DON'T "ESTOP" ME NOW: ESTOPPEL, GOVERNMENT CONTRACT LAW, AND SOVEREIGN IMMUNITY IF CONGRESS RETROACTIVELY REPEALS PUBLIC SERVICE LOAN FORGIVENESS

by
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This Article discusses whether Direct Loan borrowers can obtain recourse against the federal government using either promissory or equitable estoppel theories if Congress retroactively repeals the Public Service Loan Forgiveness ("PSLF") program. The Article addresses various hurdles, including sovereign immunity and the Sovereign Acts Doctrine, which the borrowers would encounter at litigation. It concludes that, despite likely overcoming these hurdles, in many cases, the plaintiff-borrowers' government contract law claims would likely still fail to win on their merits. The Article also contends that most, if not all, equitable estoppel claims would likely fail before a court. The Article then offers an additional proposal to Congress, which would avoid these issues at litigation and solve the problems associated with the program while also protecting the most vulnerable members of society negatively impacted by a repeal.

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INTRODUCTION

This Article considers whether federal student loan borrowers can bring successful legal challenges if Congress retroactively repeals the Public Service Loan Forgiveness ("PSLF") program.[1] It addresses whether borrowers at litigation could rely on analogies to the promissory estoppel doctrine or assert equitable estoppel claims to challenge the repeal. In doing so, the Article explores the intersection of estoppel and government contract law with sovereign immunity theories in a way that has never been done before. This topic has been given very little attention in prior literature, so I aim to present its legal issues in a clear way while paying tribute to its nuance.

The Article addresses the hurdles of sovereign immunity and the Sovereign Acts Doctrine, which the borrowers would encounter at litigation.[2] It concludes that, despite likely overcoming these hurdles, in many cases, the plaintiff-borrowers' government contract law claims would likely still fail to win on their merits.[3] The Article similarly contends that most if not all equitable estoppel claims would likely fail

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[1] *See infra* Part II.

[2] *See infra* Part II.

[3] *See infra* Section II.B.

before a court.[4] The Article then offers an alternative proposal to Congress, which would avoid the issues that would arise at litigation, while solving the problems associated with the program and protecting the most vulnerable members of society negatively impacted by a repeal.[5]

The PSLF program is a loan forgiveness mechanism available to public service employees.[6] It was enacted into law in September 2007, with an effective date of October 1, 2007.[7] Under the program's eligibility criteria, borrowers can have the unpaid amount of their federal Direct Loan student debt excused by the Department of Education ("ED") if they have made 120 monthly payments under a payment plan approved by ED while working as a full-time employee for a qualifying "public service" employer for ten (non-consecutive) years.[8] Relying on these eligibility criteria, more than "one million borrowers" have filed "employment certification forms" with ED as of June 2017.[9] Over "550,000 of those individuals" have either "taken out loans" or taken a position "in the public sector" with expectations that they will obtain debt relief under the PSLF program.[10]

These expectations, however, may never be met. The program has faced substantial criticism over the years for "unfairly allocat[ing] government subsidies to some borrowers under unequal terms" while excluding other borrowers.[11] Furthermore, the program's cost to taxpayers is very large—it could eventually increase to

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4 *See infra* Section II.C.

5 *See infra* Section II.E.

6 20 U.S.C. § 1087e(m) (amending the Higher Education Act of 1965, through the College Cost Reduction and Access Act, to include the PSLF Program); *see also* College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401, 121 Stat. 784, 800-01 (2007) (codified as amended at 20 U.S.C. § 1087e).

7 College Cost Reduction and Access Act § 401.

8 *See* 34 C.F.R. § 685.219(c) (2016) (stating the program's eligibility requirements); *see also generally* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682 & 685).

9 Sabra R. Messer, *The Parameters of Trust: Public Service Loan Forgiveness and Prioritizing Reliable Agency Communications*, 70 ADMIN. L. REV. 233, 234–35 (2018); *see also* FEDERAL STUDENT AID, PUBLIC SERVICE LOAN FORGIVENESS EMPLOYMENT CERTIFICATION FORMS (ECFS) (2018), https://studentaid.gov/help-center/answers/search/ECF%20report/everything-else/1.

10 Messer, *supra* note 9, at 235; *see also* CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK: THE COST OF STUDENT LOAN SERVICING BREAKDOWNS FOR PEOPLE SERVING THEIR COMMUNITIES 36–37 (2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf.

11 Messer, *supra* note 9, at 236; *see also* NAT'L LEGAL AID & DEF. ASS'N, THE CRITICAL ROLE OF PUBLIC SERVICE LOAN FORGIVENESS IN ACCESS TO COUNSEL AND EQUAL JUSTICE: THE RESULTS OF A 2,000-PERSON SURVEY 10–11 (2015), http://www.nlada.org/sites/default/files/pictures/NLADA_Importance_of_PSLF_0.pdf.

"$12 billion to $18 billion/year, a very large sum, and its benefits would be highly skewed in favor of mid-career doctors and lawyers with large student loan debts."[12] According to law professor Gregory S. Crespi, "approximately 200,000 or more Direct Loan borrowers qualify for, and seek, debt forgiveness each year."[13] Furthermore, "the number of people applying for debt forgiveness will grow rapidly . . . as increasing numbers of borrowers become more aware of the program's generous debt forgiveness provisions."[14]

Since the Government Accountability Office ("GOA") has estimated that "roughly one-quarter of all jobs qualify as public service jobs" under the PSLF program's very broad scope, and "[b]y the time the program roughly reaches a 'steady state' in terms of the number of people who seek debt forgiveness each year, this number could become quite large."[15] Many of these people have received "substantial amounts" of debt forgiveness—particularly many "law school graduates and medical school graduates."[16] In 2017 the Consumer Financial Protection Bureau ("CFPB") predicted that 25% of the American workforce could be eligible for PSLF.[17] As such, "the annual cost to the Treasury for this program could easily grow to a multi-billion dollar sum."[18]

In response to these "significant cost and distributional concerns[,] the Obama Administration proposed in 2016 to sharply limit the amount of debt that could be forgiven under the program."[19] This proposal, however, was never enacted into

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[12] Gregory S. Crespi, *Will the Public Service Loan Forgiveness Program Ever Forgive Any Loans?* 6 (SMU Dedman School of Law Legal Studies Research Paper No. 361, 2017), https://ssrn.com/abstract=2978111 [hereinafter Crespi, *Will the PSLF Program Ever Forgive?*]; *see also* Gregory Crespi, *Could the Benefits of the Public Service Loan Forgiveness Program be Retroactively Curtailed?*, 51 CONN. L. REV. 625, 629–30 (2019) [hereinafter Crespi, *Loan Forgiveness*].

[13] Crespi, *Loan Forgiveness*, *supra* note 12, at 629.

[14] Crespi, *Will the PSLF Program Ever Forgive*?, *supra* note 12, at 16.

[15] Crespi, *Loan Forgiveness*, *supra* note 12, at 638 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-663, FEDERAL STUDENT LOANS: EDUCATION COULD DO MORE TO HELP ENSURE BORROWERS ARE AWARE OF REPAYMENT AND FORGIVENESS OPTIONS 27 (2015), https://www.gao.gov/assets/680/672136.pdf).

[16] Crespi, *Loan Forgiveness*, *supra* note 12, at 639.

[17] *CFPB Spotlights Borrower Complaints About Student Loan Servicers Mishandling Public Service Loan Forgiveness Program*, CONSUMER FINANCIAL PROTECTION BUREAU (June 22, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-spotlights-borrower-complaints-about-student-loan-servicers-mishandling-public-service-loan-forgiveness-program/.

[18] Crespi, *Loan Forgiveness*, *supra* note 12, at 639.

[19] Crespi, *Will the PSLF Program Ever Forgive*?, *supra* note 12, at 6; *see also* U.S. DEP'T OF EDUC., FISCAL YEAR 2015 BUDGET SUMMARY AND BACKGROUND INFORMATION 54 (2014), https://www2.ed.gov/about/overview/budget/budget15/summary/15summary.pdf [https://perma.cc/5FBR-G4L9].

law.[20] Subsequently, the "Trump Administration . . . in its first proposed budget in May of 2017, went even further and called for prospective elimination of the PSLF program for future Direct Loans," although Congress declined to adopt the proposal.[21] More recently, in December 2017, the House Committee on Education and the Workforce passed the Promoting Real Opportunity, Success, and Prosperity through Education Reform ("PROSPER") Act, which was intended to "eliminate the PSLF program and leave only standard repayment and income-based repayment options available to borrowers."[22] This bill, however, was never enacted into law either.[23] Finally, the Trump Administration attempted in its 2020 budget proposal to prospectively eliminate the program, but the attempt failed to succeed before Congress.[24]

Regardless, "the program's very large projected costs and controversial redistribution" of taxpayer dollars will continue to become even "more visible as substantial debts continue to be forgiven on a large scale."[25] According to Crespi, "there will likely be efforts made [by future presidential administrations] . . . or by members of Congress to take even more aggressive action and *retroactively* repeal the PSLF program with regard to persons who have . . . not yet been granted debt forgiveness."[26] Crespi's view is consistent with the opinion of Equal Justice Works attorney and debt specialist Kenneth Strickland. Strickland believes that Congress may very well pass a law "that disrupt[s] . . . a contractual promise, i.e. PSLF, with current borrowers."[27] In fact, ED's own website cautions that loan applicants cannot be "certain that the PSLF Program will exist by the time [they] have made [their]120 qualifying payments[,]" because the "PSLF program was created by Congress, and Congress could change or end [it]."[28]

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[20] Crespi, *Will the PSLF Program Ever Forgive?*, *supra* note 12, at 6.

[21] Crespi, *Loan Forgiveness*, *supra* note 12, at 629; *see also* OFFICE OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATE GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS, FISCAL YEAR 2018, at 20 (2017).

[22] Messer, *supra* note 9, at 236; *see also* Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act, H.R. 4508, 115th Cong. (2017).

[23] H.R. 4508, 115th Cong. (as reported by H. Comm. on Educ. and the Workforce, Feb. 8, 2018).

[24] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATE GOVERNMENT: A BUDGET FOR A BETTER AMERICA, FISCAL YEAR 2020, at 32 (2019).

[25] Crespi, *Will the PSLF Program Ever Forgive?*, *supra* note 12, at 7.

[26] Crespi, *Loan Forgiveness*, *supra* note 12, at 629–30.

[27] Kenneth Strickland, *Public Service Loan Forgiveness and Breach of Contract Claims*, HUFFINGTON POST (Mar. 7, 2017), https://www.huffpost.com/entry/forgive-or-ill-sue-how-contract-law-could-save-public_b_58486ccae4b013b566b2ba54 (evaluating the merits of potential legal challenges under federal government contract law that borrowers could bring in response to a retroactive PSLF repeal).

[28] *Public Service Loan Forgiveness FAQ*, U.S. DEP'T OF EDUC., https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/questions (last visited Mar. 13, 2022).

Although a repeal seems far less likely to occur in the short-term period because of the government's response—especially under the progressive Biden Administration[29]—to the damaging economic and public health impacts of the COVID-19 pandemic, a repeal in the future could still very likely occur in the event that the political pendulum swings back in favor of fiscal conservatism and the economy continues to recover—especially if additional Federal stimulus packages accelerate sufficient economic growth for a faster recovery, which at least one leading expert on recessions predicts could occur.[30] Further contributing to the likelihood of a repeal is the risk of conservative political backlash in response to some of the more recent progressive measures to suspend or forgive student debt payment. As such, the threat of a PSLF repeal is real and ongoing, and it has created serious public concern.[31] Crespi writes:

> If [a retroactive repeal] occurs, it will be very disappointing, and in some instances, financially devastating to the hundreds of thousands—even perhaps millions—of persons who will not yet have qualified for debt forgiveness . . . but who have [over several years] relied on the availability of

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[29] *See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 404 (2020) (to be codified at 20 U.S.C. § 1001) (Coronavirus Aid, Relief, and Economic Security Act or *CARES Act*, which relieves borrowers from having to make student loan payments for six months while allowing them to receive PSLF credit as if they made payments for those months); Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic, 2020 DAILY COMP. PRES. DOC. 590 (Aug. 8, 2020) (extending the student loan relief through December 31, 2020); *COVID-19 Emergency Relief and Federal Student Aid*, U.S. DEP'T OF EDUC., https://studentaid.gov/announcements-events/covid-19 (last visited Mar. 13, 2022) (informing public of *CARES Act* being signed into law); Press Release, U.S. Dept. of Educ., At the Request of President Biden, Acting Secretary of Education Will Extend Pause on Federal Student Loan Payments (Jan. 21, 2021), https://www.ed.gov/news/press-releases/request-president-biden-acting-secretary-education-will-extend-pause-federal-student-loan-payments (announcing intent to extend the Trump administration's pause on federal student loan payments with PSLF credit through September 30, 2021); Collin Binkley, *Biden Officials Considering Action on Student Debt Relief*, AP NEWS (Feb. 4, 2021), https://apnews.com/article/joe-biden-race-and-ethnicity-legislation-coronavirus-pandemic-jen-psaki-f5a13d4aae4e308a3709b3ac1370c05e (describing how Biden administration is considering whether to provide student debt relief through executive action, even while continuing to call on Congress to pass legislation providing for $10,000 in student loan forgiveness per borrower).

[30] According to Claudia Sahm, a former Federal Reserve economist who is one of the leading experts on recessions, "this recession is going to be more severe than the Great Recession" that happened in 2007–2009, but it might not last as long if policymakers act boldly. *See* Heather Long, *Americans Are Very Likely to Get $1,000 (or More) Checks. Here's What You Need to Know*, WASH. POST (Mar. 17, 2020, 1:45 PM), https://www.washingtonpost.com/business/2020/03/17/checks-virus/.

[31] *See, e.g.*, u/INSANITY_WOLF_POOPS, *U.S. Education Department Says Many Student Loan Forgiveness Letters May Be Invalid*, REDDIT, https://www.reddit.com/r/personalfinance/comments/62kyoe/us_education_department_says_many_student_loan/ (containing posts from law students and recent graduates very worried about PSLF program benefits being taken away).

eventual debt forgiveness in making their borrowing and subsequent employment decisions.[32]

Many of these people, upon being surveyed, indicated that they would not have gone to law school or medical school or entered into public service careers without the assurances of debt forgiveness because the low pay would have discouraged them from doing so.[33] A retroactive repeal would therefore cause people to experience devastating financial harm based on their detrimental reliance.

Such a severe and unfortunate form of detrimental reliance would appear to create the classic type of scenario of injustice that could—or at the very least should—give rise to a promissory estoppel claim.[34] The issue is whether, as a matter of law, a borrower in this type of position can actually rely on promissory estoppel theories to prevail against the implementation of such retroactive legislation. Crespi believes that promissory estoppel claims could be used with some success to overcome a retroactive statutory repeal of the PSLF program.[35] I challenge this analysis. I argue that the courts would need to rely on federal common law as an analogy to promissory estoppel because of the need to account for the doctrine of sovereign immunity.

Promissory estoppel is not a contract-based theory.[36] Rather, it is derived from principles of equity and is based on the interests of justice.[37] Furthermore, promissory estoppel is commonly understood to apply only to disputes that arise from

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[32] Crespi, *Loan Forgiveness*, *supra* note 12, at 630.

[33] NAT'L LEGAL AID & DEF. ASS'N, *supra* note 11, at 1, 4, 8–9; *see also* Messer, *supra* note 9, at 235.

[34] RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. L. INST. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) (stating that promissory estoppel should be applied "if *injustice* can be avoided only by enforcement of the promise" (emphasis added)).

[35] Crespi, *Loan Forgiveness*, *supra* note 12, at 646, 661–62. His paper also explores the viability of various contractual (i.e., express contract, good faith and fair dealing and unconscionability) and constitutional (i.e., due process, Contracts Clause and Takings Clause) claims. *See generally id.*

[36] *See* John Price Assocs. v. Warner Elec., Inc., 723 F.2d 755, 757 (10th Cir. 1983) ("*We need not address the propriety of the trial court's finding that a contract existed* between Price and Warner, *since we agree that the doctrine of promissory estoppel barred* Warner from withdrawing its bid." (emphasis added)); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 345–46 (1969) ("[T]he rules of Section 90 have independent force without regard to, and in spite of, the bargain concept [of contract law theory]."); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 52–54 (1981) (arguing promissory estoppel is an independent theory of obligation based on the tort principle of reliance rather than on the contract principle of consent).

[37] *See, e.g.*, Olson v. Synergistic Technologies Business Systems, Inc., 628 N.W.2d 142, 150–51 (Minn. 2001); Phuong N. Pham, *Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1264 n.5 (1994) (explaining how "[t]he term 'promissory estoppel' is derived from the term 'equitable estoppel'"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (hinging the

agreements gone awry between private litigants under state law—and not to such disputes that arise between private parties and the federal government.[38] So plaintiffs in the latter scenario—rather than relying on promissory estoppel *per se*—would need to effectively *fit* the doctrine into a relevant federal statute to show that Congress has consented to waive sovereign immunity.[39]

Here, the relevant federal statute that affirmatively waives sovereign immunity is the Tucker Act.[40] Among other things, the Tucker Act deals with contractual disputes arising between the government and private entities.[41] It applies to student loan disputes between borrowers and ED.[42] The relevant language of the Tucker Act allows for relief against the government for breaches of "implied" contract claims,[43] which the courts have interpreted as "implied-in-fact" claims.[44] Such claims can be inferred from the "surrounding circumstances" and "conduct of the parties."[45] The courts have further held that Tucker Act federal common law "has *drawn* . . . upon traditional private contract law for *analogies and concepts*."[46] As such, the "rights and duties" contained in a government contract "are *governed generally by the law applicable to contracts between private individuals*."[47]

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application of promissory estoppel on the interests of justice); 28 AM. JUR. 2D, *Estoppel and Waiver* § 34 (West 2022) (explaining that promissory estoppel is a "creature of equity").

[38] *See, e.g.*, Hubbs v. United States, 20 Cl. Ct. 423, 427–28 (1990), *aff'd*, 925 F.2d 1480 (Fed. Cir. 1991); Eliel v. United States, 18 Cl. Ct. 461, 469 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); Schwartz v. United States, 16 Cl. Ct. 182, 185 (1989); *see also* Ralph C. Nash & John Cibinic, *Promissory Estoppel: A Theory Without a Home in Government Contracts*, 3 THE NASH & CIBINIC REP. ¶ 52 (July 1989).

[39] *See, e.g.*, Lehman v. Nakshian, 453 U.S. 156, 160–61 (1981); United States v. Testan, 424 U.S. 392, 399 (1976).

[40] *See* United States v. Mitchell, 463 U.S. 206, 212 (1983) (explicitly confirming that "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims").

[41] Tucker Act, 28 U.S.C. § 1491(a)(1); *see also* 28 U.S.C. § 1346(a)(2) (providing concurrent jurisdiction of claims not exceeding $1,000—presently increased to $10,000, and also known as the "Little Tucker Act").

[42] *See, e.g.*, Pfeiffer v. Duncan, 659 F.Supp.2d 160 (D.D.C. 2009) (applying Tucker Act in student loan transaction dispute).

[43] 28 U.S.C. § 1491(a)(1).

[44] *See, e.g.*, City of El Centro v. United States, 922 F.2d 816, 823 (Fed. Cir. 1990).

[45] *See* Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); City of El Centro v. United States, 16 Cl. Ct. 500, 505–06 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

[46] *See, e.g.*, Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 369 (1988), *aff'd*, 903 F.2d 1560 (Fed. Cir. 1990) (emphases added).

[47] United States v. Winstar Corp., 518 U.S. 839, 895 (1996) (emphasis added) (citing Lynch v. United States, 292 U.S. 571, 579 (1934)).

Applying these precedents, the logical follow-up question is whether the "implied-in-fact" contract doctrine can effectively be used as a "public law" analogy to the private law promissory estoppel doctrine, to afford people relief when they detrimentally and reasonably rely on statements made by the federal government. The more specific, related question is whether student loan borrowers who have detrimentally relied on the existence of the PSLF program can use the "implied-in-fact doctrine" in such a manner, marshaling the surrounding circumstances to obtain recourse if Congress repeals the PSLF program retroactively.

I argue that the answer to the first, general question is "maybe," while the answer to the second, more specific question is "no."[48] Despite the purported similarities claimed to exist between the promissory estoppel and "implied-in-fact" doctrines,[49] the courts would likely still decline to uphold such claims in the PSLF repeal context for the reasons discussed in the Article below. As such, most, if not all, aggrieved loan borrowers would probably be unable to successfully claim that their detrimental reliance on the existence of the PSLF program, upon a repeal, would allow them to prevail on their claims for breach of an "implied-in-fact" contract.

The Claims Court's articulation of the required elements of an "implied-in-fact" contract makes it clear that most, if not all, plaintiffs would be unlikely to prevail at litigation. The court has held that "implied-in-fact" contracts require: (1) mutuality of intent to contract; (2) unambiguous offer and acceptance; (3) consideration; and (4) that the relevant governmental officer has actual authority to bind the federal government.[50] Most of these elements reveal numerous weaknesses in a borrower-plaintiff's claims.

Applying these elements, in most, if not all, cases, a borrower-plaintiff would most likely fail to prove that the surrounding circumstances show that a government officer (if even present): (1) made a clear and unequivocal statement or clear non-verbal representation offering to forgive the balance of the borrower's student loans, without any caveats;[51] (2) in a "bargained-for exchange," that is, with consideration, for the borrower taking a "public service" position instead of a non-qualifying,

[48] *See infra* Part II.

[49] *See, e.g.*, Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 605–06 (1991) (arguing that promissory estoppel and "implied-in-fact" claims are materially analogous).

[50] *See, e.g.*, Yachts Am., Inc. v. United States, 779 F.2d 656, 661 (Fed. Cir. 1985); Nitol v. United States, 7 Cl. Ct. 405, 415 (1985); Prevado Vill. P'ship v. United States, 3 Cl. Ct. 219, 223–24 (1983); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976).

[51] *See infra* Section II.B.2.

higher-paying job in exchange for eventual debt forgiveness;[52] with (3) "actual authority," delegated by statute or regulation, or "implied actual authority," to bind the federal government as a whole.[53]

A proper interpretation of these required elements, as presented below, reinforces the implausibility of the plaintiffs satisfying them. Different borrowers may potentially experience varying levels of success on the merits of their claims, as they are fact-intensive by nature. However, for the reasons stated below, in most (if not all) realistically likely factual scenarios (which are speculated upon in the Article below), the claims would likely fail to fall within the scope of the Tucker Act.

Furthermore, even if the Tucker Act were to somehow apply here, the need to defer to subsequent Acts of Congress, that is, the statutory PSLF repeal, would weigh in favor of a narrow interpretation of the Tucker Act. A PSLF repeal would also be specific in nature, whereas the Tucker Act is generally-applicable. When conflicts exist between two statutes, the courts typically give greater weight to statutes that come later in time, as well as to statutes that are specific as opposed to general.[54] As such, canons of statutory construction would weigh in favor of a PSLF repeal trumping the Tucker Act on this issue.

As a result, the path to doctrinal success would require a lot of breaks in litigation in favor of the borrowers. Numerous tension points exist in the analysis that would be unlikely to break to the borrowers' benefit. Given all the ways that the plaintiffs' claims could go wrong, it appears that, in relying on the Tucker Act, the odds of survival are low—very low.

This unfortunate outcome from the borrowers' perspective would occur despite the "fading" nature of the canon of strict statutory construction of waivers of sovereign immunity.[55] The Supreme Court had traditionally applied this canon of

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[52] *See infra* Section II.B.3.

[53] *See infra* Section II.B.4.

[54] *See, e.g.*, Nitro-Lift Tech., L.L.C. v. Howard, 568 U.S. 17, 21–22 (2012); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*)."); WILLIAM N. ESKRIDGE, JR., PHILIP F. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1199 (5th ed. 2014) ("Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue."); *see also* SCALIA & GARNER, *supra* at 54 ("Repeals by implication are disfavored . . . . But a provision that flatly contradicts an earlier-enacted provision repeals it.").

[55] *See, e.g.*, Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1291–1300 (2014) (explaining how in more recent cases, the Supreme Court has created a distinction by upholding the validity of asking the "threshold question of whether sovereign immunity has been waived"—by requiring "a 'clear statement' by Congress"—while moving away from inquiring into "how the statutory waiver should be interpreted *in application*"—with this latter inquiry "*fading away* as a viable tool for statutory interpretation" (emphases added)).

strict construction in the past, refusing to find any consent to waive sovereign immunity when the language of a statute left any doubt or uncertainty on the issue—in other words, the Court had required the waiver to be clear and unambiguous in its application.[56] In doing so, the Court had previously declined to "look beyond the text" of a statute to "legislative history or statutory purpose" on the matter.[57] As shown below,[58] however, this judicial trend is moving in the opposite direction. Thus, although applying this canon of strict construction arguably seems appropriate in scenarios where the government is operating in its sovereign capacity to promote the general welfare of society as a whole—such as with a retroactive PSLF repeal, which reflects a policy choice affecting the general public—as opposed to the government acting in its propriety capacity as a market participant, for example, in the form of a specific agency procuring goods and services for its operations,[59] the approach of strict construction ultimately appears to be turning into an outdated relic of jurisprudence. This "fading out" may render sovereign immunity less of an insurmountable hurdle for plaintiffs here.

Regardless, however, the "fading out" of the canon of strict construction would probably not suffice to enable the plaintiffs to ultimately prevail, should Congress decide to repeal the PSLF program. For one, Congress could explicitly *denounce* its consent to waive sovereign immunity, either in substance or effect, via an amendment to the Tucker Act in the PSLF repealer bill. Furthermore, even if Congress were to decline to take this approach, for the reasons stated below, a court would likely dismiss any Tucker Act claims on their merits due a failure to satisfy the "implied-in-fact" elements.

For similar reasons, a court would likely dismiss any equitable estoppel claims arising under the Tucker Act that challenge a Congressional repeal of the PSLF program. Equitable estoppel claims are barred against the government when it acts in

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56 *See* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 460–61 (2005); *see also* Libr. of Cong. v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983); Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399 (1976).

57 Sisk, *supra* note 56, at 461; *see also* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 137 (1991).

58 *See infra* Section I.B.2.

59 *Cf., e.g.*, Portmann v. United States, 674 F.2d 1155, 1159–61 (7th Cir. 1982) (discussing the distinction between the "sovereign" [or governmental] and the "proprietary" [or nongovernmental] functions of the federal government in the related context of equitable estoppel). On the other hand, David Rubenstein has pointed out that it might make less sense to conceive of the government's interest in such a binary fashion when it comes to student loan regulation since the government owns the loans and stands to make money in the form of interest on the loans. Email from David S. Rubenstein, Professor, Washburn Univ. Sch. of L. (Oct. 20, 2020) (on file with author).

its sovereign capacity or when agency officials act outside of the scope of their delegated authority.[60] In the PSLF repeal context, the government would be acting in its sovereign capacity to make policy choices that impact the general welfare of society at large. Individual corrupt, "misinformed or [even] overly generous bureaucrat[s] should not be able to give away assets which the government holds for the public good."[61] Nor should they be able to "rewrite the laws enacted by Congress" that "define for all the scope of particular governmental action."[62] Democratic theory and separation of powers principles therefore call for the courts to restrain themselves and decline to apply equitable estoppel in these circumstances.[63]

In the unlikely event that a plaintiff would be able to prevail under the Tucker Act or equitable estoppel doctrine, however, the "Sovereign Acts Doctrine"[64] defense would most likely not release the government from any contractual PSLF obligations, if found to exist. Rather, for the reasons discussed below,[65] a court would probably hold that a PSLF repeal does not constitute a "sovereign act."

Regardless, however, the fact remains that loan borrowers would face a very difficult, if not impossible, doctrinal path at litigation under the Tucker Act and equitable estoppel doctrine if Congress were to retroactively repeal the PSLF program. This reality underscores something fundamentally inequitable and unfair with the norms, doctrines and structures in place, given that Congress likely could repeal the program without any recourse for borrowers apart from whatever the political process might afford. This reinforces the imperative for Congress to get it right on the front end, in order to avoid these issues, by accounting explicitly for hardship and reliance in any subsequent legislation it enacts to impact the PSLF program.[66]

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[60] Jean F. Rydstrom, Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies*, 27 A.L.R. Fed. 702 §§ 2[a], 4, 7 (1976); *see also* Utah Power & Light Co. v United States, 243 US 389 (1917); *In re* LaVoie, 349 F. Supp. 68 (D.V.I. 1972).

[61] Rydstrom, *supra* note 60, §§ 2[a], 5; *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

[62] Rydstrom, *supra* note 60, § 2[a].

[63] *Id.* § 8; *see also* Gestuvo v. Immigr. & Naturalization Serv., 337 F.Supp. 1093, 1101 (C.D. Cal. 1971) (finding estoppel, but acknowledging importance of "democratic principles" in limiting judicial review in estoppel cases).

[64] Froemming Bros., Inc. v. United States, 70 F. Supp. 126, 127 (Ct. Cl. 1947) (articulating the Sovereign Acts doctrine).

[65] *See infra* Section II.D.

[66] *Cf.* Messer, *supra* note 9, at 258–60 (arguing that ED should "grant certain hardship exceptions for persons who have relied substantially on the PSLF program").

In doing so, Congress should craft a "debt-to-income ratio" test[67]—as consistent with generally accepted finance and accounting principles[68]—to determine when people experience sufficient economic hardship to justify still receiving (at least some) loan forgiveness benefits. Congress should also provide individuals the opportunity to make fact-specific showings of substantial reliance on the existence of the PSLF program.[69] As argued below, such safeguards would be vital to protecting the most vulnerable members of society—mitigating the most damaging economic impacts of a repeal—while also saving taxpayer dollars and addressing many of the distributional concerns voiced by critics of the PSLF program.

Assuming that there are sufficient lobbying efforts by interested stakeholders and deliberation by Congress, the issue of the government's liability at the end of the day may be less likely to turn on interpretations of the Tucker Act as it currently exists but more so on the interpretation of any subsequent statutory language enacted, including the scope of any exemptions.

With that said, one should not automatically assume that Congress would necessarily act with such due deliberation in this setting, given the current, heated political climate. The recent examples of Congress's politically-motivated attempts to repeal—without replacing—the Affordable Care Act ("ACA") come to mind. Although student loans are not as much of a "hot-button" issue as healthcare reform, the issue does carry controversy, as shown above. As such, it is unclear whether Congress would adequately fulfill its duty, as a deliberative body, to meaningfully consider all the relevant issues before repealing or amending the PSLF program, if such a repeal of amendment were to occur in the future.

In light of what might emerge out of Congress as well as the flaws and cracks in our existing doctrinal norms (which will be shown below), it is important to consider the broader implications beyond the PSLF program. If Republicans retake control of Congress, they may potentially succeed in retroactively repealing other laws that large segments of the public have relied upon—such as the ACA. One takeaway worth considering is the intriguing (and possibly frightening)

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[67] The "debt-to-income ratio" test considers one's "monthly debt payments" owed divided by their "gross monthly income." *What Is a Debt-to-Income Ratio? Why is the 43% Debt-to-Income Ratio Important?*, CONSUMER FIN. PROT. BUREAU (Nov. 15, 2019), https://www.consumerfinance.gov/ask-cfpb/what-is-a-debt-to-income-ratio-why-is-the-43-debt-to-income-ratio-important-en-1791/. It is used by lenders to "measure" someone's ability to manage their "monthly payments to repay" any money they plan to borrow. *Id.* By focusing on one's ability to repay, the test could also be adopted to determine whether someone might experience sufficient financial hardship in the event of a PSLF repeal.

[68] *See generally* Adam Hayes, *Finance*, INVESTOPEDIA, https://www.investopedia.com/terms/f/finance.asp (July 10, 2021).

[69] *Cf.* Messer, *supra* note 9, at 258–60 (proposing a similar approach in the agency context).

question of whether the same types of cracks in our doctrines and structures as those outlined below would exist if people were to challenge such repeals in court.

I. BACKGROUND

Recall that the Tucker Act's jurisprudence "has drawn . . . upon traditional private contract law for analogies and concepts."[70] Also recall that a primary question presented here is whether one could analogize between the "implied-in-fact" contract doctrine and the promissory estoppel doctrine to argue that borrowers should receive relief if they detrimentally rely on the existence of the PSLF program. However, understanding this issue—and the other issues in this paper—requires one to understand the fundamentals of the doctrines of promissory and equitable estoppel and the Tucker Act, as well as the doctrine of sovereign immunity and its conceptual underpinnings, that is, separation of powers principles as well as unitary executive and agency law theories, in addition to understanding the basics of the Sovereign Acts Doctrine.

A. Promissory Estoppel

The doctrine of promissory estoppel is rooted in detrimental reliance.[71] The doctrine is defined in the Restatement (Second) of Contracts Section 90 as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance."[72] The Restatement further states that such a promise is "binding if injustice can be avoided only by enforcement of the promise."[73] Consistent with this language, plaintiffs bringing promissory estoppel claims in any given case must show: (1) that promises or representations were made to them (the promisees); (2) that they relied on the promises or representations in way that harmed them (i.e., detrimental reliance); and (3) that the detrimental reliance was reasonable.[74]

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70 *See* Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 369 (1988), *aff'd*, 903 F.2d 1560 (Fed. Cir. 1990).

71 *See* Schwartz v. United States, 16 Cl. Ct. 182, 185 (1989).

72 RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981).

73 *Id.*

74 *See* Law Mathematics and Tech., Inc. v. United States, 779 F.2d 675 (Fed. Cir 1985); *accord* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 6-1, at 272–73 (3d ed. 1987).

The doctrine represents a merger of tort and contract law.[75] Randy Barnett and Mary Becker explain that "[c]ontracts are normally defined as freely chosen obligations supported by bargained-for consideration. Contract law holds the promisor to his [or her] word and gives the other party what was promised."[76] By contrast, "[t]orts are violations of legally-imposed obligations" that cause injury to others, so "[t]ort law forces the wrongdoer to compensate [their] victim for [their] loss."[77] Liability due to promissory estoppel "does not fit neatly into either of these categories."[78]

This lack of a neat fit exists because promissory estoppel has been "regarded as a basis for liability when one formal requirement [of contract law] was missing:" a "bargained-for exchange" or quid pro quo.[79] A "bargained-for exchange" is an important element of consideration.[80] Consideration, in turn, is a necessary element of contract formation.[81] Consideration is required to ensure a minimal level of fairness and legitimacy in any given agreement or transaction[82]—and it has been described as "a useful tool for identifying many promises intended as legally binding."[83]

In order to prove consideration, one must show: (1) a "bargained-for exchange" between the parties; that (2) creates legal value, that is, a "benefit" to the promisor *or* a "legal detriment" to the promisee.[84] The majority of courts emphasize the importance of a "detriment" (as opposed to a "benefit") in determining whether an exchange has legal value.[85] A "detriment" occurs when the promisee either undertakes an act that she is not legally required to do *or refrains* from doing something that she has a legal right to do[86]—such as seeking or taking a higher-paying private sector job.

A "detriment" is typically present when a plaintiff establishes a valid promissory estoppel claim. This makes sense because, as stated above, promissory estoppel claims are, *by their very nature*, based upon detrimental reliance.[87] The element of

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75 Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 443 (1987).

76 *Id.*

77 *Id.*

78 *Id.* at 443.

79 *Id.* at 449–50.

80 *Id.* at 450.

81 *See, e.g.*, Kirksey v. Kirksey, 8 Ala. 131 (1845).

82 BRIAN A. BLUM, EXAMPLES & EXPLANATIONS: CONTRACTS 178 (7th ed. 2017) (explaining the reasoning behind the consideration doctrine).

83 Barnett & Becker, *supra* note 75, at 450.

84 BLUM, *supra* note 82, at 179–84.

85 *Id.* at 180–81.

86 *Id.* at 181.

87 Schwartz v. United States, 16 Cl. Ct. 182, 185 (1989).

consideration that is typically missing in a promissory estoppel claim is a "bargained-for exchange."[88]

To meet the "bargained-for exchange" requirement, a plaintiff must prove two elements: (1) that the promisor's statement induced, or motivated, the plaintiff-promisee to experience her detriment; *and* (2) that the promisee's detriment motivated the promisor to make his promise in the first place.[89] In other words, the need for such motivation goes both ways for each party. It appears that the latter element involving the *promisor's* motivations, however, does not often exist in promissory estoppel scenarios.[90] This is reinforced by Restatement Section 90, which predicates promissory estoppel liability on a mere showing that the promisor should have "*reasonably expect[ed]*" to cause a promisee to experience detrimental reliance[91]—as opposed to requiring a higher showing of "intent" by the promisor—which implies that a promisor in such a situation is likely often not *motivated*, or *induced*, to cause a promisee's detriment to occur.

The following common example of a detrimental reliance scenario illustrates how a promisee may be unable to prove that her detriment *motivated* the promisor to make his promise:

Suppose that Tom makes the following promise to Betty: "I will give you my antique chair if you come to my house to pick it up." Assume that Betty, the promisee, commutes two days from out of town to arrive at Tom's house (and spends a considerable amount of money for gas and lodging) in reliance on Tom's promise, to collect the valuable antique chair. Suppose that once Betty arrives, Tom changes his mind about giving Betty the chair. Tom may be liable for costs that Betty spent on commuting to Tom's house, even though there is no "bargained-for exchange."

In this scenario, a legal "detriment" exists—Betty's "detriments" are her acts of commuting to Tom's house and spending the money on gas and lodging, as she was under no legal duty to do either. Furthermore, Betty's detriments were clearly motivated by Tom's promise to give her his chair.

The inverse of that is not true, however. Betty's detriment of commuting a long way to Tom's house probably did not *motivate* or *induce* Tom to promise his chair to her—rather, he may have just desired to upgrade his old chair or simply create more space in his house. Therefore, there is no "bargained-for exchange" for con-

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[88] Barnett & Becker, *supra* note 75, at 449. For analysis on the utility of contract formalism and bargain theory, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–06 (1941).

[89] *See* Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891).

[90] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) (emphasis added).

[91] *Id.* (emphasis added).

sideration and no valid contract is formed. Regardless, however, based on the interests of justice,[92] Betty can still potentially collect damages for any costs (e.g., gas or lodging) that she incurs in reliance on Tom's false promise. This illustrates how promissory estoppel claims can succeed even when the "bargain" element of consideration is missing.

As such, the doctrine of promissory estoppel is equitable is nature,[93] and has been commonly used in "donative settings," that is, to enforce gifts or charitable pledges to contribute money that typically lack any quid pro quo.[94] It has also been utilized to enforce commercial promises apparently intended as legally binding, even though the absence of a bargain or some other formal flaw would bar enforcement on the basis of traditional contract doctrines.[95]

B. The Framework of Federal Government Contract Litigation

The doctrine of promissory estoppel is commonly understood to apply only to disputes arising among private litigants and not to disputes arising between private parties and the federal government.[96] The federal law governing the litigation of breach of contract disputes, by contrast, is governed by two statutes—the Tucker Act and Contract Disputes Act ("CDA").[97] Unlike the state common law governing private contracts, these Federal statutes do not contain any express language allowing for private parties to obtain relief when they detrimentally rely on the government's promises.[98]

With that said, the Tucker Act's jurisprudence does allow for plaintiffs to obtain relief for violations of "implied-in-fact" contract claims against the government, which can be proven by the surrounding circumstances and behavior of the parties.[99]

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[92] *Id.*

[93] Pham, *supra* note 37, at 1264 n.5; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

[94] Barnett & Becker, *supra* note 75, at 449; *see also* Estate of Timko v. Oral Roberts Evangelistic Ass'n, 215 N.W.2d 750, 752 (1974); Danby v. Osteopathic Hosp. Ass'n, 104 A.2d 903 (Del. 1954).

[95] Barnett & Becker, *supra* note 75, at 450; *see also* United Elec. Corp. v. All Serv. Elec., Inc., 256 N.W.2d 92 (Minn. 1977).

[96] *See, e.g.*, Hubbs v. United States, 20 Cl. Ct. 423, 427–28 (1990), *aff'd*, 925 F.2d 1480 (Fed. Cir. 1991); Eliel v. United States, 18 Cl. Ct. 461, 469 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); Schwartz v. United States, 16 Cl. Ct. 182, 185 (1989); *see also* Nash, *supra* note 38 ¶ 52.

[97] 28 U.S.C. § 1491(a)(1); 41 U.S.C. §§ 7101–7109.

[98] *See generally* 28 U.S.C. § 1491; 41 U.S.C. §§ 7101–7109.

[99] *See* Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); City of El Centro v. United States, 16 Cl. Ct. 500, 505–06 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

The question is therefore whether the "implied-in-fact" contract doctrine can effectively be used by analogy as a "public law" version of the promissory estoppel doctrine, as a vehicle to afford people relief when they detrimentally and reasonably rely on statements made by the government. If so, the more specific question is whether borrowers who have detrimentally relied on the existence of the PSLF program can use the "implied-in-fact doctrine" in such a manner, if Congress repeals the PSLF program retroactively.

As stated above, I argue that the answer to the first, general question is "maybe," while the answer to the latter, more specific question is "no."[100] Even assuming the "implied-in-fact" doctrine could generally cover some scenarios involving detrimental reliance that would otherwise, under private state law, form the bases for promissory estoppel claims,[101] this would not hold true in the specific instances involving most, if any, "implied-in-fact" claims that challenge a repeal of PSLF, as explained below. This is despite the court's "fading" out of its earlier pronouncements of the persistent effects of sovereign immunity.[102]

1. Historical Background of the Tucker Act

To understand these arguments, however, it is helpful to have knowledge of the how the Tucker Act intersects with the doctrine of sovereign immunity, as well as the history of the doctrine and the statute. The Tucker Act was enacted in 1887.[103] The statute expanded the Court of Claims' jurisdiction (which had been initially created 32 years prior).[104] The Tucker Act affirmatively waived the government's sovereign immunity when litigants would bring claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, *or upon any express or implied contract with the United States*."[105] As described by Robert Porter, the Supreme Court "explicitly confirmed that 'by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act 'constitutes a waiver of sovereign immunity with respect to those claims.'"[106] The CDA was then enacted in 1978.[107] This newer statute covered "all

[100] *See infra* Sections II.B–C.

[101] Boyd & Huffman, *supra* note 49, at 624–28.

[102] Sisk, *supra* note 55, at 1291.

[103] Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies* 3 (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 22, 2006).

[104] Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; *see also* Porter, *supra* note 103, at 3 (citing 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2)).

[105] 28 U.S.C. § 1491(a)(1) (emphasis added).

[106] Porter, *supra* note 103, at 3 (quoting United States v. Mitchell, 463 U.S. 206, 212 (1983)).

[107] Porter, *supra* note 103, at 3; *see also* 41 U.S.C. § 601 (1978).

procurement contracts—the vast majority of federal contracts to purchase supplies, for construction, and for services."[108]

The CDA is the primary avenue accessible to contractors alleging a breach of contract with the federal government.[109] This avenue, however, would be unavailable to any plaintiffs challenging a repeal of the PSLF program. As stated above, the CDA generally applies to "acquisitions" and "procurement" contracts awarded to a private company working with a federal agency (to provide services, supplies and the like)[110]—but it does not apply to Direct Loan disputes with borrowers about whether an "implied" contract has been formed.[111]

Porter explains how in 1982, "the Court of Claims was abolished and its jurisdiction was divided between two new courts: the U.S. Court of Appeals for the Federal Circuit (appellate functions and jurisdiction) and the U.S. Claims Court (with additional trial jurisdiction)."[112] In 1992, the Claims Court then expanded its jurisdiction and became the U.S. Court of Federal Claims.[113]

2. *The Doctrine of Sovereign Immunity*

The jurisdiction of the courts mentioned above and the Tucker Act are inextricably linked to the doctrine of sovereign immunity. Under early American constitutional jurisprudence, the sovereign immunity doctrine had traditionally barred

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108 Porter, *supra* note 103, at 3.

109 *See* 41 U.S.C. §§ 7101–7109.

110 Porter, *supra* note 103, at 3–4. Prior to the CDA's enactment, a contractor had been required, "under the so-called 'disputes clause' found in most government contracts," to "exhaust administrative remedies, by appeal to the agency board of contract appeals, before he could file suit in the Court of Claims for a very limited judicial review of the administrative decision." *Id.* Since the CDA's enactment, however, aggrieved contractors have enjoyed a "vastly-improved choice of remedies – appeal to a judicially-enhanced agency board or 'direct access' to suit in the Court of Claims." *Id.* (citing 41 U.S.C. § 605(b) (2000) (recodified at 41 U.S.C. §§ 7101–7109) (requiring appeal to be taken within 90 days or suit within 12 months)). Both forums treat "[j]udgments . . . equally as judgments against the United States and are paid from the standing appropriations designated for such purpose." Porter, *supra* note 103, at 3–4 (citing 31 U.S.C. § 1304 (2000); 41 U.S.C. § 612(a) (2000)).

111 Porter, *supra* note 103, at 3–4 (describing how CDA applies to "procurement contracts"); *see also* Pfeiffer v. Duncan, 659 F.Supp.2d 160, 161–62 (D.D.C. 2009) (applying Tucker Act to student loan contract dispute).

112 Porter, *supra* note 103, at 4; *see also* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 25 (codified as amended in scattered sections of 28 U.S.C.); David Schwartz, *Two New Federal Courts*, 68 ABA J. 1091 (1982).

113 Porter, *supra* note 103, at 4; *see also* Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516, 4516 (codified as amended in scattered sections of 28 U.S.C.).

"suits against the government in most circumstances."[114] As Porter explained, "American colonial experience included a strong commitment to legislative adjudication of public law and legal obligation, where citizens made popular assemblies the forum that resolved monetary claims against the government by balancing public and private ends."[115] The federal government, however, "[o]ver time . . . through various congressional enactments – has 'gradually lowered the shield of sovereign immunity,' permitting suit in most contractual situations where an aggrieved party would desire relief, and weaving together what one prominent scholar has described as 'a reasonably well-integrated pattern of causes of action covering most subjects of dispute.'"[116]

For example, about a century prior to the Federal Tort Claims Act ("FTCA"), "and even in the years before [the 1887] enactment of the Tucker Act . . . Congress waived the government's immunity from judicial claims arising in contract."[117] In fact, since Congress in 1885 created the Court of Claims in order to "'relieve Congress and its Committee on Claims of the flood of private bills and the burden of legislating on individual claims' – the federal government has been subject to at least some type of litigation based upon contract disputes."[118]

Such a waiver of immunity from contract lawsuits—occurring prior to the Civil War—was viewed by many as "'indispensable to the efficient operation of government'" because it helped to ensure the "procurement of necessary goods and services from qualified private contractors."[119] This is because, from the contractors' perspective, they would feel more comfortable in working with the government knowing that they would have recourse, in the event of a breach of contract.[120]

Porter describes a commonly-quoted passage from President Lincoln's annual message from 1861. In the message, Lincoln "called for changes in the Court of

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114 Porter, *supra* note 103, at 1; *see also* John Lobato & Jeffrey Theodore, *Federal Sovereign Immunity* (Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 21, 2006) (explaining the historical context of the sovereign immunity doctrine).

115 Porter, *supra* note 103, at 1–2; *see also* Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1382 (1998).

116 Porter, *supra* note 103, at 5–6 (quoting Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against States*, 71 Geo. Wash. L. Rev. 602, 603 (2003)).

117 Porter, *supra* note 103, at 2.

118 *Id.* at 2 (quoting URBAN A. LESTER & MICHAEL F. NOONE, LITIGATION WITH THE FEDERAL GOVERNMENT § 6.104 (3d ed. 1994)); *see also* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.21(c) (2016).

119 Porter, *supra* note 103, at 2 (quoting Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1565 (1992)).

120 However, as explained by Porter, "In practice, however, this consent does not extend so far as to subject the government to all suits and actions as if it were a private party, particularly in certain segments of the liability spectrum." Porter, *supra* note 103, at 6.

Claims based on the principle that '[i]t is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.'"[121] Porter also quotes comments from Gillian Hadfield, stating that "'[p]olitically, by honoring its contracts, government has reinforced its democratic legitimacy as a government subject to the rule of [contract].'"[122]

With that said, however, even "[w]hen the government enters into the world of contract and assumes the position of a private person for juridical purposes, however, it never leaves behind its sovereign status and its overriding power."[123] In fact, as it related to contract disputes, the government never "wholly abandoned" the use of the sovereign immunity doctrine but instead still held on to "certain rules, privileges, and limitations on [its] liability."[124]

Until more recently, in fact, the realm of federal government litigation would almost necessarily always trigger the doctrine of sovereign immunity.[125] It would lurk in the background persistently, "even when Congress [had] granted consent to suit."[126] Sisk faithfully catalogues Justice Holmes' nearly century-old admonishment of how "[m]en must turn square corners when they deal with the Government."[127] Regardless, this warning had been neglected by far too many attorneys who would represent their clients in such cases, or as stated by Sisk "they [would] . . . fail to appreciate the persisting influence of sovereign immunity."[128] In fact, sovereign immunity would impact—even *after-the-fact* (i.e., post-statutory waiver)—"the manner in which the courts interpreted and applied . . . statutes" that affirmatively granted consent for plaintiffs to sue.[129]

This strict approach to interpretation has been more recently called into question. Some commentators, such as Professor Vicki C. Jackson, have argued that this

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121 *Id.* at 2 (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1 (1861)).

122 *Id.* at 2 (quoting Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 467 (1999)).

123 *Id.* at 2 (citing Hadfield, *supra* note 122, at 472).

124 *Id.*

125 Sisk, *supra* note 56, at 440.

126 *Id.*

127 Sisk, *supra* note 56, at 440 (quoting Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920)).

128 Sisk, *supra* note 56, at 440.

129 *Id.*; *see also* Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983); Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399–400 (1976); Sisk, *supra* note 55, at 1249 ("[E]ven when a statute explicitly waives federal sovereign immunity for a subject matter, the traditional rule has been that the terms of that statute must be construed strictly in favor of the sovereign." (internal quotation marks omitted)); *see also* McMahon v. United States, 342 U.S. 25, 27 (1951).

"persisting influence"[130] of sovereign immunity goes too far.[131] Jackson contends that the "abstract idea of sovereign immunity" should not be utilized to negate plaintiffs' abilities to obtain recourse "to address violations of legal rights" when "there is room for interpretation on questions of jurisdiction and remedies."[132] Rather, Jackson advocates for a more expansive interpretation of judicial authority to decide such issues if Congress affirmatively consents to a waiver.[133]

In line with Jackson's views, the courts have more recently been stepping back from the approach of strictly constructing waivers of sovereign immunity—to the extent that it no longer appears to reflect a majority trend in caselaw. In fact, as described by commentators such as Professors Gregory Sisk and Helen Hershkoff, the Supreme Court's current view is that strict construction extends only to the *initial threshold*, or "core," question of *whether* immunity is expressly waived, as opposed to "*how* the statutory waiver," if found, should exist *in application*.[134]

For example, the Court in *Franconia Associates v. United States*[135] and *United States v. White Mountain Apache Tribe*,[136] declined to continue to follow the strict construction approach to sovereign immunity waivers. Relevantly here, the judges were applying the Tucker Act's affirmative waiver of immunity to specific facts. In *Franconia*, the court held that since Congress had consented to being sued via the Tucker Act, it could no longer claim the benefit of being "cloaked with immunity," and that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties."[137] Likewise, the Court, in *White Mountain Apache Tribe*, refused to require an express statement of congressional consent to validate the existence of a waiver of immunity. It held that a statute must only "be *reasonably amenable* to the [interpretation] that it mandates a right of recovery"—in other words, only a "*fair inference*" is needed.[138]

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[130] Sisk, *supra* note 56, at 440–41.

[131] Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 522 (2003).

[132] *Id.* at 609; *see also* Sisk, *supra* note 56, at 461–62.

[133] Jackson, *supra* note 131.

[134] *See* Sisk, *supra* note 55, at 1291 (emphasis added). In more recent cases, the Court has increasingly accepted a "dichotomy between (1) the threshold question of whether sovereign immunity has been waived (which requires a 'clear statement' by Congress) and (2) the subsequent inquiry into how the statutory waiver should be interpreted *in application* with the canon of strict construction *fading away* as a viable tool for statutory interpretation." *Id.* (emphasis added); *see also* Helen Hershkoff, *Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction–Federal-Tort Filing Periods as a Testing Case*, 39 SETON HALL LEGIS. J. 243, 246–47 (2015).

[135] Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002).

[136] United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003).

[137] *Franconia*, 536 U.S. at 141, 145 (internal citations omitted); *see also* Sisk, *supra* note 55, at 1292.

[138] *White Mountain Apache Tribe*, 537 U.S. at 473 (emphasis added).

Furthermore, in *Gomez-Perez v. Potter*,[139] and as described by Sisk, the Court expanded on its articulation of the critical distinction between the "threshold question of whether a statutory waiver of sovereign immunity exists for the subject matter of the suit and the subsequent question of the meaning of substantive provisions and other terms inside the statutory waiver."[140] The Court, quoting *White Mountain Apache Tribe*, held that, "where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision need not . . . be construed in the manner appropriate to waivers of sovereign immunity."[141] In fact, the Court in *John R. Sand & Gravel Co. v. United States* acknowledged that the older cases reflecting the earlier, stricter attitude toward sovereign immunity waivers "have consequently become anomalous."[142] As such, the era of strict construction of statutory waivers of federal sovereign immunity appears to be ending, or at the very least, now being demoted to a mere "supporting player role."[143]

It is helpful to ask the basic question of "*why* the federal government should be treated differently from other litigants in the federal courts" in the first place.[144] Professor Jackson describes part of the rationale as "a commitment to democratic decisionmaking [which] may underlie judicial hesitation about applying the ordinary law of remedies to afford access to the public fisc to satisfy private claims, in the absence of clear legislative authorization."[145]

Other scholars, such as Professor Kenneth Culp Davis, have presented opposing views. Davis was one of the "nation's leading experts on administrative law – and a sharp critic of sovereign immunity."[146] He described the principle of immunity as a remnant from the medieval ages and English monarchy, stating that its "strongest support" comprises of "that four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia."[147] He claimed that sovereign immunity is a redundant and needless mechanism for the courts, in light of the public's trust of the judiciary to restrain itself from encroaching

139 553 U.S. 474, 491 (2008) (quoting *White Mountain Apache Tribe*, 537 U.S. at 473).

140 *See* Sisk, *supra* note 55, at 1292–93; *Gomez-Perez*, 553 U.S. at 491.

141 *Gomez-Perez*, 553 U.S. at 491 (internal quotations omitted).

142 *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 138 (2008). *But see* FAA v. Cooper, 566 U.S. 284, 290–91 (2012) (stating that the demand for an unequivocally expressed waiver of sovereign immunity extends to the scope of that waiver); *see also* Sisk, *supra* note 55, at 1294.

143 Sisk, *supra* note 55, at 1295.

144 Sisk, *supra* note 56, at 440 (presenting the arguments and counterarguments on this basic question).

145 Jackson, *supra* note 131, at 521.

146 Sisk, *supra* note 56, at 441.

147 Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970).

into critical activities of the government, including the executive branch's swift dealings for foreign relations and military policy.[148] Since the courts already limit themselves to "matters appropriate for judicial determination and within the competence of the judiciary," the concept of sovereign immunity is arguably superfluous.[149]

Dean Harold J. Krent disagrees with Davis, explaining how "[m]uch of sovereign immunity, however, derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule."[150] In allowing the "federal sovereign [to be] amenable to suit only when it has consented by statute, society entrusts Congress as the representative of the people with detrmining the appropriate circumstances under which public concerns should bow to private complaints."[151] As explained by Sisk, "because the federal government represents the *whole community* and thus often must act in ways that a private party cannot or should not, the government's exposure to liability must be controlled."[152] One single person "cannot be permitted in every instance to obtain judicial relief that sets aside the decisions of the community duly made through the elected branches of government."[153] However, "[r]eserving the authority to waive sovereign immunity to Congress does not mean that government is left without a check upon its conduct."[154] Instead, "the check is a political one—the potential displeasure of the electorate."[155]

The validity of the displeasure of the electorate as an effective political tool is arguably illustrated by the scenario of a retroactive PSLF repeal. As stated above, approximately "200,000 or more" people "qualify for, and seek, debt forgiveness each year."[156] These people, if impacted, would have the safety net of being able to seek recourse through the political process. Furthermore, as stated above,[157] these people are primarily mid-career doctors and lawyers, most likely with a superior knowledge—on average—of navigating the political system than the average American taxpayer. As such, sufficient political checks arguably already exist to protect this large and powerful class of people here, and democratic principles therefore call for preventing them from obtaining additional, undue recourse through the courts

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[148] *Id.*; *see also* Sisk, *supra* note 56, at 441.

[149] Sisk, *supra* note 56, at 441. The political question doctrine is a good example of the type of judicial restraint that arguably renders sovereign immunity superfluous.

[150] Krent, *supra* note 119, at 1530.

[151] Sisk, *supra* note 56, at 442.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*; *see also* Krent, *supra* note 119, at 1530.

[156] Crespi, *Loan Forgiveness*, *supra* note 12, at 629.

[157] *See supra* Introduction.

and draining the public fisc, contrary to the policy choices made by the duly elected branches of government.[158] This reasoning is consistent with the jurisprudence stating that the existence of mass political power and accountability should limit the scope of constitutional norms.[159] With that said, however, the fairness and justice concerns for individuals who reasonably rely to their detriment on promises made by the federal government and who experience severe financial or other hardships cannot be easily discounted.

3. Sovereign Immunity and Principles of Agency Law, the Unitary Executive and Separation of Powers

The sovereign immunity doctrine also overlaps with principles of agency law. Our legal system reflects a general acknowledgment that the government at-large should be held accountable only to people harmed directly by government officials acting within the scope of their authority.[160] The FTCA and the Tucker Act are classic examples of this principle at work.[161] By allowing private individuals to seek recourse for tortious conduct and breaches of contract by the government, Congress has waived sovereign immunity in these predefined areas of law and consented to be sued. However, the Tucker Act and FTCA do not apply to scenarios in which a government officer acts outside the scope of his or her authority.[162] In such scenarios, the government officer is going rogue or freelance, or on a frolic-and-detour, and is not representing the interests of the government at-large. In such scenarios, courts typically decline to hold the entire government vicariously liable for the actions of the individual government officer or employee.[163]

This outcome makes even more sense when viewed in conjunction with the theory of the unitary executive in Article II of the Constitution. The unitary executive theory calls for a unified executive branch, acting under the Chief Executive, to

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158 Krent, *supra* note 119, at 1532–33.

159 *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that a tax applicable to a large and powerful class of people does not trigger due process because such people have the safeguard of the political process and do not require extra protections) *with* Londoner v. Denver, 210 U.S. 373, 385–86 (1908) (holding that a tax assessed on an individual, by contrast, *does* necessitate the protections of due process).

160 *See, e.g.*, Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (articulating the principle of requiring authority for government liability).

161 28 U.S.C. §§ 2671–2680; 28 U.S.C. § 1346 (FTCA); 28 U.S.C. § 1491(a)(1) (Tucker Act).

162 *See, e.g.*, U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Va., LLC, 899 F.3d 236, 248 (4th Cir. 2018) (FTCA authority case); Creel v. United States, 598 F.3d 210, 213 (5th Cir. 2010) (same); Bryant v. United States, No. CIV 98-1495 PCT RCB, 2000 WL 33201357, at *11 (D. Ariz. Jan. 11, 2000) (same); New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989) (Tucker Act authority case); EWG Assocs., Ltd. v. United States, 231 Ct. Cl. 1028, 1029 (1982) (same).

163 *Id.*

speak with one federal voice.[164] This is why the courts typically decline to assert subject matter jurisdiction over legal disputes arising between Executive Branch agencies, which instead are elevated for internal resolution by the Department of Justice, Office of Legal Counsel ("OLC").[165] Doing so allows the executive branch to resolve its disputes internally and speak with one voice. Imputing statements made by rogue, reckless, or careless government officers and employees to the executive branch as a whole would make it impossible for the executive branch to speak with "one voice," however, because different people would say different things, and no one would know what the executive branch even stands for. So it makes wise policy from a unitary executive standpoint to limit the impact of statements made by government officials to those that have actual authority to speak on behalf of the federal executive branch.

The doctrine of sovereign immunity is also related to the fiscal principles of separation of powers.[166] In *Merrill*, the Supreme Court observed that only Congress had the authority to charge the public treasury.[167] Allowing for "the Government to be bound in the absence of specific authorization would, in effect, allow government employees to 'legislate' by misinterpreting or ignoring an applicable statute or regulation."[168] If the judiciary validates "such unauthorized legislation, it . . . would also infringe upon Congress's exclusive authority to make law."[169]

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[164] *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 38–39 (1995).

[165] *About the Office*, U.S. DEP'T OF JUST.: OFF. OF LEGAL COUNS., https://www.justice.gov/olc (last visited Mar. 13, 2022) (describing the role and authority of OLC). One familiar exception, of course, is that subject matter jurisdiction exists when one of the parties is an "independent agency" that does not answer directly to the President. *See, e.g.*, SEC V. FLRA, 568 F.3d 990, 997–98 (D.C. Cir. 2009) (Kavanaugh, J., Concurring); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11 n.6 (3d ed. 2008).

[166] *See, e.g.*, Krent, *supra* note 119, at 1530 (arguing that "[m]uch of sovereign immunity, however, derives . . . from a desire to maintain a proper balance among the branches of the federal government"); Jackson, *supra* note 131, at 521 n.2.

[167] Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947).

[168] Alan I. Saltman, *The Government's Liability for Actions of Its Agents that Are Not Specifically Authorized: The Continuing Influence of* Merrill *and* Richmond, 32 PUB. CONT. L.J. 775, 781 (2003); *see also* Fred Ansell, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026, 1037 (1986).

[169] Saltman, *supra* note 168, at 781 (presenting these arguments in the context of equitable estoppel).

4. *The Jurisdictional Limits of the Tucker Act*

The Tucker Act and the CDA "do not explicitly identify the substantive law that governs a contracts-based claim."[170] While a plaintiff's claim that is based on a "particular 'money-mandating' statute refer[s] to the statute itself as providing the governing substantive law," when a plaintiff's claim is based "simply upon contract, the source of substantive law is the federal common law of contracts."[171]

In *Seaboard Lumber Co. v. United States*,[172] the Claims Court articulated that:

> It is undisputed that the law to be applied in cases related to federal contracts is federal and not state law. The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the [specific agency's] Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private contract law for analogies and concepts. However, it is a separate and distinct body of law.[173]

As such, although the federal common law of contracts is distinct from traditional state contract law, state law may constitute persuasive authority that is drawn upon.

Another critical issue is what types of contract claims can be brought under the Tucker Act. The statute does not allow claims that seek injunctive relief, but it does allow for claims seeking money damages.[174] Furthermore, the courts have held that jurisdiction under the Tucker Act allows for claims that are "implied in fact" but not claims that are "implied in law"—also referred to as "quasi-contracts."[175]

In *Hercules, Inc. v. United States*,[176] for example, as described by Porter, the Supreme Court upheld this proposition, and "formulated a restrictive understanding of what constitutes an 'implied in fact' contract under the Tucker Act."[177] The litigation in *Hercules* involved military veterans and their families who had brought

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170 Porter, *supra* note 103, at 5. *See generally* 28 U.S.C. § 1491; 41 U.S.C. § 601; 41 U.S.C. § 7101.

171 Porter, *supra* note 103, at 5.

172 15 Cl. Ct. 366 (1988), *aff'd*, 903 F.2d 1560 (Fed. Cir. 1990).

173 *Id.* at 369 (internal citations omitted).

174 *See, e.g.*, Lee v. Thornton, 420 U.S. 139, 140 (1975) ("The Tucker Act empowers district courts to award damages but not to grant injunctive . . . relief.").

175 Porter, *supra* note 103, at 15–16 (discussing Hercules, Inc. v. United States, 516 U.S. 417 (1996)).

176 *Hercules*, 516 U.S. at 417.

177 Porter, *supra* note 103, at 15–16 (discussing *Hercules*, 516 U.S. at 423).

suit against "chemical manufacturers producing Agent Orange for the government during the Vietnam War"—who allegedly, according to the plaintiffs, caused health problems for the veterans by exposing them to the chemical agent.[178] The chemical manufacturers settled the claims with the plaintiffs, and then subsequently sued the government seeking indemnification from it under the Tucker Act's contract provisions.[179] Since the contracts between the government and the manufacturers did not contain any express indemnification provisions, the plaintiffs had to claim that an "implied" agreement existed between the parties to reimburse the manufacturers for any liabilities.[180] In making this argument, the manufacturers pointed to the government's detailed specifications for the chemical agent as well its seizure of certain production facilities that had belonged to the companies, as evidence of the existence of an "implied-in-fact" contract.[181] The Court, however, rejected the manufacturers' reliance on this type of evidence. It held that the existence of the specifications and even the occurrence of the seizure was insufficient to prove that the government had in fact agreed to indemnify the manufacturers—and it questioned "whether a government contracting officer would even have the authority to enter into such an open-ended indemnification agreement."[182] As such, the Court denied the claim.[183]

Absent any "circumstances from which it can be inferred that the government entered into a consensual agreement, the requirement of the Tucker Act that a suit be founded on 'implied contract' cannot be met."[184] As such, "there is no right of action against the United States in those cases 'where, if the transaction were between private parties, recovery could be had upon a contract implied in law.'"[185] In those cases, the court has repeatedly stated that it does not have jurisdiction.[186] The court has added that "implied-in-law" contracts encompass promissory estoppel claims—and it has customarily dismissed such claims on that basis.[187]

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[178] *Id.* at 16 (citing *Hercules*, 516 U.S. at 419–20).

[179] *Hercules*, 516 U.S. at 420–21.

[180] *Id.* at 424.

[181] *Id.* at 426.

[182] Porter, *supra* note 103, at 16.

[183] *Hercules*, 516 U.S. at 419.

[184] Porter, *supra* note 103, at 16 (citing Balt. & Ohio R.R. Co. v. United States, 261, U.S. 592, 597–98 (1923)).

[185] Porter, *supra* note 103, at 16 (quoting Merritt v. United States, 267 U.S. 338, 341 (1925)).

[186] *See, e.g.*, City of El Centro v. United States, 16 Cl. Ct. 500 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 2851 (1991).

[187] *See, e.g.*, Knaub v. United States, 22 Cl. Ct. 268, 276 (1991); Hubbs v. United States, 20 Cl. Ct. 423, 427–28 (1990), *aff'd*, 925 F.2d 1480 (Fed. Cir. 1991); Eliel v. United States, 18 Cl. Ct. 461, 469 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); Am. Mar. Transp., Inc. v. United States, 18 C1. Ct. 283, 292 (1989); H. Landau & Co. v. United States, 16 Cl. Ct. 35, 37 (1988),

5. *Equitable Estoppel Claims Against the Government*

As with promissory estoppel claims, many courts have also dismissed claims of equitable estoppel against the federal government.[188] This trend likewise stems from sovereign immunity.[189] However, similar to the doctrine of sovereign immunity, "governmental immunity from estoppel [has] been much discussed, criticized, and limited in recent years."[190] Although the "resulting disfavor with sovereign immunity has," as discussed above, "resulted in legislation"—such as the Tucker Act—as well as jurisprudence, "limiting the availability of that defense in certain actions against the government, a corresponding expansion of the availability of estoppel against the government has occurred rather more slowly."[191]

It is true that courts still sometimes state in a general fashion that "there can be no estoppel against the government or its agencies."[192] However, as with any generalized statement, this one is likely to mislead if one fails to remember that "[g]eneral propositions do not decide concrete cases."[193]

Although many judicial decisions "have stated categorically that there can be no estoppel against the federal government," it appears that in many of these decisions the judges have "simply used the words to put aside with the least effort a litigant's estoppel contentions which appeared on the facts to be unfounded, or unworthy of extended discussion even if the estoppel had been asserted against a private party rather than against the government."[194] Thus, upon closer examination of the relevant caselaw, "'no estoppel against the government' often means only that the elements of an equitable estoppel [claim] were not present in a case involving the Federal Government or its agencies and sometimes the courts rely on both reasons in refusing to find the government estopped."[195]

Even though the "Supreme Court has in the past, and in its recent decisions, taken a strict view in forbidding estoppel against the government . . . perhaps this

vacated on other grounds, 886 F.2d 322 (Fed. Cir. 1989); Durant v. United States, 16 Cl. Ct. 447, 449–50 (1988) (rejecting promissory estoppel claim under the Tucker Act on the basis of sovereign immunity); New Am. Shipbuilders, Inc. v. United States, 15 Cl. Ct. 141, 144 (1988), *aff'd*, 871 F.2d 1077 (Fed. Cir. 1989); *see also* Boyd & Huffman, *supra* note 49, at 605.

[188] Rydstrom, *supra* note 60, § 2[a].

[189] *Id.*

[190] *Id.*

[191] *Id.*; *see also* United States v. Georgia-Pacific Co., 421 F.2d 92, 99–100 (9th Cir. 1970).

[192] Rydstrom, *supra* note 60, § 2[a] (internal quotations omitted).

[193] *Id.* (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

[194] Rydstrom, *supra* note 60, § 2[a].

[195] *Id.* (citing 28 AM. JUR. 2D *Estoppel and Waiver* §§ 35–38 (West 2022); Spencer v. R.R. Ret. Bd., 166 F.2d 342, 343 (3d Cir. 1948)). *But see* Spencer, 166 F.2d at 343 ("It is settled that estoppel may not be asserted against an agency of the United States Government such as the Railroad Retirement Board. Moreover, even if estoppel might be asserted against the Board we are satisfied that the essential elements of an estoppel are not present in this case.").

can be accounted for in part by its . . . taking a strict view" of the validity of the underlying legal claims necessary to support an equitable estoppel allegation in the first place.[196] For instance, the Court refused, in *United States Immigration & Naturalization Service v. Hibi*,[197] to find a valid equitable estoppel claim against the government when it had denied naturalization to an alien who had done nothing to qualify for it.[198] In that case, the statute making the alien eligible for naturalization had expired, and he had failed to bring his claim until after he visited this country subsequent to the statute's expiration.[199] So the Court found there was no "affirmative misconduct" by government agents to justify estoppel but rather that the Immigration Service was simply "enforcing the public policy established by Congress," as it currently stood.[200] Likewise, the Court declined to find a valid estoppel claim against the government in *Moser v. United States*.[201] In that case, however, it held that an estoppel finding was unnecessary because of the government's clear violation of law—specifically, the government had imposed "misleading circumstances" on an alien who had actively sought to determine his eligibility for citizenship, which had prevented the alien from being able to intelligently waive "a condition of citizenship applicable in his situation," in clear violation of the immigration statute.[202] So the Court found in the alien's favor while avoiding the estoppel issue.[203]

Notwithstanding these instances of judicial side-stepping, the Court many times has directly addressed the issue of when a plaintiff may bring an equitable estoppel claim against the federal government. In doing so, it has identified competing policy considerations. Jean Rydstrom explains:

> There is a considerable overlap of the matters discussed by the courts with respect to applying estoppel against the government. Enforcement of the laws as enacted by Congress . . . is an integral part of the government's responsibilities exercise 'in trust for all the people,' which is designated a government function, and not subject to the usual rules of equitable estoppel. And the prevention of injustice to of injustice to private parties in their dealings with government agencies, although now less restricted by the dogma of sovereign immunity, has long been a goal of courts seeking to protect private interests by classifying certain functions of government as proprietary, which do not furnish immunity from estoppel. [204]

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[196] Rydstrom, *supra* note 60, § 2[a].

[197] 414 U.S. 5 (1973).

[198] *Id.* at 8–9.

[199] *Id.* at 9.

[200] *Id.* at 8–9.

[201] 341 U.S. 41 (1951).

[202] Rydstrom, *supra* note 60, § 2[a] (discussing *Moser*, 341 U.S. at 47).

[203] *Id.*

[204] *Id.* (internal citations omitted).

In other words, a tension exists between the "concern for the protection of the *public's interests* in given situations and concern for a proper consideration of the equities favoring *private parties*[*' interests*] in their dealings with the government and its agencies."[205]

According to Rydstrom:

> It seems not unreasonable for the courts steadfastly to deny estoppel against the Federal Government and its agencies when there are public interests at stake, as they do, because a misinformed or overly generous bureaucrat should not be able to give away assets which the government holds for the public good, or to rewrite the laws enacted by Congress to define for all the scope of particular governmental action.[206]

This is the same type of rationale used to support sovereign immunity, as described above. [207] Rydstrom continues:

> On the other hand, the courts are increasingly aware that the actions of individual members of the public are more often and in more areas governed by the statements and conduct of government officers or agents, placed by the government in positions to assist and advise its citizens, so that estoppel against the government may be appropriate when a citizen has relied to his detriment on such advice, so long as estoppel will not undermine the government's greater responsibility to represent the good of *all* the people.[208]

Rydstrom explains that a court's decision on whether to find a valid estoppel claim "against the government was traditionally, and in some cases still is, made to depend upon the distinction between performance of a governmental[209] versus a proprietary function."[210] It has also hinged upon whether the agent's conduct fell within or exceeded the scope of her authority.[211] In certain "recent cases, however, the courts have turned away from these traditional pigeonholes, and considered the basic question of what is justice in a particular situation."[212]

In addition, the Court of Claims has extended the doctrine of equitable estoppel to Tucker Act claims brought by private parties against the federal government, in appropriate scenarios.[213] Specifically, for estoppel to apply, the court has held

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205 *See id.* (emphasis added).

206 *Id.*

207 *See supra* Section I.B.2–3.

208 Rydstrom, *supra* note 60, § 2[a] (internal citations omitted) (emphasis added).

209 *Id.*; *see, e.g.*, United States v. Florida, 482 F.2d 205 (5th Cir. 1973).

210 Rydstrom, *supra* note 60, § 2[a]; *see, e.g*, United States v. Georgia-Pacific Co., 421 F.2d 92, 100–01 (9th Cir. 1970).

211 *See, e.g.*, Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

212 Rydstrom, *supra* note 60, § 2[a]; *see also In re* LaVoie, 349 F. Supp. 68 (D.V.I. 1972).

213 *See, e.g.*, Manloading & Mgmt. Assocs., Inc. v. United States, 461 F.2d 1299, 1303 (Ct. Cl. 1972); Branch Banking & Tr. Co. v. United States, 98 F. Supp. 757, 768–69 (Ct. Cl. 1951).

that: (1) the government must know the facts; (2) it must intend for the plaintiff to act on the government's conduct—or it must behave in a way to justify the plaintiff's belief that the government intended such action; (3) the plaintiff must be ignorant of the true facts; (4) the plaintiff must rely on the government's conduct to his or her detriment; and (5) the relevant official who's conduct is at issue must possess the authority to bind the government.[214] If these elements can be proven, equitable estoppel can effectively function as an overlay on a Tucker Act contract claim, and "prevent the denial of a contract that has been made."[215]

According to the American Jurisprudence treatise, equitable estoppel "is distinct" from promissory estoppel.[216] Liability based on "[p]romissory estoppel involves a clear and definite promise while equitable estoppel involves only representations and inducements."[217] Any "representations at issue in promissory estoppel go to future intent while equitable estoppel involves statements of past or present fact."[218] Some commentators also state "that equitable estoppel lies in tort," while promissory estoppel is more related to "contract" or quasi-contract theory.[219] Purportedly, another "major distinction between equitable estoppel and promissory estoppel is that the former is available only as a defense while promissory estoppel can be used as the basis of a cause of action for damages."[220]

This formulation is consistent with statements made by Samuel Williston, the chief reporter for the Restatement of Contracts,[221] who has also spoken of the distinction between equitable estoppel and promissory estoppel. Susan Martin explains:

> Samuel Williston . . . spoke of "genuine estoppel" as a rule that says "one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations." This shield from a wrongdoer's misrepresentations has come to be known as equitable estoppel and has been applied by courts in the United

[214] Emeco Indus., Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973); *Georgia-Pacific Co.*, 421 F.2d at 96.

[215] *See* Lichtefeld-Massaro, Inc. v. United States, 17 Cl. Ct. 67, 72 (1989); *see also* Pac. Gas & Elec. Co. v. United States, 3 Cl. Ct. 329, 340 (1983), *aff'd*, Pac. Gas & Elec. Co. v. United States, 738 F.2d 452 (Fed. Cir. 1984) ("The doctrine of equitable estoppel was applied by the Court of Claims, and will be applied by this court, in an appropriate case to prevent the United States from denying the existence of a contractual agreement."); Michael Cameron Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 611–12 (1990).

[216] 28 AM. JUR. 2D, *Estoppel and Waiver* § 34 (West 2022).

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* (internal citations omitted).

[221] 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139, at 308 (1920).

> States for more than 150 years. In this formulation, courts used estoppel to protect an innocent party who had been misled about the facts (not promises or intentions) of a deal and, because of a misrepresentation of facts, could not have protected himself in a contract. Equitable estoppel was not being used as a cause of action, but as a defense by an innocent party when a misrepresenter of facts attempted to enforce a contract.[222]

By contrast, when a person relies on a promise—as opposed to a "misstatement of fact"—Williston indicates that "the term 'promissory' estoppel or something equivalent should be used to mark the distinction."[223]

Not all courts and authorities acknowledge this distinction, however. Rydstrom's American Law Reports summarizes the modern status of the applicability of the doctrine of equitable estoppel against the federal government and its agencies.[224] In doing so, it focuses on cases in which plaintiffs have brought estoppel claims offensively against the government for causing detrimental reliance, and the cases often make little to no meaningful distinction between the promissory and equitable estoppel doctrines—and many of the cases refer to them interchangeably.[225] Similarly, other authors have referred to promissory estoppel as a "form of equitable estoppel."[226]

Nonetheless, the courts have acknowledged and articulated some degree of difference between the doctrines of promissory estoppel and equitable estoppel in the context of federal government contract cases. In fact, "[t]he Claims Court, while denying jurisdiction over claims based on promissory estoppel, has recognized

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[222] Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1, 7 (2016) (quoting WILLISTON, *supra* note 221 § 139, at 308; citing Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 (Fla. 2001); Coogler v. Rogers, 7 So. 391, 394 (Fla. 1889); Camp v. Moseley, 2 Fla. 171, 171 (1848); Hoye v. Westfield Ins. Co., 487 N.W. 2d 838, 842 (Mich. Ct. App. 1992)).

[223] WILLISTON, *supra* note 221, at 308.

[224] *See generally* Rydstrom, *supra* note 60.

[225] *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898) (referring to promissory estoppel as "equitable estoppel"); *id.* ("Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the *promise* was given without consideration." (emphasis added)); Atl. Wholesale Co. v. Solondz, 320 S.E.2d 720, 723–24 (S.C. Ct. App. 1984) (addressing whether equitable estoppel could overcome the statute of frauds, but the situation in the case clearly involved promissory estoppel).

[226] *See, e.g.*, Charles B. Jimerson, *Understanding the Basics of Equitable Estoppel and Using Equitable Estoppel Principles to Create Insurance Coverage in Florida,* JIMERSON BIRR (Oct. 26, 2010), https://www.jimersonfirm.com/blog/2010/10/understanding-the-basics-of-equitable-estoppel-and-using-equitable-estoppel-principles-to-create-insurance-coverage-in-florida/.

claims based on equitable estoppel."[227] Thus, it is important to acknowledge that many decisions treat the doctrines differently from each other under the Tucker Act.

Regardless, it remains unclear whether equitable estoppel claims can be used only in a *defensive* litigation posture or whether they also can be used *offensively*.[228] For the sake of argument, this Article operates under the assumption that equitable estoppel claims *may* be used in an offensive manner. The Article nevertheless concludes that the courts would still likely decline to uphold a claim based on the merits of the equitable estoppel doctrine, under the Tucker Act, as a challenge to a repeal of the PSLF program.

6. The Sovereign Acts Doctrine

As stated above, the Sovereign Acts Doctrine is relevant here too. The federal government may admit they breached a contract with a loan borrower relying on the PSLF program but argue that the borrower is ineligible to seek damages pursuant to the defense of the "sovereign acts doctrine."[229] This defense would effectively bar a borrower's claim if the government can prove that the new congressional legislation constitutes a sovereign act.[230] Strickland writes:

> A "sovereign act" is a law that is "public and general," i.e. (1) designed to benefit the public welfare, (2) not designed to or does not have the primary effect of helping the government avoid its contractual obligations to current borrowers under PSLF, and (3) does not place the majority of the impact of the law on current borrowers under contract with the federal government.[231]

As presented below, I argue that the majority—if not all—of the impact of a PSLF repeal would fall upon current borrowers and that the repeal would have the primary effect of allowing the government to avoid its contractual obligations (assuming they are admitted to by the government or found to exist by a court). This would render the Sovereign Acts Doctrine defense inappropriate to apply.[232]

[227] Boyd & Huffman, *supra* note 49, at 623; *see* Pac. Gas & Elec. Co. v. United States, 3 Cl. Ct. 329, 340 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984); *cf.* Russell Corp. v. United States, 537 F.2d 474, 484–85 (Ct. Cl. 1976).

[228] *Compare Pac. Gas & Elec. Co.*, 3 Cl. Ct. at 340, *with Russell Corp.*, 537 F.2d at 484–85 (analyzing doctrine of equitable estoppel as a sword, and not a shield).

[229] ROBERT MELTZ, CONG. RSCH. SERV., R42635, WHEN CONGRESSIONAL LEGISLATION INTERFERES WITH EXISTING CONTRACTS: LEGAL ISSUES 7–8 (2012); *see also* Strickland, *supra* note 27.

[230] Horowitz v. United States, 267 U.S. 458, 461 (1925); United States v. Winstar Corp., 518 U.S. 839, 896 (1996).

[231] Strickland, *supra* note 27; *see also Horowitz*, 267 U.S. at 461. For some especially fascinating background and analysis on the "Sovereign Acts Doctrine," see Joshua I. Schwartz, *The Status of the Sovereign Acts andUnmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177 (1999).

[232] *Infra* Section II.D.

II. ANALYSIS

A. Four Scenarios in Which a Detrimental Reliance Claim Could Arise

There are at least four types of scenarios that could give rise to allegations of detrimental reliance, if Congress were to then retroactively repeal the PSLF program. The first scenario involves written statements contained in the Master Promissory Note ("MPN"). The MPN is the "central loan document executed by borrowers under the federal Direct Loan program."[233] It provides the terms and conditions governing the borrowing of student loans and refers both explicitly and implicitly to the availability of the PSLF program.[234] It is a document that borrowers could rely upon in making the decision to take lower-paying jobs in hopes of receiving loan forgiveness.

The second scenario that could cause detrimental reliance involves any false promises or misinformation that may have been disseminated by former President Donald J. Trump or the former Secretary of Education to the public stating that the program will definitely forgive people's loans. Numerous examples already exist of President Trump making definitive statements about various topics and speaking in exaggerated, false or absolute terms.[235] It is not inconceivable to surmise that President Trump may have made definitive statements touting or even exaggerating the benefits of the PSLF program and vowing to forgive people's loans as a part of his re-election campaign or other political strategy. Such statements could harm and mislead borrowers if Congress were to subsequently repeal the program retroactively.

The third scenario of misinformation could involve an agency hiring official who touts or exaggerates the benefits of public service loan forgiveness to encourage

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[233] Crespi, *Loan Forgiveness*, *supra* note 12, at 643; *see, e.g.*, U.S. DEP'T OF EDUC., OMB NO. 1845-0007, MASTER PROMISSORY NOTE DIRECT SUBSIDIZED LOANS AND DIRECT UNSUBSIDIZED LOANS WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM (2018), https://studentloans.gov/myDirectLoan/subUnsubHTMLPreview.action.

[234] Crespi, *Loan Forgiveness*, *supra* note 12, at 648; U.S. DEP'T OF EDUC., *supra* note 233.

[235] *See, e.g.*, Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump's False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021, 3:00 AM), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/; Rem Rieder, Jessica McDonald, Robert Farley, Lori Robertson & D'Angelo Gore, *FactChecking Trump's Fox News Interview*, FACTCHECK.ORG (Sept. 2, 2020), https://www.factcheck.org/2020/09/factchecking-trumps-fox-news-interview-2/ (providing examples of various exaggerated and misleading claims made by the President related to COVID-19 and other topics); Daniel Dale, *Fact Check: Trump Made at Least 22 False or Misleading Claims at ABC Town Hall*, CNN (Sept. 16, 2020, 2:05 PM), https://www.cnn.com/2020/09/16/politics/fact-check-trump-abc-town-hall/index.html (same).

a desirable job applicant to work at the agency. If a PSLF repeal occurs, a job applicant who accepts the public sector position could very well suffer devastating economic harm.

Finally, scenarios exist in which private loan servicers provide misinformation about the program to loan applicants. Congress authorized ED to "delegate authority to loan servicers" to independently "carry out" the program "by serving as the primary point of contact for borrowers."[236] Currently, "[n]ine student loan servicers are . . . under contract with the ED."[237] They are "responsible for handling payment collection and deferment, and provide general customer service" about the availability of the PSLF program, as well as enrolling borrowers in selected qualifying repayment plans for it.[238] Although all nine servicers "are responsible for selected activities relating to PSLF . . . ED has contracted with a single loan servicer—FedLoan Servicing—to perform the majority of administrative tasks specific to PSLF."[239]

The information that FedLoan and the other servicers communicate to loan applicants and borrowers—including information about the PSLF program eligibility requirements and other income-driven repayment options—is often false, inconsistent, inaccurate or misleading.[240] This has caused borrowers and loan applicants to suffer severe economic harm.[241]

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236 Messer, *supra* note 9, at 241.

237 *Id.* These servicers are Navient, CornerStone, Granite State, Great Lakes Educational Loan Services, HESC/Edfinancial, MOHELA, Nelnet, OSLA Servicing and FedLoan Servicing, also known as Pennsylvania Higher Education Assistance Agency, or PHEAA. *Id.* at 241 n.49.

238 Messer, *supra* note 9, at 241.

239 ALEXANDRA HEGJI, CONG. RSCH. SERV., R45389, THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM: SELECTED ISSUES 6 (2018).

240 *See, e.g.*, David A. Stein, *CFPB Reports and Acts on Complaints about Student Loan Servicer Handling of Public Service Loan Forgiveness Program*, NAT'L L. REV. (June 23, 2017), https://www.natlawreview.com/article/cfpb-reports-and-acts-complaints-about-student-loan-servicer-handling-public-service (detailing complaints in the Consumer Finance Protection Bureau report, including informational inaccuracy, deceptive or negligent enrollment information, unclear requirements for enrollment in non-qualifying plans); CONSUMER FIN. PROT. BUREAU, *supra* note 10, at 29–30 (describing how FedLoan servicer employees, for example, incorrectly assured borrowers that they were "all set!" regarding PSLF requirements).

241 CONSUMER FIN. PROT. BUREAU, *supra* note 10, at 29–30. As noted above, ED also issues guidance documents interpreting the requirements of the PSLF program, which allows the agency to avoiding following the notice-and-comment rulemaking procedures under the APA. 5 U.S.C. § 553(b)(3)(A). ED's guidance on the PSLF program would be unlikely to support a valid detrimental reliance claim, should Congress subsequently repeal the program. The guidance makes it clear that loan applicants cannot be "certain that the PSLF Program will exist by the time [they] have made [their] 120 qualifying payments[.]" In fact, it states that ED "can't make any guarantees about the future availability of PSLF. . . . [because] [t]he PSLF Program was created by Congress, and Congress could change or end the PSLF Program." *Public Service Loan Forgiveness FAQ*, *supra* note 28.

B. Most if Not All Loan Applicants Would Fail to Meet the "Implied-in-Fact" Contract Elements Under the Tucker Act

Although some of these scenarios may give rise to stronger Tucker Act claims than others, most, if not all, of them would still likely fail to form the bases of any valid "implied-in-fact" contract claims. The existence of the MPN, any statements of agency hiring officials and any misinformation provided by the President, Secretary of Education would likely fail to support any prevailing claims, due to the lack of any clear offers or actual authority—with the lack of authority being an especially fatal infirmity. Stronger claims could possibly be made for any misinformation provided by the employees of the private loan servicers. Such scenarios, however, would still present some very uphill battles for the plaintiffs, who would likely not prevail.

The federal government may not be sued without its own express consent.[242] However, recall that the Supreme Court has been moving away from applying its rule of strict statutory construction in applying waivers of sovereign immunity. Thus, if the language of a statute leaves some doubt or uncertainty on the issue, the courts may still look beyond the text of a statute to legislative history or purpose on the matter.

Regardless, as shown below,[243] plaintiffs would be unlikely to prevail on the merits in arguing that the Tucker Act's "implied-in-fact" elements apply to most if not all types of allegations of detrimental reliance against the federal government, in attempting to collect money damages against the federal government for a retroactive PSLF repeal.

Promissory estoppel is not a contract-based theory.[244] Rather, as stated above,[245] it is an equitable doctrine based on the interests of justice.[246] So plaintiffs would need to frame their arguments within the scope of the Tucker Act to demonstrate that Congress has consented to be sued.

As stated above, in applying the Tucker Act, the Claims Court has held that "implied-in-fact" contracts require: (1) mutuality of intent to contract, (2) unam-

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[242] Libr. of Cong. v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983); Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399 (1976).

[243] *See infra* Section II.B.

[244] *See* John Price Assocs. v. Warner Elec., Inc., 723 F.2d 755, 757 (10th Cir. 1983); Henderson, *supra* note 36, at 345–46; Knapp, *supra* note 36, at 52–54.

[245] *See supra* Section I.A.

[246] *See, e.g.*, Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 150–51 (Minn. 2001); Pham, *supra* note 37, at 1264 n.5; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) (hinging the application of promissory estoppel on the interests of justice); 28 AM. JUR. 2D, *Estoppel and Waiver* § 34 (West 2022) (explaining that promissory estoppel is a "creature of equity").

biguous offer and acceptance, (3) consideration and (4) that the relevant governmental officer have actual authority to bind the federal government.[247] Each element is addressed in turn.

1. Mutuality of Intent to Contract

As shown below, this element merits only brief discussion here. One could contend that the requirement of mutuality of intent to contract does not even necessarily merit its own separate element because it fails to add any substantive requirements beyond that of the other elements of a contract. Mutuality of intent does not require parties to a contract to make "future commitment[s]" to each other or require that they "be bound with the same degree of firmness." Nor does it mean that "parties must have equal or coextensive obligations under the contract."[248] Rather, "it is nothing more than a specific application of the general principle of consideration. When consideration consists of the exchange of mutual promises, the undertakings on both sides must be real and meaningful."[249] If a "promise of one party has qualifications or limitations so strong that they negate it, it is really no commitment at all."[250]

As shown below,[251] substantial questions exist as to whether the federal government made a clear and unqualified commitment to repay student loans under the PSLF program in exchange for any quid pro quo, to qualify as an unambiguous offer or support consideration under the "implied-in-fact" doctrine. These issues are more properly addressed below[252] within the relevant sections for "unambiguous offer" and "consideration."

2. Unambiguous Offer

As indicated above,[253] the courts have held that "implied-in-fact" contracts require a clear and unambiguous offer.[254] By analogy, the courts have dismissed promissory estoppel claims on the basis of conflicting representations made by a promisor

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[247] *See* Yachts Am., Inc. v. United States, 779 F.2d 656, 661 (Fed. Cir. 1985); Nitol v. United States, 7 Cl. Ct. 405, 415 (1985); Prevado Vill. P'ship v. United States, 3 Cl. Ct. 219, 223–24 (1983); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976).

[248] BLUM, *supra* note 82, at 204.

[249] *Id.*

[250] *Id.*

[251] *See infra* Section II.B.3.

[252] *Id.*

[253] *See supra* Section II.B.2.

[254] *See* Yachts Am., Inc. v. United States, 779 F.2d 656, 661 (Fed. Cir. 1985); Nitol v. United States, 7 Cl. Ct. 405, 415 (1985); Prevado Vill. P'ship v. United States, 3 Cl. Ct. 219, 223–24 (1983); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976).

(or to put it in government contract terms, based on the lack of a "clear and unambiguous offer").[255] An example of conflicting representations made by a promisor may be disclaimers for future changes in the law, such as those contained in the MPN.

Specifically, as discussed by Crespi,[256] the language of the MPN likely does not support the existence of an express contract because there is no clear and unambiguous offer to forgive student loans in exchange for people undertaking public service jobs.[257] In fact, the explicit terms demonstrate that Direct Loan borrowers would likely *not* have any express contractual rights protected from being "unilaterally modified or rescinded by statute."[258] The MPN "incorporate[s] by reference later-enacted laws that could retroactively curtail or even eliminate those borrower rights."[259] Specifically, in its Terms and Conditions, the MPN states that "the terms of this Master Promissory Note (MPN) will be interpreted *in accordance with* . . . amendments to the HEA, [Higher Education Act, which authorized the PSLF program] and the regulations in accordance with the effective date of those amendments, and other applicable federal laws and regulations."[260] On page four, the MPN further states that "any amendment to [the HEA] that affects the terms of this MPN will be applied to your loans in accordance with the effective date of the amendment."[261] As such, the language of the MPN makes it clear that no express contract exists regarding the terms of the PSLF program and that any changes to the law will affect the terms of people's existing loans.

It is black letter law that an "offer" is required for a contract to be formed.[262] However, the lack of an express contract here opens the door for plaintiffs to assert the alternative theory of an "implied-in-fact" contract. It is well-established that the

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[255] *See* Wurmfeld Assocs. v. Harlem Interfaith Counseling Servs., Inc., 578 N.Y.S.2d 200, 201 (App. Div. 1992) (finding that state defendants explicitly disclaimed liability from contract); Sanyo Elec., Inc. v. Pinros & Gar Corp., 571 N.Y.S.2d 237, 238 (App. Div. 1991) (holding that promisor's written statements were inconsistent with terms of agreement for alleged oral distributorship); Ski-View, Inc. v. New York, 492 N.Y.S.2d 866, 869–70 (Ct. Cl. 1985) (finding explicit representations of a state defendant to effectively nullify its promise to issue a permit); *see also* Pham, *supra* note 37, at 1278.

[256] Crespi, *Loan Forgiveness*, *supra* note 12, at 655; Crespi, *Will the PSLF Program Ever Forgive?*, *supra* note 12, at 45.

[257] Crespi, *Loan Forgiveness*, *supra* note 12, at 655.

[258] *Id.* at 656.

[259] *Id.* at 655.

[260] *See* U.S. DEP'T OF EDUC., *supra* note 233 (emphasis added); *see also* Crespi, *Loan Forgiveness*, *supra* note 12, at 655 (emphasis added).

[261] Crespi, *Loan Forgiveness*, *supra* note 12, at 655.

[262] *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954).

existence of an express contract precludes the existence of an "implied-in-fact" contract dealing with the same subject.[263] The logical inverse is that, if no express contract is formed, plaintiffs should be free to argue that an "implied-in-fact" contract exists.

The question is whether the plaintiffs can prove that an "implied-in-fact" offer exists despite the disclaimers for future changes in the law contained in the MPN. The MPN's disclaimer language could arguably be interpreted as negating the existence of any implied offer by the federal government to existing Direct Loan borrowers to continue to provide them with the current PSLF program debt forgiveness benefits, if Congress were to repeal the program.

It is worth exploring, however, whether a repeal might nevertheless constitute a breach of an "implied-in-fact" contract if the former President or the Secretary of Education were to have made prior promises that the program will definitively forgive people's loans. Again, such statements are not inconceivable—to say the least—as numerous examples already exist of at least the prior President making definitive statements and speaking in exaggerated or absolute terms.[264] Assuming that such statements regarding the PSLF have been made and that people detrimentally rely upon them (creating an impetus to sue), the statements could arguably constitute relevant evidence at litigation of an implied "offer" by the government under the Tucker Act. Courts do routinely look to the surrounding circumstances and behavior of the parties to determine if an "implied-in-fact" contract exists.[265] Under such circumstances, one might argue that the surrounding circumstances should cover statements made by government officials regarding the PSLF, in an effort to urge judges to look beyond the four corners of the MPN.[266]

The courts would then need to decide whether it is proper to infer a clear and unambiguous offer based off of these officials' statements. One might argue that another way of asking this question is whether a reasonable person can rely on or give decisive weight to such statements. In other words, is it reasonable to rely on definitive statements made by the Chief Executive or other relevant governmental leaders on this issue? Arguably yes. On the other hand, does the disclaimer language in the MPN make it unreasonable to rely on such statements? Again, perhaps yes. The age and sophistication (or lack thereof) of a typical student loan applicant—

[263] Klebe v. United States, 263 U.S. 188, 192 (1923); Algonac Mfg. Co. v. United States, 428 F.2d 1241, 1255 (Ct. Cl. 1970).

[264] *See, e.g.*, Rieder et al., *supra* note 235; Dale, *supra* note 235.

[265] *See, e.g.*, Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); City of El Centro v. United States, 16 Cl. Ct. 500, 505–06 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

[266] Even assuming that this is effective, however, the argument would run headfirst into the requirement of authority to bind the government, as discussed *infra* Section II.B.4.

often a young graduating college student—may also be a relevant factor for a court to consider.[267] Ultimately, however, a court may refuse to conflate the concept of a "clear and unambiguous" offer with "reasonableness."[268]

Many of the same factual issues that pertain whether a clear and unambiguous offer exists, for example, whether any conflicting representations were made, would also arise in the context of agency hiring officials or private student loan servicers touting or exaggerating the benefits of public service loan forgiveness. Another problem with relying on such statements is that it may be very difficult to establish as a matter of law that the agency officials or loan servicers possessed the requisite authority to bind the federal government to promises they made about the PSLF program.[269] The issues of authority are addressed further below.[270]

3. Consideration

In addition to deciding whether a "clear and unambiguous offer" exists, the courts must also ask whether a borrower-plaintiff can establish consideration or whether it cannot do so due to an inability to prove a "bargained-for exchange."[271] One could argue that a "bargained-for exchange" exists here. Recall that to establish a "bargained-for-exchange," a promisee's detriment must have *motivated*, or *induced*, the promisor to make the promise.[272] In this case the promisor is the U.S. federal government. Congress, in enacting the PSLF legislation, clearly *was* motivated by the loan applicants' detriment, that is, their decision to *refrain* from doing something that they have a legal right to do[273]—that is, to refrain from seeking higher-paying jobs in the private sector and instead engage in public service (which is something they are not legally required to do).[274]

Specifically, ED's own preamble to its final rule implementing the PSLF program states that the program "is intended to encourage individuals to enter and

[267] *See, e.g.*, Nabisco, Inc. v. Ellison, No. CIV. A. 94-1722., 1994 WL 622136, at *7 (E.D. Penn., Nov. 8, 1994) (finding no express promise to exist in the promissory estoppel context and relying in part on the presence of plaintiff's "sophistication"). It is also worth mentioning, as a practical matter, that a jury, if empaneled in lieu of a bench trial, may also possibly feel sympathy for a borrower under such circumstances, which could sway a potential verdict.

[268] *Cf.* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–45 (1984) (distinguishing between the questions of whether Congress in a statute has "clear" intent and has "unambiguously" spoken to the precise question at issue versus whether an agency's interpretation of the statute was "reasonable").

[269] *See infra* Section II.B.4.

[270] *Id.*

[271] *See* Barnett & Becker, *supra* note 75, at 443 (describing the requirement of a "bargain").

[272] Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891).

[273] BLUM, *supra* note 82, at 180 (describing the requirements for proving a "detriment").

[274] *Id.*

continue in full-time public service employment,"[275] which would effectively preclude most of them from working in any higher-paying private sector jobs. This evidence of regulatory intent shows that the government, that is, the promisor, was induced to cause the promisees to experience what amounts to a "legal detriment." This supports the argument that a "bargained-for exchange" exists between the government and the borrowers to prove consideration. This argument properly takes into account the "behavior of the parties" and the "surrounding circumstances"[276]—which entails a consideration of the government's behavior and intent. The preamble statement therefore arguably supports a finding of "consideration" to support an "implied-in-fact" contract.

The argument is novel and interesting because it merges the touchstones and tools of contract interpretation[277] with those of statutory interpretation,[278] that is, by merging the analyses of the intent of the parties to a contract with the intent of Congress and the administrative agencies that administer statutes. One possible flaw with this approach is that it overlooks the fact that, as we know, the traditional canon of strict statutory construction dictates that the courts must refrain from looking at congressional purpose or intent when examining whether Congress has unambiguously waived sovereign immunity.[279] Bringing forth evidence of regulatory intent and policy here would conflict with that canon. At the same time, considering such intent is necessary here in order to prove that: (A) the government was induced by the idea of people foregoing higher-paying jobs to instead take public service positions, to (B) show that a "bargained-for exchange" exists—which would (C) help enable the plaintiffs to prove that consideration exists to prove D) that the Tucker Act applies. Ultimately, however, this formulation is consistent with the Supreme Court's movement away from the canon of strict construction of waivers of sovereign immunity. It may therefore be a valid approach to resolve the tension

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[275] *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232, 63,256 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682 & 685).

[276] *See, e.g.*, Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); City of El Centro v. United States, 16 Cl. Ct. 500, 505–06 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982) (taking account the surrounding circumstances for "implied-in-fact" contracts).

[277] *See, e.g.*, Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73, 118–20 (1999) (discussing contract interpretation tools).

[278] *See, e.g.*, ESKRIDGE ET AL., *supra* note 54, at 477–890 (presenting theories and doctrines of statutory interpretation).

[279] Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 137 (1991).

between the principles of sovereign immunity, the objectives of the HEA[280] and PSLF program,[281] and the Tucker Act's "implied-in-fact" contract doctrine.[282]

More pertinently, however, one needs to be careful here about treating the government as an undifferentiated whole. Adopting this consideration argument opens the door for private plaintiffs to be able to cobble together statements from multiple federal officials across different branches of government to prove a breach of a government contract—which would carry very problematic structural implications. It is unclear that any support exists for this approach—nor for the proposition that Congress or agencies can create such a type of "consideration" under federal contract law or the Tucker Act. If such an approach were to be allowed by a court, there would arguably be too many Federal "voices" upon which a private party could rely—undercutting the principles of the Unitary Executive and the separation of power doctrine described above.[283]

Suppose that the courts agree that these problems exist and they therefore decline to consider any evidence of statutory or regulatory intent—and instead hold that the plaintiffs cannot establish a "bargained for exchange" to support consideration. Should such an infirmity, if found, preclude a detrimental reliance claim from constituting an "implied-in-fact" contract? Boyd and Huffman argue "no."[284] They argue that promissory estoppel claims are nevertheless very similar to "implied-in-fact" contracts, and that the Court of Claims should "exercise its jurisdiction to hear claims based on promissory estoppel."[285]

According to Boyd and Huffman, close parallels exist between "implied-in-fact" and promissory estoppel claims.[286] They acknowledge that "implied-in-fact" claims require consideration, which requires a "bargained-for exchange" between the parties (i.e., a quid pro quo) to have occurred.[287] They correctly point out, however, that courts can infer consideration from the surrounding circumstances and behavior of the parties, under the "implied-in-fact" caselaw.[288] This creates analytical flexibility, according to Boyd and Huffman (as it appears from their argument)

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280 20 U.S.C. § 1087e(m).

281 34 C.F.R. § 685.219(a) (2016).

282 *See, e.g.*, Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

283 *See supra* Section I.B.3.

284 Boyd & Huffman, *supra* note 49, at 624–27.

285 *Id.* at 606.

286 *Id.*

287 *Id.* at 624.

288 *Id.*

which opens the door for plaintiffs to argue that the "implied-in-fact" and promissory estoppel doctrines are similar.[289]

Specifically, as the argument goes, a loan applicant undertaking an act or forbearance of behavior—by declining to seek or accept a higher-paying job, that is, acceptance by performance—in exchange for the promise of loan forgiveness—hence the consideration—is materially analogous to a loan applicant taking the exact same action or forbearance *in reliance on* the promise of loan forgiveness.[290] In other words, reliance is materially analogous to consideration here. The facts to be marshaled are exactly the same and the analysis is similar, despite being couched in somewhat different language.[291]

This interesting argument's validity depends in part on whether the courts continue to move away from the traditional canon of strict construction requiring unambiguous waivers of sovereign immunity—although the issue may not be dispositive. Under this canon, a judicial finding of consent to waive sovereign immunity may only exist if a statute creating a right to sue the federal government clearly applies.[292] If the statute leaves any doubt or uncertainty on its applicability, the courts need to refuse to find any consent to waive sovereign immunity.[293] The very need to create analogies between the consideration and promissory estoppel doctrines illustrates that doubt and uncertainty exist about whether the Tucker Act's "implied-in-fact" elements would apply to allegations of detrimental reliance against the federal government. Under the formulation of strict statutory construction, therefore, such doubt would require the courts to restrain themselves and dismiss the allegations. With that said, however, a court may very well continue to fade out and disregard the canon of strict construction and examine the Tucker Act here on its merits. Even if it does so, however, the analogy between promissory estoppel and the "implied-in-fact" doctrine would likely ultimately falter due to the plaintiffs' failure to prove "actual authority," as explained below.

Furthermore, these arguments all address whether consideration can be inferred from the surrounding circumstances and behavior of the federal government *as a whole*, which, as stated above, is a problematic formulation. One might also ask, however, whether consideration could be inferred from the surrounding circum-

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289 *Id.* at 624–27.

290 *Id.* at 624–25.

291 As a practical matter, a loan applicant would be well-served to phrase his or her claim carefully to make it consistent with the requirements of the "implied-in-fact" doctrine.

292 *See* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 137 (1991).

293 *Id.*

stances and behavior (or even written statements) of specific individuals. As discussed above,[294] these individuals may be the President, the Secretary of Education, agency hiring officials or the employees of private student loan servicing companies. Whether consideration exists depends on the nature of any statements made by these individuals, officials or entities, and whether the statements could be interpreted as offering PSLF benefits *in exchange* for meeting the eligibility criteria for the program—that is, a quid pro quo.[295] This would be a fact-specific determination for a court or jury to undertake.

4. *Authority*

Even if a plaintiff can establish consideration when bringing an "implied-in-fact" claim against the federal government, he or she would still need to prove that the relevant governmental official or employee—if even applicable—possesses the requisite actual authority to bind the federal government.[296] This would be where most, if not all, of the claims fail. In most scenarios no such authority would exist, although in certain scenarios the plaintiffs may have a stronger argument while still facing a very uphill battle.

When evaluating whether the federal government should be bound by statements made by its officers or employees, it is important to bear in mind the relevant policy considerations. A primary concern is to avoid stagnation in the law and ensure regulatory flexibility for the government to be able to adapt and change, and to be able to use its expertise to determine its policies and solve problems affecting the nation.[297] To do so, the government (both agencies and Congress) must possess the

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[294] *See supra* Section II.A.

[295] Barnett & Becker, *supra* note 75, at 443.

[296] Many courts have dismissed implied-in-fact cases due to the relevant governmental officials lacking authority. *See, e.g.*, New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989); EWG Assocs., Ltd. v. United States, 231 Ct. Cl. 1028, 1029 (1982); Jascourt v. United States, No. 180-74, 1975 WL 22989 (Ct. Cl. May 30, 1975); Porter v. United States, 496 F.2d 583, 590–91 (Ct. Cl. 1974); Kilmer Vill. Corp. v. United States, 153 F. Supp. 393, 396 (Ct. Cl. 1957); United Food Servs., Inc. v. United States, 19 Cl. Ct. 539, 548–50 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991); Eliel v. United States, 18 Cl. Ct. 461, 466 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); OAO Corp. v. United States, 17 Cl. Ct. 91, 99–100 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); Marks v. United States, 15 Cl. Ct. 609, 613–14 (1988); Pollack v. United States, 15 Cl. Ct. 46, 49 (1988); Miles Farm Supply, Inc. v. United States, 14 Cl. Ct. 753, 756–58 (1988); Truckee-Carson Irrigation Dist. v. United States, 14 Cl. Ct. 361, 370–71, aff'd, 864 F.2d 149 (Fed. Cir. 1988); Pasco Enterprises v. United States, 13 Cl. Ct. 302, 306–08 (1987); De Roo v. United States, 12 Cl. Ct 356, 360–62 (1987); Gratkowski v. United States, 6 Cl. Ct. 458, 461–63 (1984); Pac. Gas & Elec. Co. v. United States, 3 Cl. Ct. 329, 340 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984); Wertz v. United States, 2 Cl. Ct. 45, 52 (1983).

[297] *Cf.* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863–64 (1984) (reasoning that an "agency . . . must [have flexibility to] consider varying interpretations and the wisdom of its policy on a continuing basis").

discretion to make the tough choices on how to benefit the overall general health and welfare of society as a whole.[298] In that light, it is unwise and undemocratic to allow specific individuals to be able to drain the public fisc and effectively prevent the government from adapting its policies, especially when the government at-large has not caused the detrimental reliance to those individuals.[299] Otherwise specific individuals' interests could improperly override the interests of society as a whole.[300] Principles of fiscal law are also relevant here, as they limit the government's ability to commit appropriations in contractual arrangements.[301]

These considerations reflect a commitment to majoritarian principles.[302] It may be fair and necessary from an individual justice standpoint, however, to allow private interests to prevail when a governmental officer acting with authority directly causes detrimental reliance.[303]

At the same time, however, allowing individuals to collect on monetary claims against the government could open Pandora's Box and make it impossible for the government to adapt or change its policies.[304] It would arguably seem unwise and undemocratic to thwart a policy change benefitting the majority of the electorate simply due to the fact that certain people experience disadvantage. The government, that is, both the elected members of Congress and indirectly the heads of agencies, has the policy-making expertise and constitutional mandate to make policy choices deciding which segments of the population should benefit the most under the law—even at times *retroactively*.[305] In doing so, the government is acting in its sovereign

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[298] *Id.*

[299] *See* Kenneth M. Williams, Office of Personnel Management v. Richmond*: Estopping the Government—A Brighter Line?*, 1 WIDENER J. PUB. L. 455, 463–64 (1992); Matthew D. Zinn, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 257 (1998).

[300] Williams, *supra* note 299, at 463–64.

[301] *See generally* JAMES V. SATURNO, CONG. RSCH. SERV., R42098, AUTHORIZATION OF APPROPRIATIONS: PROCEDURAL AND LEGAL ISSUES (2016).

[302] *Cf., e.g.*, Krent, *supra* note 119, at 1530 (discussing the commitment to majoritarian principles in the sovereign immunity context); *see also* Sisk, *supra* note 56, at 442.

[303] *See, e.g.*, Letter from Comptroller General to Anchor Coupling Co., Inc., No. B-151796, 1964 WL 3051 (Apr. 29, 1964) (writing that when express contract is invalid, right to payment in *quantum meruit* stems from principle that it would be unfair and inequitable for government to retain benefits of other party's work); *see also* Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); N.Y. Mail Newspaper Transp. Co. v. United States, 154 F. Supp. 271 (1957).

[304] *Cf.* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863–64 (1984) (articulating the need to allow the government to change its mind on policy matters); *see also* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 532 (2007) (articulating the need for "regulatory flexibility").

[305] The question of whether due process or any other constitutional doctrines limit Congress's authority to *retroactively* curtail people's PSLF benefits is a separate issue that requires further research. *See, e.g.*, Crespi, *Loan Forgiveness*, *supra* note 12, at 664–67 (dealing with the retroactivity issue for PSLF); *see also* JOANNA R. LAMPE, CONG. RSCH. SERV., IF1 1293,

capacity to promote the general welfare—as opposed to acting in its propriety capacity as a market participant.[306] If certain individuals in the former scenario are able to obtain compensation under a claim for economic costs incurred from a retroactive repeal of the PSLF, those costs would merely be re-distributed to the taxpayers at large, in a manner contrary to the policy preferences of Congress—thereby undercutting the principles of our democracy.[307] These principles should be considered when determining when it is fair and appropriate to recognize a claim against the government arising from detrimental reliance. Regardless, however, the individual fairness and justice concerns must also be considered when people rely to their detriment on promises made by the government and experience severe financial or other foreseeable harm.

These principles all come into play when deciding the key legal issue—whether the relevant Federal official at issue (if applicable) possesses actual authority.[308] The courts have taken two different approaches in deciding whether actual authority exists.[309] Specifically, it can be "express" or "implied."[310] Depending on which test is used, different types of evidence may be relevant[311]—although it would make no difference to the outcome in the PSLF context.

For express authority to exist, a warrant is typically required.[312] This is the practice that typically applies in the "procurement" or "acquisition" components of federal government contract law under the CDA. The warrant embodies the con-

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RETROACTIVE LEGISLATION: A PRIMER FOR CONGRESS (Aug. 2019). It is worth noting that many PSLF repeal scenarios may not, in fact, involve *any* actual retroactive deprivation of property interests to trigger due process. This is because many of the borrowers will not yet have satisfied the ten-year requirement of working in "public service" by the time that Congress repeals the program. As such, the borrowers may arguably lack any legitimate claim of entitlement to trigger due process in the first place. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577, 601 (1972) (requiring the existence "legitimate claim of entitlement" to a liberty or property interest being deprived, to trigger due process); Perry v. Sindermann, 408 U.S. 593 (1972) (same).

[306] *See e.g.*, Portmann v. United States, 674 F.2d 1155, 1159–61 (7th Cir. 1982) (discussing the distinction between the "sovereign" (or governmental) and the "proprietary" (or nongovernmental) functions of the federal government in the context of equitable estoppel).

[307] *See, e.g.*, Krent, *supra note* 119, at 1530; Jackson, *supra* note 131, at 521 (discussing democratic principles).

[308] *See* New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989); EWG Assocs., Ltd. v. United States, 231 Ct. Cl. 1028, 1029 (1982); Jascourt v. United States, No. 180-74, 1975 WL 22989 (Ct. Cl. May 30, 1975).

[309] TERRENCE M. O'CONNOR, UNDERSTANDING GOVERNMENT CONTRACT LAW 112 (2d ed. 2018).

[310] *Id.*

[311] *Id.*

[312] *Id.* at 111–12.

tracting official's authority, delegated by statute or regulation, to bind the government by signing contracts.[313] Without a warrant, no express actual authority exists.[314]

This practice reflects a majority trend of judicial decisions. The Supreme Court in *Merrill*[315] held:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his [or her] authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his [or her] authority.[316]

As such, the courts generally require an agent entering into an agreement to be "specifically authorized" by statute or regulation to enter into a contract, for an aggrieved party to be able to receive any damages for a breach of that contract.[317]

"Implied" actual authority, by contrast, does not need to be specifically authorized by law.[318] Rather, [i]mplied authority 'comes with the job'—there's no warrant but the authority is 'an integral' part of [the contracting official's] work."[319] "Contracting authority is integral to a government employee's duties when the government employee could not perform his or her assigned tasks without such authority and the relevant agency regulation does not grant such authority to other agency employees."[320] Put differently, "the test is whether or not contract authority is essential or necessary for the person to do their job." This is based on the nature of "the government employee's duties and the agency's regulations."[321]

If the President or the Secretary of Education were to have made promises causing loan applicants to detrimentally rely on the existence of the PSLF program, the applicants may argue that the President or the Secretary of Education possessed implied actual authority to administer the program. At the same time, however, it may be quite the stretch to argue that having contracting authority under the PSLF is "integral" for the President or the Secretary of Education to do their jobs, given

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313 *Id.*

314 *See id.* at 112.

315 Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

316 *Id.*

317 Saltman, *supra* note 168, at 780–81.

318 O'CONNOR, *supra* note 309, at 112.

319 *Id.*

320 *Id.* (quoting Flexfab, LLC v. United States, 62 Fed. Cl. 139, 148 (2004)).

321 O'CONNOR, *supra* note 309, at 113.

the broad scope of their overall responsibilities and the fact that they could likely sub-delegate such a type of job to a subordinate employee.[322]

Furthermore, such an "implied authority" claim would be weakened to the extent that ED has specifically designated contracting officials to handle direct student loan transactions.[323] The fact that the courts have dismissed "implied-in-fact" claims due to the relevant governmental officer lacking authority suggests that the presence of a contracting officer or some other equivalent official is a necessary prerequisite for a court to find an "implied-in-fact" claim.[324] A plaintiff might argue that the court's willingness to infer a contract based on the "surrounding circumstances" and "conduct of the parties" should enable a judge to look beyond such formalistic requirements of a "contracting officer" and consider more broadly any promises made by the President or Secretary of Education.[325] The courts, however, would likely reject such a holistic, sweeping argument as it would open the door to treating the federal government as an undifferentiated whole—again, a very troubling approach from a separation of powers standpoint. Therefore, the courts would instead likely hold that an examination of the "conduct of the parties" requires a narrow interpretation of the term "party"—which would limit "parties" to the private plaintiff and the "contracting officer" acting on behalf of the agency. As such, any analysis of the "surrounding circumstances" and "conduct of the parties" must necessarily be tied to the conduct of the "contracting officer."[326]

Likewise, it would be difficult if not impossible to persuasively argue that an agency hiring official would ever have the express delegated authority to bind the entire federal government to any promises he or she may make about the PSLF

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[322] For more discussion about the practice of agency heads sub-delegating authority to subordinate employees, see Jennifer Nou, *Subdelegating Powers*, 116 COL. L. REV. 473 (2017).

[323] *But see* 20 U.S.C. § 1087f(b) (allowing for the Secretary of Education to enter into contracts for the origination and servicing of direct student loans, and the data systems that relate to them). *Compare* 20 U.S.C. § 1003(17) (defining "Secretary" as "Secretary of Education" without any reference to "delegates" or "sub-delegates," unlike other statutes), *with* 30 U.S.C. § 802(a) (section of Federal Mine Safety and Health Act, by contrast, defining the "Secretary" as "the Secretary of Labor or his delegate"), and 26 U.S.C. § 7701(a)(11)(B) (Internal Revenue Code's definition section, including similar "delegate" language).

[324] *See, e.g.*, New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989); EWG Assocs., Ltd. v. United States, 231 Ct. Cl. 1028, 1029 (1982); Jascourt v. United States, No. 180-74, 1975 WL 22989 (Ct. Cl. May 30, 1975); Porter v. United States, 496 F.2d 583, 590–91 (Ct. Cl. 1974); Kilmer Vill. Corp. v. United States, 153 F. Supp. 393, 396 (Ct. Cl. 1957).

[325] *See, e.g.*, Chavez v. United States, 18 Cl. Ct. 540, 545 (1989); OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989) (citing Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)); City of El Centro v. United States, 16 Cl. Ct. 500, 505–06 (1989), *rev'd*, 922 F.2d 816 (Fed. Cir. 1990); Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

[326] O'CONNOR, *supra* note 309, at 112 (describing "contracting officer" as a party to a government contract).

program. The authority to administer the PSLF program is delegated solely to ED.[327] This exclusive delegation would be ignored if the courts would allow other agencies—acting through the statements of careless, overly generous or rogue government employees—to make promises effectively binding ED.[328] Such an outcome would, structurally-speaking, be very strange.

Similarly, in terms of *implied* actual authority, plaintiffs may face substantial difficultly proving that such authority exists in the scenarios involving the agency hiring officials. The authority to bind the government at-large to promises about the PSLF program is not generally, if ever, "integral" to or "necessary" for a government hiring official's ability to do his or her job.[329] A hiring official is focused on recruiting and retaining personnel to further the agency's specific mission. Administering and interpreting the PSLF program does not fall within the mission of agency officials other than those at ED.[330]

With everything said, it is worth asking the separate, more intriguing question of whether the plaintiffs may experience some success in proving authority based on ED's use of private loan servicing entities to implement the Federal Direct Loan Program. As stated above,[331] the companies that provide information related to student loans—including the PSLF program eligibility requirements and other income-driven repayment options—often provide false, inconsistent, inaccurate or misleading information to loan applicants.[332] Assuming this misinformation leads to borrowers suffering economic harm, the questions are whether a court may impute the servicers' statements to the federal government under a theory of agency-principal law, and if so, whether a court would find that government authority exists.

The answer to the first question is "possibly" but the answer to the second question is "unlikely." The Third Restatement of Agency[333] defines an "agency" relationship as follows:

> Agency is the fiduciary relationship that arises when one person (a "principal") [such as ED] manifests assent to another person (an "agent") [such as a loan servicer] that the agent [servicer] shall act on the principal's [ED's] behalf *and*

[327] *See* 34 C.F.R. § 685.219 (outlining PSLF program); 34 C.F.R. Subtitle B (entitled "Regulations of the Offices of the Department of Education").

[328] This analysis would not necessarily prevent an aggrieved borrower from bringing a tort claim based on fraud or misrepresentation or a breach of contract claim against the agency hiring official in his or her *personal capacity*, for making such harmfully misleading claims. That right may still exist. It is a separate issue—one worth exploring in future research.

[329] O'CONNOR, *supra* note 309, at 112–13.

[330] *See* 34 C.F.R. § 685.219; 34 C.F.R. Subtitle B.

[331] *See supra* Section II.A.

[332] *See, e.g.*, Stein, *supra* note 240 (detailing complaints about the loan servicers).

[333] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

subject to the principal's control, and the agent [servicer] manifests assent or otherwise consents so to act.[334]

According to the Restatement, "[a]n essential element of agency is the principal's right to control the agent's actions."[335] "Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent [such as a loan servicer,] shall and shall not do, *in specific or general terms*."[336] By contrast, if the agent is not subject to the direction or control of the principal, it is an "independent contractor," acting at its own discretion, and no fiduciary relationship exists.[337]

Here, a fiduciary relationship probably exists because the loan servicers are subject to the direction, oversight and control of ED. This becomes apparent upon analyzing the terms and conditions of the servicing contracts between ED and the servicers.[338] The servicing contracts "govern many details of the servicers' operations, including financial reporting, transaction management, internal controls, accounting, and security."[339] The contracts also "contain several mechanisms that ED may invoke against servicers that violate applicable federal requirements, including (1) ordering the noncompliant servicer 'to return any fees that [it] billed to [ED] from the time of noncompliance' or (2) 'reallocating new loan volume to other servicers or transferring all or part of the noncompliant servicer's current loan volume to another servicer until the noncompliant servicer comes back into compliance.'"[340]

Furthermore, the servicing contracts require the servicers to certify that "there are no relevant facts or circumstances which could give rise to . . . conflict of interest . . . for the organization or any of its staff," and to disclose "all such relevant

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[334] *Id.*

[335] *Id.* at cmt. f(1).

[336] *Id.* (emphasis added).

[337] *Id.* at cmt. c.

[338] *See generally Loan Servicing Contracts*, U.S. DEP'T OF EDUC., https://studentaid.gov/data-center/business-info/contracts/loan-servicing (last visited Mar. 13, 2022) (providing information on loan servicing contracts).

[339] KEVIN M. LEWIS, CONG. RSCH. SERV., R45917, FEDERAL AND STATE REGULATION OF STUDENT LOAN SERVICERS: A LEGAL OVERVIEW, 9 (2019). *See generally, e.g.*, U.S. DEP'T OF EDUC. & GREAT LAKES EDUC. LOAN SERVS., CONTRACT NO. ED-FSA-09-D-0012 (June 17, 2009), https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing; U.S. DEP'T OF EDUC. & NELNET SERVICING, CONTRACT NO. ED-FSA-09-D-0013 (June 17, 2009), https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing; U.S. DEP'T OF EDUC. & PA. HIGHER EDUC. ASSISTANCE AGENCY, CONTRACT NO. ED-FSA-09-D-0014 (June 17, 2009), https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing; U.S. DEP'T OF EDUC. & SLM CORP., CONTRACT NO. ED-FSA-09-D-0015 (June 17, 2009), https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing.

[340] LEWIS, *supra* note 339, at 9–10 (internal citations omitted).

information if such a conflict of interest appears to exist."[341] If a conflict of interest exists, ED reserves the right, among other things, to terminate the contract.[342]

The contracts had also required the servicers to meet specific, prior deadlines: For example, the servicers had been required to meet certain requirements by "August 31, 2009 for servicing federally held debt."[343] If these requirements were met, additional servicing could begin. The servicers were then required to meet additional deadlines by "March 31, 2010 . . . for servicing federally held debt."[344] If a servicer failed to meet these deadlines, ED had the right to "elect to not assign further volume to the contractor" and ED was allowed to "transfer currently held accounts to another servicer."[345]

As another example of ED's oversight and control, the modification contract requires that servicers "provide [ED with] a complete copy of any complaint served on [the servicers] in a lawsuit by an individual" alleging any misconduct by a servicer.[346] Finally, the original contract allows ED to "make changes" regarding the "[d]escription of services to be performed" by the servicer, the [t]ime of performance (i.e., hours of the day, days of the week, etc.), "and the [p]lace of performance of the services."[347]

These contractual terms demonstrate that ED retains the right to exercise direction, oversight and control over the servicers' loan servicing methods, and that the servicers are therefore beholden to ED in many aspects regarding the terms of the loans.[348] As a result, any false statements or misinformed, definitive promises made by a servicer to a loan applicant or borrower could arguably be imputed to the

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[341] GREAT LAKES EDUC. LOAN SERVS., *supra* note 339; NELNET SERVICING, *supra* note 339; PA. HIGHER EDUC. ASSISTANCE AGENCY, *supra* note 339, at 4; SLM CORP., *supra* note 339.

[342] *See* sources cited *supra* note 341.

[343] *See* sources cited *supra* note 341.

[344] *See* sources cited *supra* note 341.

[345] *See* sources cited *supra* note 341.

[346] U.S. DEP'T OF EDUC. & GREAT LAKES EDUC. LOAN SERVS., AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT NO. ED-FSA-09-D-0012, at 5 (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0012_MOD_0080_GreatLakes.pdf; U.S. DEP'T OF EDUC. & NELNET SERVICING, AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT NO. ED-FSA-09-D-0013, at 5 (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0013_MOD_0082_Nelnet.pdf; U.S. DEP'T OF EDUC. & PA. HIGHER EDUC. ASSISTANCE AGENCY, AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT NO. ED-FSA-09-D-0014, at 5 (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0014_MOD_0072_PHEAA.pdf; U.S. DEP'T OF EDUC. & NAVIENT (SALLIE MAE), AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT NO. ED-FSA-09-D-0015, at 5 (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0015_MOD_0085_Navient.pdf.

[347] GREAT LAKES EDUC. LOAN SERVS., *supra* note 339, at 2; NELNET SERVICING, *supra* note 339, at 2; PA. HIGHER EDUC. ASSISTANCE AGENCY, *supra* note 339, at 2; SLM CORP., *supra* note 339, at 2.

[348] *Id.*

federal government as evidence of an implied-in-fact "offer," under agency law "control" principles.

With that said, however, this would at most establish government misinformation, not government authority, which is where the rub is. One could argue that the employees of the private loan servicing companies possess "implied actual authority" to speak on behalf of ED about the PSLF program when implementing the MPNs with borrowers because providing information about the program is "integral" to their jobs.[349] The job of the servicing employees is, in large part, to give helpful information and guidance about the program.[350] Contract authority—which creates accountability and allows for public trust—is essential for the servicers to be able to do their jobs in a legitimate and effective manner. If loan applicants cannot trust the veracity of the statements made by the servicers, they may disregard their advice, elect to forego taking out student loans, or other undesirable societal consequences may occur. As such, policy-wise, allowing ED to evade accountability by hiding behind the veil of the servicers would be very problematic.[351]

The counterargument is that courts should want to prevent rogue or careless private employees who may have their own interests or incentives (profit-based or otherwise) to be able to effectively legislate from behind a customer service phone line by misinterpreting or ignoring an applicable statute, regulation or agency statement or directive.[352] By making definitive promises that ED will forgive people's Direct Loans if the program's requirements are met, the servicer employees are going beyond the language of ED's MPN and undermining Congress's ability to enact future conflicting legislation—a very strange and problematic legal result. If the judiciary validates "such unauthorized" promises, this will also drain the public fisc, impermissibly expand the scope of the PSLF program and "infringe upon Congress's exclusive authority to make law" and appropriate funds.[353]

This argument, however, would still need to account for the fact Congress in the HEA *delegated* to ED the power to transfer some of its authority to private servicers to administer the Direct Loan and PSLF programs. To support this delegation argument, it is helpful to contrast the language in different sections of the HEA, to see that authority arguably exists for the servicers. Specifically, the language of 20 U.S.C. § 1082(a)(1) enables the Secretary of Education ("Secretary") to "prescribe

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349 O'CONNOR, *supra* note 309, at 112.

350 LEWIS, *supra* note 339, at 9.

351 *Cf., e.g.*, Reply Brief for Petitioners at 1, Park Props. Assocs. v. United States, 140 S. Ct. 857 (2020) (No. 19-268) (arguing that the Federal government cannot effectively "insulate itself from liability for breaching a contract [under the Tucker Act] with a private party by including a third-party 'contract administrator' in the agreement").

352 Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

353 Saltman, *supra* note 168, at 781 (presenting these arguments in the context of equitable estoppel).

[Federal Family Education Loan Program or "FFELP"] . . . regulations[, (which are *not relevant here*,)] . . . to *third party servicers*, . . . including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers."[354] Section 1082(l)(1) of the FFELP provisions, in turn, requires the Secretary of Education to promulgate regulations governing various details of managing and coordinating the FFELP servicers.[355] Interestingly enough, however, the provision also explicitly states that "*in no case shall damages be assessed against the United States* for the actions or inactions of such servicers" under the FFELP provisions.[356]

By contrast, the pertinent provision here, 20 U.S.C. § 1087f, contains *no such language* disclaiming government liability or damages for the actions or inactions of the private servicers.[357] Section 1087f directs the Secretary to award contracts to loan servicers under the Direct Loan Program—which, unlike the FFELP provisions, is covered by PSLF and is therefore relevant here.[358] Moreover, rather than disclaiming government liability, Section 1087f merely directs the Secretary of Education to award the contracts to the servicers "to the extent practicable" —which is very distinct from the language of the FFLEP provisions.[359] Clearly Congress knew how to disclaim liability with the FFELP provisions, yet it chose not to do so for Direct Loans. This triggers the textualist canon of statutory construction urging that judges should refrain from reading a statute in a manner that renders any words of the statute superfluous.[360] As such, holding ED accountable for statements made by its servicers does not conflict with Congressional power, but rather reinforces Congress's power to legislate—as the approach is consistent with Congress's explicit statutory delegation to ED to effectively transfer or assign some of its authority to servicers.[361] This outcome is therefore consistent with the delegation requirements of *Merrill*—which, as noted above, holds that actual "authority may be explicitly defined by Congress or be limited by delegated legislation."[362]

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[354] 20 U.S.C. § 1082(a)(1) (emphasis added).

[355] 20 U.S.C. § 1082(l)(1).

[356] 20 U.S.C. § 1082(a)(1) (emphasis added).

[357] *See generally* 20 U.S.C. § 1087f.

[358] *Id.*

[359] 20 U.S.C. § 1087f(a)(1). One might attempt to explain away this difference in language by citing how the HEA does not expressly establish a general private cause of action against the government for mishandled Direct Loans. However, the fact that Congress included the liability disclaimer language in the FFLEP provisions and not in the Direct Loan provisions suggests that they may have been contemplating whether to provide for an *implied* private right of action.

[360] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (applying the *expressio unio* rule against redundancy).

[361] *See* 20 U.S.C. § 1087f.

[362] Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

At the same time, the issue of whether a federal contractor—such as a private servicer for ED—qualifies as an "agent" under state law or Restatement principles for purposes of the Tucker Act is novel. State law principles may not apply to the loan servicers in the same way—or they may not apply at all. In this unique set of circumstances, the courts applying agency law doctrine may be guided by the normative implications of finding a principal-agency relationship.

To that end, it is useful to analogize to other areas of law to consider the propriety of imputing promises made by loan servicers to the federal government under the Tucker Act. To begin, one might look at the exception to the state action doctrine for government involvement under the Constitution.[363] As a general rule, "the state action doctrine holds that a claim based on the Constitution must be dismissed if the alleged injury is a not the result of government wrongdoing."[364] The courts have articulated an exception to this rule, however, upholding a claim when the government is *sufficiently entwined* with the private entity.[365] Under this exception, the courts often examine the relationship between the government and the private entity to determine if the "government is entwined in [the private group's] management or control."[366]

Logic dictates that, under this test, when the government "controls the manner in which work is done, there should be a finding of state action, without requiring a finding of explicit authorization of the disputed act."[367] Mere regulation is "insufficient, but something less than direct coercion should implicate the State."[368]

The relationship between ED and the private servicers would appear to meet these criteria. As shown by the servicing contracts, ED outlines objectives and establishes the acceptable ways for the servicers to achieve them.[369] So it makes sense that ED should bear responsibility for the results of the servicers' actions.

With that said, however, it is still very unclear that loan servicers would qualify as state actors. The modern Court applies the state action doctrine very strin-

[363] *See* Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON CIV. RTS. L. REV. 203, 204 (2001); Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561 (2008).

[364] John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 575 (2005).

[365] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[366] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (quoting Evans v. Newton, 382 U.S. 296, 299 (1965)).

[367] Kennedy, *supra* note 363, at 221.

[368] *Id.*

[369] GREAT LAKES EDUC. LOAN SERVS., *supra* note 339; NELNET SERVICING, *supra* note 339; PA. HIGHER EDUC. ASSISTANCE AGENCY, *supra* note 339; SLM CORP., *supra* note 339.

gently—both in general and as applied to federal (or state) contractors specifically.[370] As such, plaintiffs would face an uphill battle in analogizing to the state action doctrine exception for government involvement to support the propriety of imputing promises made by loan servicers to the federal government to prove authority under the Tucker Act.

It is also important to note that, even at best, the state action doctrine's exception pertaining to government involvement provides for only a limited analogy to support the propriety of holding ED accountable for any misinformation provided by private loan servicers under the Tucker Act. This is because the state action doctrine focuses on overarching constitutional issues and individual rights—which arguably carry greater normative impact than government contractual rights[371]—thereby justifying a more liberal approach to imposing liability against the government through private entities than under the Tucker Act.

One can account for these limitations of the constitutional analogy, by analogizing to *non-constitutional* areas of law—that is, other federal statutes—that provide for some government liability for entwinement with private action. The classic example of this is the National Environmental Policy Act ("NEPA").[372] As a general rule, NEPA only applies to "major federal actions significantly affecting the quality of the human environment," and does not apply to private action.[373] Despite this statutory language, however, the courts have held that in certain instances a state or private action may be "federalized" through some kind of federal "nexus," and that the federal agency involved may therefore be subject to NEPA on the basis of the private action.[374] According to the courts, the amount of federal assistance involved and the extent of federal control are key factors in determining whether a private

[370] *See* David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1142 (2020); *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–70, 1403–06 (2003) (describing how and why federal contractors are generally immunized from constitutional requirements under the state action doctrine); Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1786 (2010) ("Constitutional rules are almost all addressed to the government.").

[371] *See* Michael Joshua Cole, *Avoiding a Hobson's Choice: Why EPA's Tailoring Rule is a Valid Act of Agency Discretion*, 28 J. LAND USE & ENV'T L. 261, 311 n.344 (2013) (arguing that, unlike with issues of administrative law, "it is the role of the judiciary to defend individual rights") (citing Trop v. Dulles, 356 U.S. 86, 103 (1958) (stating that "[t]he Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."); *accord* Brill v. Hedges, 783 F. Supp. 340, 346 (S.D. Ohio 1991) ("[T]he judiciary's role [is to serve] as a protector of individual rights and freedoms.")).

[372] 42 U.S.C. § 4331(a).

[373] 42 U.S.C. § 4332(2)(C).

[374] *See, e.g.*, Monarch Chem. Works, Inc. v. Exon, 452 F. Supp. 493, 501 (D. Neb. 1978), *vacated*, 466 F. Supp 639 (D. Neb. 1979), *aff'd sub nom.* Monarch Chem. Works, Inc. v. Thone, 604 F.2d 1083 (8th Cir. 1979).

entity's action is sufficiently "federalized" to implicate NEPA requirements.[375] As such, some precedent exists in other areas of federal law to hold the government accountable for being sufficiently intertwined with private action. This arguably lends further credibility to the claim that the courts should hold ED accountable for statements made by loan servicers to borrowers, under the Tucker Act, if Congress were to subsequently repeal the PSLF program.[376]

Ultimately, however, as with the consideration arguments, the very need to analogize to other areas of law indicates that the Tucker Act does not clearly apply here. This doubt and uncertainty may constitute a fatal infirmity if the courts apply the rule of strict statutory construction of waivers of sovereign immunity.[377] If it applies, the courts would likely need to restrain themselves and dismiss[378] any cases

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[375] *Id.*

[376] It is highly unlikely, however, that an agency would, or should, be bound by statements made by a purely a bank, law school or other educational or non-profit entity (or the media or internet for that matter). In such cases, no authority or fiduciary relationship exists, and the government should not be bound by any statements made by any of these entities.

[377] Libr. of Cong. v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983); Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Testan, 424 U.S. 392, 399–400 (1976).

[378] If a court relies on the rule of strict construction to dismiss an "implied-in-fact" case, it is unclear whether the court would need to rely on Rule 12(b)(1) versus Rule 12(b)(6) of the Federal Rules of Civil Procedure. This distinction is important because it impacts the outcome of a case. Dismissals under Rule 12(b)(6), for the failure to state a claim upon which relief can be granted, constitute final judgments on the merits triggering *res judicata* and collateral estoppel as opposed to Rule 12(b)(1) dismissals for lack of subject matter jurisdiction, which are arguably divorced from the merits of a case. *See* Holt v. U.S., 46 F.3d 1000, 1003 (10th Cir. 1995) (holding that if resolution of a jurisdictional question is "intertwined with the merits of the case," the court must convert a motion to dismiss for lack of subject matter jurisdiction into a motion to dismiss for failure to state a claim). Unlike a "merits-based" issue, sovereign immunity issues are typically considered issues of subject matter jurisdiction because they deal with the judiciary's structural authority to hear cases while not stepping on the toes of other branches of the government. *See, e.g.*, E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1301–04 (10th Cir. 2001). One could argue, however, that Rule 12(b)(6) is the proper standard of review here because the United States is arguing that no "implied-in-fact" *claim* exists on the merits to grant relief under the Tucker Act. The answer to this question depends in part on whether the courts actually accept the canon of strict construction for waivers of sovereign immunity. Doing so, however, could, among other things, create the unintended consequence of confusion and inconsistency in the law. Specifically, Rule 12(b)(6) determinations typically ask whether a plaintiff can assert a "plausible" claim in the complaint. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). "Plausibility" is a lesser standard, however, than what is required for obtaining a waiver of sovereign immunity, since under the formulation of strict statutory construction, a Federal statute must be found to *clearly apply*. *Shaw*, 478 U.S. at 318; *Ruckelshaus*, 463 U.S. at 685–86. In my view, this incongruency between the two standards reinforces why the Court should continue to move away from applying the strict construction approach. In any event, the Supreme Court has left open the question of which standard applies in sovereign immunity cases. *See* Wis. Dep't of

relying solely on the Tucker Act alleging of detrimental reliance on the existence of the PSLF program, in the event of its repeal.[379] Moreover, even if not, the courts would likely find these claims invalid on their merits, for the reasons stated above.

Furthermore, even if the courts find that the Tucker Act applies here, the need to defer to subsequent acts of Congress would weigh in favor of a narrow interpretation of the Tucker Act. A subsequent statutory PSLF repeal may be found to constitute a Congressional act that amends the Tucker Act. Furthermore, the PSLF repeal would be *specific* in nature—whereas the Tucker Act is *generally-applicable*. When conflicts exist between two statutes, the courts typically give greater weight to statutes that are specific as opposed to general, as well as to statutes that come later-in-time.[380] As such, canons of statutory construction may weigh in favor of a PSLF repeal trumping the Tucker Act on this issue.

C. Any Equitable Estoppel Claims Brought by the Plaintiffs Would Likely Fail

The plaintiffs would also experience a low likelihood of success with regards to equitable estoppel claims. Many courts have dismissed claims of equitable estoppel against the federal government.[381] This is especially true when the government has acted in its governmental—as opposed to its propriety—capacity,

Corr. v. Schacht, 524 U.S. 381 (1998); *see also* Carver v. Nassau Cnty. Interim Fin. Auth., 730 F.3d 150, 156 (2d Cir. 2013) ("[W]hether the claim of sovereign immunity constitutes a true issue of subject matter jurisdiction or is more appropriately viewed as an affirmative defense is an open question in the Supreme Court and the Second Circuit."); Garcia v. Paylock, No. 13-CV-2868 (KAM), 2014 WL 298593, at *2 n.3 (E.D.N.Y. Jan. 28, 2014) ("It is an open question in the Second Circuit whether the claims of sovereign immunity should be viewed as raising a question of subject matter jurisdiction, and thus be evaluated under Rule 12(b)(1), or as an affirmative defense analyzed under Rule 12(b)(6).").

[379] Many plaintiffs would also face a challenge in proving money damages due to not having actually turned down a written offer for a higher-paying position. As stated above, the Tucker Act does not allow for injunctive or equitable-based relief, so specific performance is not an option here, but only damages. *See, e.g.*, Lee v. Thornton, 420 U.S. 139, 140 (1975). As a practical matter, many loan applicants may never apply for higher-paying private sector jobs if they believe that they will get their loans forgiven from working in a "public service" position. In such scenarios, it may be difficult or impossible for a plaintiff to prove damages or to request for a court to calculate them, given the speculative nature of the harm experienced by those plaintiffs.

[380] *See, e.g.*, Nitro-Lift Tech., L.L.C. v. Howard, 568 U.S. 17, 21–22 (2012); *see also* SCALIA & GARNER, *supra* note 54, at 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*)."); ESKRIDGE ET AL., *supra* note 54, at 1199 ("Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue."); *see also* SCALIA & GARNER, *supra* at 54 ("Repeals by implication are disfavored . . . . But a provision that flatly contradicts an earlier-enacted provision repeals it.").

[381] *See, e.g.*, Utah Power & Light Co. v United States, 243 U.S. 389 (1917) (holding that the government was not estopped from insisting upon compliance with rules established for the use of public lands, despite a company's construction of a power plant there at great expense as a

with public interests for the general welfare at stake.[382] Similar to the rationale used to support sovereign immunity, these courts have reasoned that corrupt, "misinformed or [even] overly generous bureaucrat[s] should not be able to give away assets which the government holds for the public good or to rewrite the laws enacted by Congress [that] define for all the scope of particular governmental action."[383]

In the scenario of a repeal of the PSLF program, the government would be acting in its sovereign capacity to reconsider its policies with serious implications for society at large. Strong arguments exist on both sides regarding whether a PSLF repeal makes wise policy.[384] On the one hand, as stated above, fairness and justice concerns exist for many individual loan applicants and borrowers understandably feeling like they have detrimentally relied on assurances of receiving loan forgiveness under the program, so it would feel extremely frustrating, unfair and unjust to have those benefits taken away.[385] On the other hand, as described above, serious cost and distributional concerns arguably exist with the PSLF program in its current form—that is, the public and tax-payers at large are footing the bill for major amounts of money being forgiven to certain segments of the population at the expense of others.[386] In addressing this problem, Congress would be acting in its sovereign capacity to make a decision impacting the general welfare of the public. Although private fairness interests are certainly implicated with a PSLF repeal, the government in such a scenario is weighing these interests on behalf of society at-

result of its reliance on alleged assurances of non-enforcement by government officers and agents); *In re* LaVoie, 349 F. Supp. 68 (D.V.I. 1972) (observing that estoppel is invoked against the government only with great reluctance, the reasons reflecting a concern for preserving the government's continued power to take general action in the public welfare).

382 *Id.*

383 Rydstrom, *supra* note 60, § 2[a] (internal citations omitted); *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); *see, e.g.*, Flamm v. Ribicoff, 203 F. Supp. 507 (S.D.N.Y. 1961) (holding that widow was properly denied certain social security benefits and could not rely on estoppel against the government, even if "misinformation" was communicated from an employee of local social security office causing her delay and to untimely file her claim).

384 This Article takes no position on which side of the policy debate is better—but rather focuses solely on the relevant legal issues.

385 As stated *supra*, "the National Legal Aid and Defender Association (NLADA) surveyed 2,000 civil legal aid lawyers and public defenders to understand the potential impact of the proposed changes to the PSLF program. Some respondents indicated that they would not have entered into their respective careers without the assurance of loan forgiveness, and others indicated they would likely leave for a higher paying job if the program were to be eliminated." Messer, *supra* note 9, at 235.

386 As stated *supra*, Crespi estimates the costs of the PSLF program "will eventually rise to $12 billion/year or more as an estimated 200,000 people/year or more will eventually seek debt forgiveness," and the benefits will be skewed "in favor of mid-career doctors and lawyers." Crespi, *Will the PSLF Program Ever Forgive?*, *supra* note 12, at 2.

large—as opposed to acting in its purely self-interested propriety capacity as a market participant. This reality would most likely weigh heavily against the propriety of a court allowing a plaintiff to bring an equitable estoppel claim against the federal government under these circumstances.

A decision from the U.S. Court of Appeals for the Fifth Circuit, *Hicks v. Harris*,[387] is also instructive here. The court in *Hicks* held that "[e]stoppel cannot be asserted against the United States in actions arising out of the exercise of its sovereign powers in encouraging lenders to make student loans," based on the representations of subordinate ED employees.[388] In that case, a private lender had sued ED under the HEA in attempt to obtain reimbursement for student loans on which individual borrowers had defaulted.[389] ED had refused to reimburse the lender by using a loophole under the law—that is, by claiming that the lender had disbursed the loan funds *before* receiving an official "certificate of insurance" from the Commissioner of Education, thus technically failing to conform to the statute and regulations.[390] The lender raised an estoppel argument, claiming that ED had waived this requirement of prior receipt of a certificate—on the basis that subordinate employees at the agency had stamped the loan applications for approval after the beginning of the school term for which the funds were to be provided and allegedly had made statements approving the lender's practice of disbursing loan money prior to the stamping of the loans.[391] Essentially, the lender claimed that it had detrimentally relied on the ED employees' assurances and conduct.[392]

The Fifth Circuit rejected the lender's argument.[393] It held that no actual authority had been delegated to the subordinate employees to waive or make an express exception to the student loan program's regulatory provisions.[394] According to the court, "even if government employees purported to waive the requirements for obtaining federal student loan insurance, either by express statements or by stamping the loans 'approved,' they were acting outside bounds of their authority and could not bind the government to repay the defaulted loans."[395] As such, the government was not bound to repay them.

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387 606 F.2d 65 (5th Cir. 1979).

388 *Id.* at 68.

389 *Id.* at 66.

390 *Id.*

391 *Id.*

392 *Id.* at 67.

393 *Id.* at 70.

394 *Id.*

395 *Id.* at 68.

Importantly here, the court pointed out how ED's own rules prohibit any official, agent or employee of ED from waiving or altering any provision of ED's regulations or of any relevant statute except through amendment by publication in the Federal Register, and that the rules specify that "no action or failure to act on the part of such official, agent, or employee shall operate in derogation of the Commissioner's right to enforcement of said provisions in accordance with their terms."[396] As such, the court held that the subordinate employees lacked "actual authority" to change the applicable laws under *Merrill*, and so it rejected the lender's claim of estoppel.[397]

ED's rules and the legal principles of *Hicks* apply here to any equitable estoppel argument brought against ED for a PSLF repeal. They also apply equally to the arguments made above for authority under the Tucker Act.[398] As argued above in the context of the Tucker Act and the four likely factual scenarios of misinformation,[399] the plaintiffs would likely not be able to argue that actual authority exists to bind the government here. Any statements of misinformation made by a specific agency's hiring officials or by private loan servicer employees would not be viewed as binding on the federal government at-large. As stated above, ED employees are prohibited from altering the laws or regulations applicable to student loans "except through amendment by publication in the Federal Register."[400] Allowing anything otherwise would allow corrupt or "overly generous bureaucrats" or private employees with inappropriate incentives to effectively legislate from a customer service phone line and modify the law unilaterally.[401] This would lead to absurd, inconsistent and unfair decisions being made—and it would intrude on Congress's own power to make the law and the agency's own authority to implement it. Also, for the reasons stated above,[402] it would constitute an uphill battle for plaintiffs to argue that the President or the Secretary of Education have actual authority to make promises under the PSLF program, in a manner contrary to a subsequently enacted Act of Congress, that is, a PSLF repeal.

For these reasons, any equitable estoppel claims brought by the plaintiffs challenging a retroactive repeal of the PSLF program would almost certainly fail in court.

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396 *Id.* at 67 (quoting 45 C.F.R. § 100a.483 (1978)).

397 *Hicks*, 606 F.2d at 68 n.4.

398 *See supra* Section II.B.4.

399 *See supra* Section II.B.

400 *Hicks*, 606 F.2d at 67.

401 Rydstrom, *supra* note 60, § 2[a]; *see* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Flamm v. Ribicoff, 203 F. Supp. 507 (S.D.N.Y. 1961).

402 *See supra* Section II.B.4.

D. The "Sovereign Acts Doctrine" Defense Would Likely Not Apply Here

In the unlikely event that a plaintiff does somehow successfully challenge a PSLF repeal, it would likely overcome any defense asserted under the Sovereign Acts Doctrine.

The Sovereign Act defense dictates that the United States is not contractually liable for its "public and general acts as sovereign."[403] Robert Meltz explained:

> Stated the Supreme Court in its seminal decision on the defense: "Whatever acts the government may do . . . so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons . . . ." The doctrine "thus balances the Government's need for freedom to legislate with its obligation to honor its contracts." Otherwise put, the doctrine levels the contractual playing field by ensuring that government contractors and private contractors are affected the same way when the government, acting in its sovereign capacity through a "public and general" enactment, affects existing contract rights.[404]

Meltz proceeds, discussing *Yankee Atomic Electric Co. v United States*[405] as follows:

> [A] nuclear utility claimed that congressional legislation requiring it to pay money into a fund created to clean up contaminated uranium enrichment facilities violated the government's pre-existing contractual agreement to supply enriched uranium to the utility at a specified price. The court rejected the breach claim, reasoning that the legislation was not enacted to retroactively increase the earlier contract price—that is, was not enacted for the benefit of the government as contractor. Rather, [the legislation] was enacted to address contamination at enrichment facilities, and the need to decommission them—that is, for the benefit of the public. Hence, the government could assert a sovereign act defense.[406]

Under the "public and general" requirement, "federal legislation found to specifically target existing contracts does not qualify for the sovereign acts defense."[407] An example of this is illustrated in the *Winstar* case.[408] Meltz explains that, in that case, "an accounting device placed in federal contracts to encourage thrift institutions to acquire failing thrifts was, after such acquisitions, specifically withdrawn by

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403 Horowitz v. United States, 267 U.S. 458, 461 (1925).

404 MELTZ, *supra* note 229, at 7 (first quoting *Horowitz*, 267 U.S. at 461; then quoting United States v. Winstar Corp., 518 U.S. 839, 896 (1996)) (omissions in original) (footnotes omitted).

405 112 F.3d 1569 (Fed. Cir. 1997).

406 MELTZ, *supra* note 229, at 8 (discussing *Yankee Atomic*, 112 F.3d at 1569) (footnotes omitted).

407 MELTZ, *supra* note 229, at 8.

408 *Winstar*, 518 U.S. 839.

Congress."[409] According to the Court, the federal government could thus not rely the sovereign act doctrine defense.[410] Since a "substantial part of the impact of Congress's action fell on the government's own contractual obligations, not to mention the government's financial self-interest in the legislation," this rendered the defense "inappropriate."[411]

The cases and their principles directly apply here. If a plaintiff were to be successful in his or her contractual claim under the Tucker Act, the government would likely not be able to simply escape its PSLF obligations under the Sovereign Acts doctrine merely on the basis that it has enacted subsequent legislation. Rather, the legislation would likely be found to place the majority, if not all, of the impact of the law on current borrowers under contract with the federal government. It would also have the "substantial effect of releasing the Government from its contractual obligations," which, as the Supreme Court found, renders the defense inappropriate to apply.[412] As such, any new law affecting repayment provisions on existing loan contracts would likely not be found to constitute a "sovereign act."[413] Thus, in the unlikely event that a borrower-plaintiff successfully challenges a PSLF repeal, it would likely overcome any defense asserted under the Sovereign Acts Doctrine.

E. A Proposed Alternative Remedy Exists

Despite the Sovereign Acts doctrine's inapplicability, overall a plaintiff would nevertheless face a very difficult, if not impossible, doctrinal path at litigation under the Tucker Act and equitable estoppel doctrine, if Congress were to retroactively repeal the PSLF program.[414] Given these barriers, questions exist as to whether the courts are the proper forum to entertain challenges to a repeal of the PSLF program, and whether the existing doctrinal norms and structures are sufficient to protect borrowers in such a scenario.

This reality illustrates something fundamentally inequitable and unfair with these norms, given that Congress likely could repeal the program without any recourse for borrowers apart from whatever the political process might afford. This underscores the need for Congress to get it right on the front end, to avoid all these

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409 MELTZ, *supra* note 229, at 8 (discussing *Winstar,* 518 U.S. at 899).

410 *Id.* (discussing *Winstar,* 518 U.S. at 899).

411 MELTZ, *supra* note 229, at 8; *Winstar,* 518 U.S. at 899 (holding that "a governmental act will not be public and general it has the substantial effect of releasing the Government from its contractual obligations"); *see also* Stockton East Water Dist. v. United States, 583 F.3d 1344, 1367 (Fed. Cir. 2009) (holding that the sovereign acts defense is invalid when "the governmental action is specifically directed at nullifying contract rights").

412 *Winstar*, 518 U.S. at 899.

413 *See* Strickland, *supra* note 27.

414 *See supra* Sections II.A–C.

issues, by accounting explicitly for hardship and reliance in any subsequent legislation it enacts to impact the PSLF program.[415]

Furthermore, the doctrinal controversies described in this Article are way more likely to occur if Republicans retake a majority in the Congress. The analysis in the Article also begs the question of *why* such a Congress, from its own perspective, would want to go through the trouble of repealing the PSLF program, if it ends up facing the consequences of such intense litigation risks, costs, and headaches—in addition to the inevitable political fallout. Based on these considerations, it instead seems more hopeful that Congress may (at least ideally) not view its choice as a black and white decision to repeal or not repeal, but rather as a choice of what to do with those who have relied on existence of the PSLF program.

This all underscores the fact that the loan applicants and borrowers would have an opportunity in the form of a political check to protect themselves. Lobbying efforts before Congress may prove useful and effective, should Congress desire to repeal or amend the PSLF program. In such a scenario, consumer advocates can urge Congress to create an exemption for individuals who: (1) have "relied substantially on the PSLF program" and (2) would suffer extreme financial harm from losing their loan forgiveness benefits.[416]

In particular, consumer advocates could urge Congress to craft a "debt-to-income" ratio test[417]—as consistent with generally accepted finance and accounting principles ("GAAP")[418]—in determining when people should still receive (at least some) loan forgiveness benefits. Under this test, Congress may want to consider creating a legal standard that takes into account both the dollar amount of the student loan debt owed by the borrower (including both principal and interest) minus any income (perhaps including any inheritance-based income) owned by the borrower.

Furthermore, each loan applicant should have an opportunity to make a showing of substantial reliance on the PSLF program to qualify for this exemption.[419] "Each determination should be individualized to account for the applicants' factual circumstances."[420] For example, if an applicant is enrolled in law school and has engaged in legal internships or clerkships at one or more federal agencies, this could be considered as evidence of commitment to public service—

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[415] *Cf.* Messer, *supra* note 9, at 258–60 (arguing that the ED should "grant certain hardship exceptions for persons who have relied substantially on the PSLF program").

[416] *Id.*

[417] *What Is a Debt-to-Income Ratio?*, *supra* note 67.

[418] *See generally* Hayes, *supra* note 68.

[419] *Cf.* Messer, *supra* note 9, at 258–60 (proposing a similar approach in the hypothetical scenario of a regulatory, as opposed to a statutory, repeal).

[420] *Id.* at 260.

especially if it is motivated by "substantial reliance" on the existence of the PSLF program.

Determinations of reliance and hardship should be made by ED through authority delegated to the agency by Congress, as opposed to being made by a court. This would be necessary to afford Congress the ability to allocate sufficient funding and maintain necessary oversight over the process to ensure that fair, efficient and expeditious decision-making occurs.

Hardship exemptions would therefore allow Congress—if it were to insist on addressing or changing the PSLF program—to balance out the goals of saving taxpayer dollars and addressing many of the program's distributional concerns with the need to protect the most vulnerable members in our communities, which is even more morally imperative than ever, given the devastating health and economic impacts of the COVID-19 global pandemic and the virus's many variants.

It is also worth considering the important (and intriguing) question of whether such a legislative approach could have relevance beyond the PSLF program. As stated above, Congress in the long-term could repeal other laws and beneficiary structures that large segments of the public have relied upon, such as the ACA, which would have very devastating impacts. If this occurs, it is worth exploring in future research whether the same flaws in our existing judicial norms and doctrines described in this Article would apply upon any legal challenges to the repeal of these other laws. If so, fewer protections would exist. As such, Congress should strongly consider crafting similar exemptions for hardship and reliance in the event that it desires to modify any other existing similar laws.

CONCLUSION

In the event of a congressional repeal of the PSLF program, many of the plaintiff-borrowers' Tucker Act claims would be unlikely to survive as a basis to collect money damages. Any equitable estoppel claims would also likely fail. The borrowers, however, would have an alternative, political recourse. With the help of consumer advocacy groups,[421] they should be able to lobby before Congress and the President to try and ensure that if an amendment or repeal does occur, it is done so in a way that—at the very least—protects the most vulnerable and at-risk members in various communities. Such an approach may have broader implications beyond PSLF.

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[421] *See, e.g.*, *Fighting to End the Student Debt Crisis*, STUDENT DEBT CRISIS CTR., https://www.studentdebtcrisis.org/ (last visited Mar. 13, 2022) (student loan advocacy group involved in PSLF litigation on behalf of borrowers); *see also ABA Settles PSLF Lawsuit,* AM. BAR ASSOC. (Feb. 27, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/aba-settles-pslf-suit/ (describing lawsuit by American Bar Association against ED, advocating for student borrowers under the PSLF program).