, or benefit of FFELP loans by virtue of being a term, condition, or benefit of the FFEL Program.

More generally, statutes and judicial decisions use the phrase "terms and conditions" of a program to refer to all the rules governing that program.[372] The "terms and conditions" include rules authorizing the program administrator to use discretion.[373] Sometimes the word "terms" alone instead of the phrase "terms and

371. *See supra* Parts IV.A, IV.B.1, IV.C.1, IV.D.1, and IV.E.1 (discussing appearances of "terms, conditions, and benefits," "terms and conditions," "terms," conditions," and "benefits" in HEA Title IV).

372. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 575 (1992) (providing for transfer of certain excess funds "under the terms and conditions of the appropriate program"); Elliott v. Montgomery, 59 So. 3d 663, 669 (Ala. 2010) (the power to set the "terms and conditions" of a state benefit program included the power to set "the administrative rules governing the State program").

373. *See* Nat'l Fed'n of the Blind v. Container Store, Inc., 904 F.3d 70, 86 (1st Cir. 2018) (loyalty program's "terms and conditions" provided that seller could, "at [their] discretion," modify terms of program); James v. McDonald's Corp., 417 F.3d 672, 678 (7th Cir. 2005) (for promotional contest offered by fast-food restaurant, "A contest participant cannot pick and choose among the terms and conditions of the contest; the rules stand or fall in their entirety."); Santich v. GNC Holdings, Inc., No. 17-cv-540 DMS(RBB), 2017 U.S. Dist. LEXIS 164707, at *6 (S.D. Cal. Sept. 8, 2017) (discussing retailer's Gold Card loyalty program, saying: "The Terms and Conditions and the Gold Card permit GNC to modify and eliminate the Program at its discretion, at any time and without notice."); Liberchuk v. Guardian Life Ins. Co. of Am., No. 99 Civ. 8555, 2000 U.S. Dist. LEXIS 18267, at *4–*5 (S.D.N.Y. Dec. 20, 2000) ("Under the terms and conditions of plaintiff's health care plan, . . . defendant is vested with discretionary authority to determine eligibility for benefits and to construe the terms of the plan"); *In re* Quinn, 141 B.R. 44, 48 (Bankr. D.N.J. 1992) ("Terms and conditions" of pretrial intervention program included "discretion of the prosecutor and program director" to require restitution and community service); *In re* Ward, No. SB-18-0018-R, 2018 Ariz. LEXIS 176, at *1 (Ariz. May 31, 2018) ("Terms and conditions" of lawyer's reinstatement to the bar include lawyer's entry into agreement that "may, at the discretion of the Compliance Monitor, include" certain requirements); State v. Parekh, 1 CA-CR 08-0583, 2009 Ariz. App. Unpub. LEXIS 358, at *10 (Ariz. Ct. App. Aug. 27, 2009) ("Terms and conditions" of probation included provision that "[a]t the discretion of [the Adult Probation Department]," defendant must attend certain treatment program); Marianna v. Ark. Mun. League, 722 S.W.2d 578, 579 (Ark. 1987) ("Terms and conditions" of program under which organization would defend certain lawsuits, included that the program "shall, in the sole discretion of the Program administrators, provide extraordinary legal defense" in certain lawsuits); Commonwealth v. Univ. of Pittsburgh Med. Ctr., No. 334 M.D. 2014, 2019 Pa. Commw. Unpub. LEXIS 305, at *16 (Pa. Commw. Ct. April 3, 2019) ("Terms and conditions" of program offered by health plan included power, in plan's "sole discretion" to modify or terminate program); Parker v. Ind. State Fair Bd., 992 N.E.2d 969, 975 (Ind. Ct. App. 2013) ("General Terms and Conditions" for state fair participation adopted by state fair board in exercise of delegated legislative authority "give the [Board] broad discretion to interpret its rules, administer a drug testing program and assess appropriate penalties."); People v. Thomas, 577 N.E.2d 496, 497 (Ill. App. Ct. 1991) (finding it improper for court to delegate discretion to require treatment program as a condition of probation because "[t]he determination of the terms and conditions of probation is a judicial function") (citations omitted).

conditions" is used to refer to the rules of a program.[374] Here again, "terms" can include rules that confer on the party running the program the discretion to benefit the other or not.[375]

In connection with a program in which people choose to participate, "conditions" can be used to refer to the requirements the beneficiary must meet in order to participate in the program.[376] "Conditions" in this sense can be used to refer to requirements that the program administrator can waive.[377] As applied to FFELP loans, the borrower's promise to repay is itself a "condition" of the borrower's participation. This promise to repay is qualified by the possibility that the Secretary will use relinquishment authority to forgive. For DLP loans to have the "same" conditions, as provided by U.S.C. § 1087e(a)(1), they arguably would have to have the same qualifications on the obligation to repay, including the qualification created by the Secretary's relinquishment authority.

Loan forgiveness via relinquishment authority could also be a "benefit" of the FFEL Program even if "benefit" is understood to mean something narrower than "advantage," the interpretation discussed previously.[378] One of the less expansive ordinary meanings of "benefit" is financial aid received under a government program.[379] Loan forgiveness is arguably a "benefit" in this sense. And a benefit under a program need not be available as a matter of right to be a benefit. In the famous *Bakke* case, Justice Powell's opinion refers to the "opportunity to participate" in an educational program as a "benefit."[380] Thus, the opportunity to receive

374. *See, e.g.*, Beltran v. Smith, 458 U.S. 1303, 1305 (1982) (rejecting Witness Protection Program participant's application for stay of ruling denying relief: "There is no indication that the officials responsible for the program will not continue to provide him with protection under the terms of the program."); Sleater v. Benton Cty., 812 F. App'x 470, 471 (9th Cir. 2020) ("Under the terms of the [Legal Financial Obligations] program, if an LFO debtor failed to make a monthly payment . . . the Clerk's office would issue an arrest warrant.").

375. *See* Apple, Inc. v. Corellium, LLC, No. 19-81160-CIV-SMITH, 2021 U.S. Dist. LEXIS 36577, at *17 (S.D. Fla. Feb. 24, 2021) ("[T]erms" of Apple's Security Bounty Program Policy included provisions that "[p]ayments are at Apple's sole discretion" and "[r]ewards are granted solely at the exclusive discretion of Apple.").

376. *See, e.g.*, United States v. Knotterus, 139 F.3d 558, 560 (7th Cir. 1998) (using "conditions" of IRS program interchangeably with "eligibility requirements" of the program). The phrase "conditions of eligibility" is commonly used to describe the prerequisites for participation in a government program. *See, e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 883 (1988); Mayhew v. Burwell, 772 F.3d 80, 95 (1st Cir. 2014); Anderson v. Recore, 446 F.3d 324, 331 (2d Cir. 2006).

377. *See* United States v. Jones, No. 17-20697, 2020 U.S. Dist. LEXIS 190768, at *12–*13 (E.D. Mich. Oct. 15, 2020) (stating that a "condition" of defendant's supervised release was that he participate in a substance abuse treatment program, but that "[t]his condition may be waived at the discretion of the Probation Department").

378. *See* discussion *supra* Part IV.B.1.

379. *See Benefit*, AMERICAN HERITAGE, *supra* note 273 ("A payment made or an entitlement available in accordance with . . . a public assistance program."); *Benefit*, AMERICAN HERITAGE CONCISE, *supra* note 273 (retaining the same definition as AMERICAN HERITAGE); *Benefit*, MERRIAM-WEBSTER'S COLLEGIATE, *supra* note 273 ("[F]inancial help in time of sickness, old age, or unemployment.").

380. Regents Univ. of Cal. v. Bakke. 438 U.S. 265, 304 (1978) (quoting Lau v. Nichols, 414 U.S. 563, 568 (1974)); *see also* United States v. Maxwell, 579 F.3d 1282, 1306 (11th Cir. 2009) (holding that program aimed at "giving exclusive opportunities" to certain businesses was a "Government Benefit Program" for application of federal sentencing guidelines). Standing cases also support the point. *See, e.g.*, Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993) (plaintiffs had standing based on allegation

forgiveness under relinquishment authority could be a "benefit" of the FFEL Program.

2. Counterarguments

Apart from the fact that the HEA does not directly call relinquishment authority part of the "terms and conditions," or a "term," or a "condition" of the FFEL Program, there are at least two counterarguments to the positions just presented. The first builds on the observation that program "conditions" can include eligibility requirements. It is also possible that the "conditions" mentioned in U.S.C. §§ 1087a(b)(1) and 1087e(a)(1) are *limited to* FFELP eligibility requirements.[381] Older versions of some provisions of Title IV do seem to use "conditions" to refer to eligibility requirements for forgiveness and repayment assistance programs,[382] but "conditions" does not appear to be consistently used to mean "eligibility requirements."[383] There does not seem to be any particularly compelling reason to limit "conditions" to loan eligibility requirements, but that interpretation is plausible. If adopted, it would cut against the legal argument for jubilee, as it would foreclose the possibility that "conditions" refers to relinquishment authority or the possibility of its exercise.

The more significant objection is that it is not clear that the "terms, conditions, and benefits" of FFEL *loans* necessarily include all terms, conditions, and benefits of the FFEL *program*. Little authority bears significantly on this question. Given that the program's rules govern the loans, it stands to reason that their status as "terms, conditions, and benefits" should also carry over.

G. Additional Textual Arguments on Relinquishment Applicability to Direct Loans

This section addresses two additional textual arguments relating to whether relinquishment authority extends to direct loans. These arguments are not based on the use of individual words and phrases in the statute but relate to higher-level aspects of the statutory design. The first is that the meager nature of the powers that Part D explicitly grants the Secretary, combined with the fuller suite of authorities in Part B, suggests that the parity provision ought to carry over the Part B powers. The second is simply that not all "terms, conditions, and benefits" of FFELP loans can apply to

of imposition of barrier to receipt of government benefit; they did not have to show they were ultimately unable to get the benefit).

381. FFELP loans had several prerequisites for eligibility. For example, all recipients of federal student aid first must be enrolled or accepted at a program leading to a recognized educational credential at an eligible institution of higher education. 20 U.S.C. § 1091(a)(1). Additionally, these recipients must either (a) be a citizen, national, or permanent resident, or (b) provide evidence from the INS of intent to become a citizen or permanent resident, § 1091(a)(5).

382. *See id.* § 1078-10(e)(2); *id.* § 1078-11(f)(2).

383. For example, the HEA provides that certain outstanding loans remain subject to the "same terms and conditions" if they are sold under a particular provision. *See* 20 U.S.C. § 1078-6(a)(4). If "conditions" were limited strictly to conditions of eligibility, it seems it would not be necessary to specify that loans that have already been made retain the same conditions when sold.

direct loans because the programs have different structures and different players. This problem is resolved by applying the parity provision to Part D only where it can be applied, that is, to aspects of the DLP that are analogous to the FFELP. The possibility of forgiveness for federally held loans is just such an analogous attribute.

1. Statutory Structure

Statutory structure supports the idea that relinquishment authority extends to direct loans, as both the CLM Letter and Herrine observe.[384] The statutory framework for the Ford program in Part D is rather skeletal. As the CLM Letter points out, Part D does not even expressly authorize the Secretary to sue and be sued in connection with the Direct Loan Program, unlike Part B, which does contain such authorization in connection with the FFELP.[385]

Part D's provisions are sparse with respect to collection procedures other than filing suit as well.[386] Part B of Title IV sets a substantive standard of due diligence for loan collection,[387] provides that that standard entails the use of collection procedures "at least as extensive and forceful" as those financial institutions use to collect consumer debt,[388] and authorizes the Secretary to specify due diligence activities by regulation.[389] In contrast, Part D addresses servicing and collection by emphasizing that the Secretary "shall, to the extent practicable," contract these functions out.[390] It provides no substantive standard for collection and does not even clearly authorize the Secretary to prescribe regulations for collections activity.[391]

It has been suggested that one should draw a negative inference from the fact that the HEA explicitly grants relinquishment authority for the FFEL and Perkins programs and not for the DLP.[392] The parity provisions, combined with the sparse authorities explicitly granted to the Secretary in Part D, go a long way toward rebutting any such inference: Congress left a lot out of Part D, the argument goes, because it relied on the parity provisions to fill the gaps. As we have seen, the

384. *See* Herrine, *supra* note 1, at 371 n.265; CLM Letter, *supra* note 3, n.5.

385. *See* CLM Letter, *supra* note 3.

386. *See* Hunt I, *supra* note 36, at 1181.

387. *See* 20 U.S.C. § 1078(c)(2)(A) (requiring FFELP agreements between guaranty agency and Secretary to set forth procedures "to assure that due diligence will be exercised in the collection of loans insured under the program"); *id.* § 1080(d) (requiring "reasonable care and diligence in the making and collection of loans under the provisions of this part.") (internal citations omitted).

388. *Id.* § 1085(f).

389. *See id.* § 1072b(d)(3)(A)–(B).

390. *Id.* § 1087f(a)(1).

391. One provision does require institutions and servicers under the Ford program to comply with the FFELP disclosure provisions of 20 U.S.C. § 1083 "in accordance with such regulations as the Secretary shall prescribe." *Id.* § 1087e(p). However, the quoted phrase may refer to the Secretary's authorization to regulate FFELP servicing under Part B. *See id.* § 1082(a)(1) (authorizing Secretary to "prescribe such regulations as may be necessary to carry out the purposes of" Part B). Part D also authorizes the Secretary to require borrowers to pay reasonable collection costs. *See id.* § 1087e(d)(5)(A).

392. *See* Mark Kantrowitz, *Is Student Debt Forgiveness by Executive Order Illegal?*, COLL. INV. (Mar. 11, 2021), https://thecollegeinvestor.com/35892/is-student-loan-forgiveness-by-executive-order-legal/ (noting grants of compromise authority for FFEL and Perkins loans and observing "[t]here is no similar language for Part D for the William D. Ford Federal Direct Loan (Direct Loan) program.").

Department has relied extensively on the parity provision to make the student loan programs work.[393] The Court has been reluctant to embrace interpretations that would upend major statutory schemes,[394] as a holding that the Secretary's Part B powers do not extend to Part D would do.

Relatedly, it simply does not make sense that the Secretary would lack the same power over DLP loans as over FFELP loans.[395] Why should the Secretary be able to compromise, waive, release, and modify FFELP loans made by private parties and not DLP loans made by the federal government itself? Certainly, no opponent of jubilee has made the case that different treatment is justified. This point might deserve even more emphasis if the federal courts' primary approach to statutory interpretation were purposivist rather than textualist; but even textualists recognize the importance of honoring statutory purpose where it is discernible from the text[396] and avoiding absurdity.[397]

2. Scope of "Same Terms, Conditions, and Benefits"

Application of every FFELP loan term to all DLP loans of the corresponding type[398] is impossible. For one thing, lenders are expressly authorized to offer varying terms under the FFEL program, so there is no single set of "terms, conditions, and benefits" of each type of FFELP loan to carry over to the corresponding type of DLP loan. [399] Moreover, many aspects of the FFEL program are unique to the FFEL program, as they are particular to its lender-guaranty agency-federal reinsurance structure.[400] For example, the per-student dollar limit on federal insurability of loans under the FFELP cannot be applied to the DLP through the "same terms, conditions, and benefits" provision because there is no federal insurance of federal direct loans.[401]

Yet textualism demands that we give the parity provisions some meaning, if possible, rather than abandoning them because one interpretation makes them nonsensical.[402] The most sensible way of resolving the problem seems to be to interpret the "same terms, conditions, and benefits" provision to cover the terms,

393. *See* discussion *supra* Part III.A.

394. *See, e.g.*, King v. Burwell, 576 U.S. 473, 498 (2015) (interpreting the Affordable Care Act using "context and structure" to "avoid the type of calamitous result that Congress plainly meant to avoid.").

395. *See* Hunt I, *supra* note 36, at 1181 (arguing that sensible interpretation is that relinquishment authority extends to DLP).

396. *See* SCALIA & GARNER, *supra* note 64, at 56–58.

397. *See id.* at 234–39.

398. Recall that the U.S.C. § 1087e(a) sets up four categories of DLP loans, each corresponding to a category of FFELP loans. *See* 20 U.S.C. § 1087e(a)(2) (2021).

399. *See, e.g.*, *id*. § 1083(a)(12) (requiring disclosure before loan proceeds disbursement of "the minimum and maximum repayment terms which the lender may impose"); *id.* § 1083(b)(8) (requiring disclosure before repayment of "an explanation of any special options the borrower may have for loan consolidation"); *id.* §§ 1094(h)(1)(A)(ii), (h)(1)(C) (requiring records of certain individual lenders' "terms and conditions favorable to the borrower" and "additional benefits beyond the standard terms and conditions or provisions for such loans").

400. *See* Hunt II, *supra* note 334, at 98 (describing FFELP's structure).

401. *See* 20 U.S.C. § 1075(a)(1)(A).

402. *See* SCALIA & GARNER, *supra* note 64, at 63–65.

conditions, and benefits that are uniform across the FFEL program and are capable of application to the DLP. In other words, one could say that the provision operates where it can operate. That is not incompatible with the text.[403]

Under this interpretation, the parity provisions would not call for the application of federal-insurance-specific provisions of the FFELP to the DLP because there is no federal insurance under the DLP for them to apply to. But there is no comparable difficulty in applying relinquishment authority to the DLP: the FFELP provision authorizes the government to release FFELP claims it holds, and there is no inherent problem with the government releasing DLP claims it holds.

CONCLUSION

The Supreme Court has embraced a brand of textualism that deemphasizes widespread lay understanding of legal materials. This development has advantages and disadvantages for proponents of federal student loan jubilee. On the one hand, courts may be more willing to disregard the traditional view that the Secretary lacks the power to order jubilee in favor of a contrary conclusion based on the statute's clear text. On the other hand, they also may be more willing to disregard the traditional view that the Secretary's powers are equivalent across loan programs and demand a textual explanation of why jubilee authority covers direct loans and not just FFELP loans. This demand pushes to the forefront the previously obscure question of whether the Secretary's power to compromise, waive, release, and modify claims is part of the "terms, conditions, and benefits" of FFELP loans.

This Article has analyzed that question from a textualist perspective and suggested two conclusions: (1) the opportunity to gain loan forgiveness is probably a "benefit" of FFELP loans, and (2) the authority to forgive is probably part of the "terms and conditions" of FFELP loans. In offering these results, this Article contends that a major legal obstacle to student loan jubilee can be overcome.

403. *See* 2 A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:7 (7th ed. 2020) ("[W]ords or clauses may be enlarged or restricted to harmonize with other provisions of an act.").