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Jubilee Under Textualism

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Abstract

Can the executive order widespread federal student loan forgiveness without additional congressional action? Most likely, a prerequisite for such a jubilee is authorization in the Higher Education Act. And in federal court the HEA is likely to be interpreted through a textualist lens.

Textualist statutory interpretation strongly suggests that at least some jubilee authority exists. The Secretary of Education may "waive ... or release any ... claim" held by the government under certain loan programs. Textual arguments advanced by Trump administration lawyers that this clear language does not authorize jubilee are weak. Nontextual arguments advanced by others are based largely on the premise that the pro-jubilee interpretation of the HEA is fairly new. But after Bostock and McGirt, which elevated the Court's reading of plain text over previous common understandings of legal documents, the argument from novelty should fail.

It is less clear that jubilee authority extends to all federally held loans. The "waive or release" provision governs a now-defunct guaranteed loan program called FFELP, and it may not extend to the current direct loan program. However, the HEA also contains the "parity provision," under which direct loans have the "same terms, conditions, and benefits" as FFELP loans.

So is jubilee authority part of the "terms, conditions, and benefits" of FFELP, and therefore direct, loans? Here, textualism is less helpful. The Department of Education relies on the parity provision to run the direct loan program. But the Department and courts have not explained why this is appropriate. Courts may disregard this administrative precedent unless it is backed by statutory text.

A textual analysis of the HEA, relying on the use of words and phrases throughout the statute, dictionary definitions, and the common legal use of key terms, suggests that jubilee authority does extend to direct loans. Among other things, the HEA describes loan cancellation and adjustment provisions as "benefits," part of the "terms and conditions," and part of the "terms" of federal student loans. Moreover, the possibility of enjoying jubilee is a "benefit" of direct loans under the ordinary meaning of the word, and the Secretary's loan cancellation powers are probably "terms and conditions" of guaranteed loans in that they are written into promissory notes and are an integral part of the relevant legal environment.

It is not certain that jubilee authority extends to direct loans, but a textualist examination of the issue strengthens the legal case for executive forgiveness.

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