The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families

Phyllis C. Smith

Follow this and additional works at: http://scholarship.law.berkeley.edu/bjalp

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/bjalp/vol10/iss2/5

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38WK7B

This Article is brought to you for free and open access by the Berkeley Journal of African-American Law & Policy at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of African-American Law & Policy by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Elusive Cap And Gown:
The Impact Of Tax Policy on Access to Higher Education for Low-Income Individuals And Families

Phyllis C. Smith∗

It is with great pleasure that I have signed into law today H.R. 2015, the Balanced Budget Act of 1997. This Act, together with tax cut legislation that I have also signed today, implements an historic agreement that will benefit generations of Americans. They are a victory for all parents who want a good education for their children and for all families working to build a secure future.2

- President William Jefferson Clinton

INTRODUCTION

The education incentive provisions in the Taxpayer Relief Act of 1997 were drafted to facilitate access to higher education for low and middle income individuals and families.3 This was an admirable goal given that low-income families need higher education to emerge from poverty. While obtaining higher education may not be the answer to all problems of those living in poverty, it is an essential step. Without the availability or access to postsecondary education, those in poverty have little or no hope of ever gaining enough ground to move out of poverty and into middle and high-income class levels of society. To be more specific, higher education is fundamental towards obtaining higher paying jobs.4

∗Phyllis C. Smith, Assistant Professor, Florida Agricultural and Mechanical (A&M) University, College of Law. The author is indebted to members of the faculty in the Graduate Tax Program at the University of Florida, Levin College of Law for assistance and guidance in writing. For vital comments on earlier drafts I thank my colleagues, Professors Robert Abrams and Omar Saleem. I also thank James Smith for research assistance and editorial advice. I also thank my former research assistants Derrien Bonney and Melissa Ford. I am grateful to the Berkeley Journal of African American Law and Policy for the opportunity to present these ideas at the Boalt Hall School of Law, University of California, Berkeley.

4. JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, THE BIG PAYOFF: EDUCATIONAL
obtaining higher paying jobs.⁴

While the population in the United States is becoming more educated, there are significant differences between those who can and cannot attain higher education.⁵ The contemporary emphasis on building a knowledge-based economy that makes the United States preeminent in the world, redoubles the importance of a college education.⁶ Nearly 60% of jobs today require some college education.⁷ Access to higher education becomes more important as time passes because in the future, there will likely be an increase in both the percentage and the level of education required to obtain meaningful employment.⁸

Despite President Clinton's expressed belief that the education incentive provisions of the Taxpayer Relief Act of 1997 would benefit all families, this Article will demonstrate that this law, as well as other contemporaneous legislation operating in concert with it, actually inhibits access to postsecondary education for low-income individuals. Even more pointedly, the Taxpayer Relief Act of 1997 had unintended adverse consequences that have disproportionately disadvantaged African Americans, who, as a group, have attained lower levels of past academic achievement as compared to other ethnic groups.⁹ In addition, African Americans have historically been overrepresented among low-income families and are currently overrepresented among low-income families.¹⁰ This disparity in income levels warrants a detailed

---

4. JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS, 23 (July 2002), available at http://www.census.gov/prod/2002pubs/p23-210.pdf. (Between 1997-1999 adults who worked earned an average salary of $34,700 per year. During the period of time covered in this study, high school drop outs earned $18,900 compared to $25,900 for high school graduates. College graduates earned $45,400 compared to $99,300 for workers with professional degrees. By 1999, full-time year-round workers with a bachelor's degree earned 1.8 times the annual earnings of workers with only a high school degree. During the same period, the relative earnings of the least educated workers fell).

5. Id. at 6. (Educational attainment differs significantly by race and Hispanic origin. Among adults twenty five year of age and older in the year 2000, 28% of non-Hispanic Whites had received a degree compared to 15% of Blacks had receive a bachelor's degree).


7. Id. at 2.

8. Id.

9. THE BLACK POPULATION IN THE UNITED STATES, U.S. CENSUS BUREAU, 20 (1999). (The report shows that 15% of Blacks had earned a bachelor's degree or higher, while 28% of non-Hispanic whites had achieved a bachelor's degree or higher). See also Susan Dynarski, Focus Incentives on the Students Who Need Them, THE CHRONICLE OF HIGHER EDUCATION B20, (2007), (Estimated 13% of Blacks earned a bachelor's degree or higher, while 30% of non-Hispanic whites earned a bachelor's degree).

10. Id. at 9. (An estimated 34.5 million people were in poverty in 1998, including 9.1 million Blacks and 15.8 million non-Hispanic whites. The poverty rate for the entire population was 13% while the poverty rate was 26% for the Black population and 8% for the non-Hispanic white population). See NATIONAL URBAN LEAGUE POLICY INSTITUTE, 2006 CENSUS, POVERTY
discussion of the impact that a lack of education has had on the African-American population.\textsuperscript{11}

Higher education has been elusive for people of African descent throughout the greater part of United States history. Indeed, when the original African slaves were involuntarily transported to America where the language and culture were both foreign, the mass of the slaves could have no education.\textsuperscript{12} At that time, laws prohibited African slaves from learning the reading and writing skills that constituted basic education.\textsuperscript{13} There were two primary obstacles to a free public school system: the property owners did not want to pay taxes to provide it, and the poor white laborers did not demand it.\textsuperscript{14} As a result, general public education did not materialize at this time.

Public education became available to all children of free men in the United States during the nineteenth century.\textsuperscript{15} For children of slaves, however, public education was not available until after President Lincoln issued the Emancipation Proclamation.\textsuperscript{16} While public education was theoretically available to the children of former slaves, it was only available in segregated schools. Despite the Emancipation Proclamation, as late as the 1950s, segregated schools were common in the public education system in the United States.\textsuperscript{17} The premise of "separate but equal" was the justification for segregated school systems.\textsuperscript{18}

The education was indeed separate, but it certainly was not equal. The

\begin{tabular}{ll}
\end{tabular}

(In 2006, the U.S. Census Bureau reports an estimated 12.3\% of the entire population were living below poverty level. Blacks continue to have the highest poverty rate at 24.3\%. Blacks also have the highest rate of people living in severe poverty (less than half of the poverty threshold) at 10.9\% and non-Hispanic whites at 3.9\%. The educational attainment of those living at or below poverty during this time period is as follows: 7.8\% have some college education while only 3.7\% actually obtain a bachelor's degree or higher).

\textsuperscript{11} For the purpose of this Article the term "low-income individual" means an individual whose family's taxable income for the preceding year did not exceed 150 percent of the poverty level amount. Under the current standards a family of four would qualify as low-income with an annual income of $30,975 and a single person would qualify with an annual income of $15,315. These terms and definitions are available at \texttt{www.ed.gov/about/offices/list/ope/trio/incomelevels.html.}

\textsuperscript{12} W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, 638 (1992).

\textsuperscript{13} Id at 638. (The laws on this point were explicit and severe and all slave states had such laws).

\textsuperscript{14} Id. at 641. (The property owners believed laborer did not need education and if education were provided they would be more likely to escape their conditions. The white laborers did not see a need to become educated as they perceived education as a luxury for the wealthy. Most white southerners believed that Negroes could not and would not learn, thus their education involved an unjustifiable waste of private property for public disaster).

\textsuperscript{15} Deepta Thattai, \textit{A History of Public Education in the United States}, \texttt{http://www.servinfree.net.}

\textsuperscript{16} See id.

\textsuperscript{17} See id.

\textsuperscript{18} Plessy v. Ferguson, 163 U.S. 537 (1896).
African-American students attended schools with poorly trained teachers, the schools' physical facilities tended to be substandard, and books were scarce and when available they were used and worn. In addition to the aforementioned obstacles, African-American students often had to travel great distances to attend school and suffered from poor nutrition because they lived in poverty.

In a progressive nation, like the United States, one would expect that the education system would have made massive reforms to remedy these past injustices. Unfortunately, similar to African Americans of earlier eras, low-income individuals and families, particularly African Americans, still face many access to higher education obstacles. It is logical and unquestionable that to generate more income for the family, low-income individuals need to obtain higher education, yet historically they have been unable to attain that necessary education at the same levels as middle and high-income individuals. When considering why so few African-American students pursue higher education, history is only one of many obstacles.

While it is important to note that in the typical low-income family there are usually no college graduates serving as role models, the primary obstacle is lack of money. Most low-income families do not have the financial ability to

19. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (citing Briggs v. Elliot, 98 F.Supp. 529 (1951). The plaintiffs were Negro children of both elementary and high school age residing in Clarendon County. They brought action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities; but the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program.

20. Roberts v. City of Boston, 59 Mass. 198 (Mass. 1849). This case represented the first significant challenge to racial segregation in education which took place in 1849, where the plaintiff, Benjamin Roberts, as the father of Sarah Roberts, a five year old "colored" girl, was forced to walk his daughter past the nearest public schools in order to attend a "colored" school located an additional fifth of a mile or seventy rods away from his home. Plaintiff argued the exclusion of colored children from the public schools, which are open to white children, is a source of practical inconvenience to them and their parents, to which white persons are not exposed, and is, therefore, a violation of equality. The separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality. The court found the plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools; the objection is, that the schools thus open to the plaintiff are exclusively appropriated to colored children, and are at a greater distance from her home. The court specifically found that under the circumstances presented in the case, the plaintiff had not been unlawfully excluded from public school instruction.

21. Family Income and Higher Education Opportunity 1970-2003, POSTSECONDARY EDUC. OPPORTUNITY, 1 (2005). (While 75% of students from affluent families have graduated college by the age of 24; only 9% of students from a low-income families, by the age of 24, have graduated college).
pay outright or save money in advance to send a child to college, so these families, particularly the student pursuing higher education, must depend on other sources of funding. The primary sources which historically have been available to provide funding for low-income individuals going to college were grants, scholarships, and other sources of state and/or federal financial aid. By 1981, student loans became the primary source of financial aid for students across the income spectrum. As will be discussed in greater detail, the introduction of student loans into the financial aid system has substantially changed higher education opportunities for low-income individuals.

Affordability is a critical component for accessing higher education because, regardless of academic achievement, if there is no way to pay for tuition and necessary expenses, the student will lack the opportunity to attend college. With the uneven distribution of wealth in America, a majority of American families cannot afford to pay for college expenses without some form of assistance. Without access to higher education, it is unlikely that low-income individuals will ever be liberated from poverty.

The Taxpayer Relief Act of 1997 was established to help widen the availability of higher education to persons from low-income families. The specific purpose stated in the Joint Committee’s Report was:

To assist low and middle-income families and students in paying for the costs of post-secondary education, the Congress believed that taxpayers should be allowed to claim a credit against Federal income taxes for certain tuition and related expenses incurred when a student attends a college or university (or certain vocational schools).

This Article examines whether the education incentive provisions of the Taxpayer Relief Act of 1997 achieved its intended goal by analyzing educational policies that have historically operated as barriers to the pursuit of postsecondary education for low-income individuals and families, evaluating federally subsidized programs available to assist with expenses for postsecondary education, how the new education incentives interrelate with the federally subsidized programs, and analyzing the actual impact Taxpayer Relief Act of 1997 had on low-income individuals and families.

The education incentive provisions of the Taxpayer Relief Act of 1997 (as amended by the Economic Growth and Reconciliation Act of 2001) fail to

---

23. Id.
24. See supra note 3.
26. Id.
27. Economic Growth and Tax Relief Reconciliation Act, 26 U.S.C.A. § 401 (2001) amended § 530(b)(1)(A)(iii) by striking “$500” and inserting “$2,000.” (Once the limit was
achieve the goal of making higher education more accessible for low-income taxpayers. Ironically, or perhaps deliberately, the application of the education incentive provisions of the Act operate to make access to higher education more elusive rather than more accessible to low-income individuals.

Explanation for the failure of the Act may be found in the design and the lack of coordination with other federal subsidies already available when the education incentive provisions of the Act were implemented. Specifically, the provisions of the Taxpayer Relief Act contain an inherent design flaw being that benefits are primarily in the form of tax credits. These tax credits are ultimately meaningless for the majority of low-income individuals and families who tend to lack enough taxable income to benefit from the credit.

In addition, Congress shifted federal resources from aid-based programs to self-help programs; student loans replaced grants. With the reduction in grant awards, Congress diverted a dedicated asset for low-income students away from low-income students and replaced them with federally subsidized student loans. By changing the financial aid award in this manner, where need-based aid was replaced by self-help aid, access to higher education became more difficult for low-income students because the student loan funds were not prioritized on a need-based system so less money was available to the low-income students. With the added education incentive provisions provided in the form of tax credits; Congress unbalanced the scales because these programs favor middle and high-income class families at the expense of low-income individuals and families.

Part I of this Article provides the historical barriers on access to postsecondary education for African Americans. Part II discusses and analyzes the federally subsidized programs specifically established to increase higher education. Part III discusses and analyzes the education incentive provisions of the Taxpayer Relief Act of 1997. Part IV discusses and analyzes how the education incentive provisions interrelate with each other and other higher education federal subsidies. Part V provides an analysis of welfare reform, how it affects access to education, and provides policy recommendations.

I. HISTORICAL BARRIERS ON ACCESS TO EDUCATION FOR AFRICAN AMERICANS

A. General Considerations

Ethnic inequality, though it remains a constant problem, is no longer at the forefront of societal concerns. Nevertheless, the ethnic and social inequalities that exist today impact society in ways that are not intuitively obvious. For
instance, a primary predictor of whether a person will escape poverty is the person’s career choice. The available career an individual is able to obtain is largely dictated by an individual’s educational level. The level of education an individual is able to achieve will be determined by access to that education as the individual advances from secondary to postsecondary educational institutions. Without at least a bachelor’s degree, individuals living at or below the poverty level are essentially denied access to the types of careers that will facilitate their ability to bridge the financial gap between poverty and middle income for themselves and their family members.

Americans must recognize the real obstacles that exist regarding access to education in order to find feasible solutions to the systemic problems creating a lack of access to higher education for certain individuals; lack of access does not exist in a vacuum. In order to objectively scrutinize the solutions and discern the real obstacles, a brief overview of the historical barriers to postsecondary education is in order.

B. Impact of Segregated Schools on Access to Education for African Americans

Lack of access to any education can be traced back to the years of slavery. For the purposes of this Article it will suffice to begin at a point in history when it was normal to have segregated schools in the American public education system. When free public education became available to everyone, white families did not wish to send their children to school with African-American children.

The premise of the segregated schools initiated in primary and secondary education and then infiltrated into postsecondary education. When challenges to segregation were initiated, these challenges started outside the educational arena. For instance, one of the most renowned challenges occurred when Homer Plessy, a thirty-year-old shoemaker from Louisiana purchased a ticket on a Louisiana Railway train and sat in the “white only” car section. Plessy

28. See supra note 4.
29. See supra note 6. (Indicating nearly 60% of jobs today require some college education).
30. See id. (Stating the participation of low-income youth in postsecondary education continues to lag far behind that of their middle and high income peers. The college entry rates among low-income families and high-income families are as wide as they were three decades ago).
31. Supra note 12, at 662. (During and after Reconstruction, in nearly every state, the question of mixed race schools and separate schools were a matter of much debate and strong feeling. The black children wanted the mixed schools and some white Northern leaders wanted mixed schools. Nevertheless, most states established segregated schools and with propaganda of race hatred, it became nearly impossible to desegregate the schools.
32. Supra note 18. In this case the Supreme Court affirmed the decision in the lower court, which held, in general, an act requiring white and colored persons to be furnished with separate accommodations on railway trains was not a constitutional violation. Although Plessy was only one-eighth black, under Louisiana law he was considered black and required to sit in the
was prosecuted and his case, *Plessy v. Ferguson*, resulted in the famous Supreme Court decision finding legally enforced separation of the races neither a violation of the Equal Protection Clause of the Fourteenth Amendment, nor a violation of Due Process under the law. Based on this ruling, the government held a legal rationale to justify separation of the races. This separation of the races extended to public education.

For a period of forty-two years after *Plessy*, schools and universities were permitted to deny access to African Americans because other physical facilities were available. It was not until *State of Missouri v. Canada*, decided in 1938, that a trend toward making the opportunity for higher education more available to African Americans became a priority. The *Canada* court affirmed the *Plessy* ruling and did not require the state of Missouri to accept Lloyd Gaines at the University of Missouri Law School. The court, however, ruled that the university must either pay the costs required for black students to attend law school out of state or build a similar facility within the state. This ruling prevented the state from establishing a separate lower standard of education provided to African Americans and further required the State to provide a substantially equal alternative to the white law school, making segregation an expensive principle to maintain. After this case, a series of cases emerged which ultimately found that segregated schools were not substantially equal. Those cases led to the overturning of *Plessy*.

---

"Colored" section. When he sat in the "White" section and refused to move to the "Colored" section, he was jailed. The case specifically dealt with the Amendment 13 (Abolition of Slavery and Involuntary Servitude), and Act La. 1890, No. 111, (Louisiana statute), enacting that all railway companies carrying passengers shall provide equal, but separate, accommodations for the white or colored races, by providing two or more passenger coaches for each train, or by dividing passenger coaches, and prohibiting persons from occupying seats in any coaches other than the ones assigned to them on account of the race to which they belong.

33. *State of Missouri et rel. Gaines v. Canada et al.*, 305 U.S. 337 (1938). (Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. He was refused admission because at that time it was common for the state to send black students to neighboring states for courses not offered in the black schools).

34. *Id.*

35. *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948), (Ada Sipuel was denied admission to law school at the University of Oklahoma and she brought suit to compel her admission to the University. The state tried to establish an alternative by designating three instructors, three classrooms, and separate access to the law library. The Supreme Court held this was not an adequate substitute thus in violation of the Fourteenth Amendment and remanded back to the Supreme Court of Oklahoma). In *Sweatt v. Painter*, 339 U.S. 629 (1950), petitioner was denied admissions to University of Texas Law School solely on the basis of race. Petitioner was offered admission to another state school but he refused. The court ruled the legal education offered to Petitioner was not substantially equal and required his admission to University of Texas. In *McLaurin v Oklahoma State Regents*, 339 U.S. 637 (1950), a Negro student admitted to the state supported Graduate School as a candidate for a doctorate degree in education was segregated in the classroom, cafeteria, library, etc. The Supreme Court held that admission alone was not enough; the conditions of the education must be the same as those provided for students of other races.
C. Impact on Access to Education Post Brown v. Board of Education

In 1954, the Supreme Court decided *Brown v. Board of Education* which held that segregated education violated the Equal Protection Clause of the Fourteenth Amendment. *Brown* is most widely known for discussions regarding racial segregation in public education, but this decision was instrumental to the issue of access to education in general. While the ruling in *Brown* never mentions the term access, with its decision, the Supreme Court sanctioned the premise and gave authority to the principle that access to education was a fundamental right that warranted constitutional protection. The Court acknowledged that education was essential to a person's success and lot in life, thus, interference with or outright denial of that right, based on race, was a constitutional violation. After *Brown* a multitude of opportunities should have become available to African-American students pursuing higher education; however, years of struggle would come before the letter and the spirit of the law were followed.

The travails of African-American students are well documented. For example, in Florida, Virgil Hawkins applied for admission to the University of Florida (UF) in 1949 but was denied admission because of his race. Instead,

38. *Supra* note 19. (Linda Brown had to walk one mile through a railroad switchyard to get to the “colored” school even though a “white” school was only several blocks away from her home. Her father, Oliver Brown tried to enroll her in the “white” school, but she was denied access because a “colored” school was available).
39. *See supra* note 36. The Court specifically stated, “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”
40. *See id.* (The court specifically stated, “Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment”).
41. The Supreme Court believed it was necessary to issue an opinion in *Brown v Board of Education of Topeka*, 349 U.S. 294 (1955) (*Brown II*) to order public school integration “with all deliberate speed.” In *Cooper v. Aaron*, 358 U.S. 1 (1958) due to the overt opposition to desegregation by the Legislature and the Governor of the State of Arkansas and threats of violence from angry mobs, the federal government had to send troops to protect the black students during the course of the school year. Because of the chaos in implementing the desegregation plan, the members of the Board of Directors for Little Rock requested a 2-year delay for desegregation. The Supreme Court, affirming the District Court of Appeal’s decision, held that desegregation plans were to be reinstated, effective immediately.
42. *State ex.Rel. Hawkins v. The Board of Control of Florida*, 47 So. 2d. 608 (1950). (The Board of Control, the governing body of the State University system, was required to deny the application because specific language in the Florida Constitution prohibited admission of students
he was offered the opportunity to attend law school out of state at the state's expense. Hawkins refused to leave Florida and sued the state. In response to the suit, the Board of Control authorized the establishment of a law school at Florida Agricultural and Mechanical University (FAMU) — a historically Black university — and sent Hawkins' application there. Virgil still fought for admission to UF. In response, UF retroactively increased the Law School Admissions Test (LSAT) score required for admission to its law school, and evenhandedly denied him admission because he did not have a high enough score to attend. Though Hawkins's case originated before Brown, as a result of Brown, the Supreme Court ordered the state of Florida to comply with the mandate of Brown. The Board complied but still retroactively raised the LSAT score high enough to exclude all of the then current black applicants.

Even with de jure segregation outlawed, some institutions found other ways to limit access to those persons the institutions wished to exclude on racial grounds without specifically stating race as a reason. The most familiar methods of exclusion are to make entry costs prohibitive and set the entry standards so high that only a select few will qualify. In the immediate post-Brown era, both test scores and wealth were very effective at preventing racial integration. By raising the cost and scores, low-income families were systematically shut out from higher education opportunities.

While acknowledging and recognizing that providing education or allowing access to public education is the direct responsibility of the individual states, the Federal government has become an integral part of the process. By providing federal subsidies, national policies and national oversight of higher education institutions, the federal government has assumed a portion of the direct responsibility. By providing a direct benefit to the individual states

who were not white).

43. *Id.* At the time of filing his application, there were no law schools in the state of Florida that would admit students who were not white.

44. *Id.*

45. *Id.* After the suit was initiated, but prior to the time the Board of Control was required to answer, the Board of Control set up and established the law school at FAMU and directed the president of FAMU to acquire personnel, facilities and equipment to open as soon as possible.

46. *Id.*


48. *Id.*


50. THE OFFICE OF POSTSECONDARY EDUCATION, HOME PAGE, available at http://www.ed.gov/about/offices/list/ope/index.html. The federal government has a number of agencies that coordinate with states to provide uniform policies and standards regarding higher education. The Office of Postsecondary Education (OPE) formulates federal postsecondary education policy and administers programs that address critical national needs in support of its mission to increase access to quality postsecondary education. A component of OPE is the Accreditation and State Liaison (ASL) which has responsibility for the accrediting agency recognition process and for the coordination of activities between states and the U.S. Department
through subsidies, the federal government is in a position to exercise great influence over the state action, as it pertains to higher education. Therefore, the Federal government has the joint responsibility, with the individual states, to ensure access to higher education is available to everyone, especially persons who lack financial resources.

The federal government has historically provided subsidies to promote desired behavior; such an example include mortgage interest deduction which reduces tax liability to encourage home ownership.\(^{51}\) Homeownership is desired because many believe that homeowners have a greater stake in their communities and thus are better citizens. Similarly, the federal government should promote obtaining higher education because educated citizens, like homeowners, tend to be agents of positive change in society at large. Furthermore, by promoting access to education for low-income individuals and families, at the federal level, the federal government sends a clear message that education should be available to everyone, not just the privileged few.

The remainder of this Article considers and evaluates those programs which attempted to increase access to higher education for low-income individuals and families. It provides support for the conclusion that these programs ultimately fail at providing access because the programs are not synchronized and as a consequence conflict in application. By accessing one form of aid, a student is prevented from using other sources of aid despite having unmet financial need. If the goal is to make access to education more available to low-income individuals, then sources of financial aid should be more inclusive and provide as much financial assistance as necessary to meet a minimum percentage of unmet need. The original intent of the various programs was to make financial assistance more available to low-income students; the following data will demonstrate the results are not consistent with that intent.

\(^{51}\) ADAM CARASSO, WHO RECEIVES HOMEOWNERSHIP TAX DEDUCTIONS AND HOW MUCH? TAX POLICY CENTER, (2005), available at http://www.urban.org/url.cfm?ID=1000804. Some of the costliest tax expenditures the federal government permits go to subsidizing homeownership. According to estimates by the Joint Committee on Taxation for fiscal year 2004, the total tax expenditure value of the mortgage interest deduction was $70.2 billion. Very few low-income taxpayers receive this subsidy as most low-income tax return filers owe little tax, do not itemize, and are less likely than taxpayers in other groups to own a home.
II. FEDERALLY SUBSIDIZED PROGRAMS AVAILABLE FOR HIGHER EDUCATION

A. Contrasting the Federal Pell Grant Program (Pell Grants) with the Student Loan Program

1. Higher Education Act of 1965

One of the foremost considerations in determining access to postsecondary education is the cost of acquiring this education and the availability of financial assistance. In order to gain access to higher education, individuals living at or below the poverty level simply cannot afford to pay the expenses of postsecondary education directly. Over four decades ago, Congress enacted legislation that has lead to a series of subsequent pieces legislation, which attempted to bridge the gap between students of considerable economic means and those having few economic resources.

The Economic Opportunity Act of 1964\(^52\) was initiated to deal with the crisis in access to higher education. Its Preamble states, in relevant part,

"...The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is, therefore, the policy of the United States to eliminate the paradox of poverty by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in dignity. It is the purpose of this Act to strengthen, supplement, and coordinate efforts in furtherance of that policy."\(^53\)

This Act allowed programs such as Work Study to be authorized.\(^54\)

In the following year Congress approved The Higher Education Act (HEA) of 1965.\(^55\) HEA was established for the purpose of providing need-

\(^52\) The Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508, was initiated to mobilize the human and financial resources of the Nation to combat poverty in the United State. The Act further established as part of its findings that a substantial number of people in our country were living in poverty. The United States could achieve its full economic and social potential as a nation only if every individual had the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society.

\(^53\) Id.

\(^54\) Id. (The stated purpose of work-study programs was to stimulate and promote the part-time employment of students in higher education who are from low-income families and are in need of the earnings to pursue a course of study at such institution. Other programs initiated out of this Act are outside the scope of this Article).

\(^55\) 20 U.S.C.A. § 1070a, provides, in part, for the Secretary to pay eligible institutions such sums as may be necessary to pay to eligible students for each academic year they are enrolled as an undergraduate student at any one of 6,000 participating postsecondary institutions. These sums are in accordance with 20 U.S.C.A. § 1091.
based grants, known as Pell Grants, to low-income undergraduate and certain post-baccalaureate students to pay for college attendance.\textsuperscript{56} These grants, combined with reasonable family and student contributions, were designed to meet at least 75\% of a student's cost of attendance.\textsuperscript{57} If the grant amount plus the "reasonable" family and student contribution exceeded the cost of attendance for an academic year, then the grant amount was reduced to balance the cost of attendance.\textsuperscript{58} The original purpose of the grants was to promote access to postsecondary education for low-income students.\textsuperscript{59} While the statutory language announcing the purpose did not specifically state that the program was targeting low-income families,\textsuperscript{60} the requirements to qualify for the grants make it clear that the purpose was indeed to provide access to postsecondary education for economically disadvantaged individuals.\textsuperscript{61}

The Pell Grants were particularly beneficial for low-income individuals because there were no repayment requirements. The actual amounts received were based on variables such as need, cost of attendance, and enrollment status.\textsuperscript{62} This legislation was foundational; it not only expanded resources available to low-income students, but it provided funds to obtain higher education without the additional requirement that students had to work or repay

\textsuperscript{56} 20 U.S.C.A \S\ 1070 (Thompson/West 1998) (The grants were referred to as the Basic Equal Opportunity Grant. If a student were accepted or enrolled in a post baccalaureate program that did not lead to a graduate degree; or if the student were enrolled in courses required by the State in order for the student to receive a professional certification or licensing credential that is required for employment such as a teacher in elementary school or secondary school in the State; then they qualified for the grants. The amount of the grant would be determined based on need. The Reauthorization of the Higher Education Act in 1972 renamed the Basic Equal Opportunity Grant, the Federal Pell Grant Program).

\textsuperscript{57} Id. Cost of attendance is defined by 20 U.S.C.A. \S\ 1087 and includes expenses such as tuition, fees, equipment rental, transportation, room and board among other things for a student attending college on a full-time basis.


\textsuperscript{59} Id.

\textsuperscript{60} Higher Education Act of 1965, Public Law 89-329, 79 Stat. 1219 (codified as amended in 20 U.S.C.A. \S\ 1070). The stated purpose was to strengthen the educational resources of colleges and universities and to provide financial assistance for students in postsecondary and higher education.

\textsuperscript{61} Id. While any undergraduate or vocational student enrolled or accepted for enrollment in a participating school may apply for a Federal Pell Grant, the student must meet a financial need requirement as established by a student's expected family contribution. The expected family contribution (EFC) is the sum of a percentage of net income (income minus basic living expenses and taxes) and a percentage of net assets (assets minus asset protection allowance). The EFC is used as a measure to determine the family's ability to contribute to the cost of a student's education. As the amount the family is expected to contribute increases, the amount of aid decreases for the student.

\textsuperscript{62} The amount of the award determines the percentage rate a student would receive for total cost of education. As a full-time student you are eligible to receive more than a part-time student at the same institution.
the funds that had been provided, as was the case with work study and student loan programs. By providing Pell Grants, the government provided means for low-income students to pursue higher education without the financial burden of substantial debt upon graduation.

2. The Effect of Rising Tuition Expenses on Access to Education

During the 1990s, college tuition and fee increases outpaced both inflation and growth in the median family income. Over the years the average tuition costs at four year public institutions have increased. Between the years 1976 and 2000 there was an increase rate equalling 359%. From 1997 to 2000, average tuition costs increased again by 8.93%.

![Average Annual Tuition Cost](chart.png)

63. The Guaranteed Student Loan Program was also initiated as part of the Higher Education Act of 1965. This program provided money to students through lending institutions to offset the cost of education. Since the aid was in the form of a loan the money received had repayment requirements.

64. Supra note 58. In the public sector, annual increases in tuition have ranged between 10-14%. A period of modest tuition increases were followed by a period ranging four to 6% increases in tuition rates. By 2001-2003 fiscal years, tuition increases rose again by 9%. This report is required by law and summarizes important developments and trends in education using the latest available data.

65. Id.

Because the tuition rates have increased at such a rapid pace, the cost of higher education has soared over the years and continues to outpace inflation. In addition, when states make decisions whether to make budget cuts during economic hardships, the prime targets for such budget cuts are higher education institutions. The consequence of such cuts is that schools have to raise tuition to compensate for lost revenue. The lost revenue from state appropriations is among the most important factors related to tuition increases at public four-year institutions. The states also tend to resort to using public colleges and universities to subsidize state expenses during these economic hardships through tuition increases. The rising costs have disproportionately affected low-income families as the cost of attendance continues to rise. When the education costs increased, the low-income students were at a higher risk of dropping out of school or choosing not to attend because they lacked extra finances to cover the lost aid.

Specifically, from 1992 through 2001, tuition at four-year public institutions rose faster than family income in forty one states. During this recession period the state-level policy makers shifted the focus on access to higher education for low-income families by shifting the eligibility for state grants from need based to merit based. Since 1993, funding for need based grants has increased by 88% while funding for merit based grants has increased by 336%, resulting in an adverse impact on individuals from low-income households, while merit based grants tended to inure to the benefit of middle and high-income students. Low-income students were placed in the tenuous position of trying to secure income to replace the grant amounts lost.

By shifting the focus to providing access to a college education to the


70. Id. The steepest tuition increases in public higher education have been imposed during recessions when students and families have the least ability to pay. Between 1992-1993 when the economy was in an economic recession, tuition rose 12% and state appropriations were less than 1% higher than appropriated in 1989-1990. During this recession average income rates decreased by 2%.

71. See supra note 6, at 7. The cost of education, as it pertains to impact on the percentage of income of low-income bracket households, rose from 42% to 62% of the household income between the periods 1976 and 1999. For high-income there was practically no effect.

72. Id. In 1980, for students in the lowest income attending a four year public college, tuition represented 13% of their income. By the year 2000, tuition represented 25% of their income at the same colleges.

73. Id.

74. Id.
middle class, the amount of financial assistance available to the low-income class was necessarily decreased, thus reducing the percentage of the cost-of-attendance expenses covered by financial aid awards to low-income individuals. So, in theory, while the U.S. government supports the idea of providing financial assistance to the population that needs the most help, our actions have not demonstrated that this goal still remains a priority. To further demonstrate this point, a brief analysis of the enrollment rates is in order.

3. Enrollment Rates of Students Applying to 4-year Public Institution

Enrollment rates, in general, for all populations between the ages of 18-24, suffered a decrease during the same period there was a sharp increase in the average annual tuition costs of American colleges and universities. By 1976 and 2000 the enrollment rates for non-Hispanic Whites slowly declined. By 2001, the enrollment rate for non-Hispanic Whites was 64.2%; which was a 1.5% decrease from the prior year and 4% decrease from 1997 for this entire population. However, by the year 2005, the non-Hispanic White population had surpassed the 1997 statistics and achieved an enrollment rate of 73.2%, representing an all time high for this population. Thus, it would appear that the enrollment rates at public colleges and universities for non-Hispanic Whites have benefited from by the shift in state support from the low-income to the middle income students.

In comparison, the 2001 annual enrollment rate for the entire population, regardless of race, classified as low-income individuals was 43.8%. This rate

---

75. Supra note 6.
76. The dates and statistics used in this table are derived from statistics collected by the U.S. Bureau of Census; and U.S. Department of Labor available at www.nces.ed.gov/programs/digest/d98/d98t184.asp
78. Id.
represented a 6% decrease from the prior year and a 13% decrease from the enrollment rate in 1997. There was a 13% increase in 2002 and a steady decline since then, with a slight increase between the years 2001 to 2005.

For the black population the annual enrollment rates from 1976 until 2005 were substantially the same and still substantially below the non-Hispanic white population. Overall, the statistics demonstrate that there still remains a vast disparity between the enrollment rates of low-income individuals and high-income individuals, as well as a gap between enrollment of non-Hispanic Whites and African-Americans. Accordingly, tuition rates appear to have had a disparate impact on African American enrollment rates in colleges and universities.

4. Impact of Rising Tuition on Pell Grants

Even though financial aid, in the form of grants, has been available throughout the years previously discussed, the appropriations have not maintained pace with the costs of attendance. Between 1986 and 1999, the Pell Grant Program represented the largest need-based financial aid program.

79. Id.
80. Id.
81. Id.
82. The dates and statistics used in this table are derived from statistics collected by the U.S. Bureau of Census; and U.S. Department of Labor available at http://nces.ed.gov/programs/digest/d98/d98t184.asp
83. THE CONDITION OF EDUCATION 2003, U.S. DEPARTMENT OF EDUCATION, NATIONAL
Since 1999, Pell Grants have covered a smaller percentage of cost of attendance at public four-year colleges and universities in comparison to the percentage appropriated in 1986. The gap in college attendance between high and low-income Americans has widened, even among those low-income Americans who are prepared academically for college.

Low-income students who are prepared for college, when faced with the financial costs of higher education and limited financial resources are deterred from pursuing higher education. Therefore, even those low-income individuals who are academically prepared for college are denied access due to insufficient financial resources to assist them with the unmet financial need to pay for college. The goals of the Higher Education Act, Taxpayer Relief Act of 1997 and other education incentive programs are to make higher education available to anyone who is academically prepared yet lacks the financial resources to finance the dream.

With the increase in tuition rates, college and universities have sought to alleviate some of the financial hurdles, allowing them to entice all types of students to attend the respective universities. One of the ways universities facilitated this effort was to expand the grant programs to award student grants based on merit or a combination of merit and financial need. As a result, there was a shift in the type of student who qualified for grants because the grants were no longer exclusively for low-income students with financial needs.

The steep increase in tuition rates and the overall costs of higher education gained national attention. A primary concern that the rising cost in tuition

---

84. Supra note 58. Because most low-income individuals will seek access to public colleges and universities, it is also important to note that state financial aid has also affected access and varies considerably. In some states such as Alaska and South Dakota there is no state financial aid available and in other states, such as California and New York, there is substantial aid available. However, overall the state level financial aid has declined.

85. ACCESS DENIED: RESTORING THE NATION'S COMMITMENT TO EQUAL EDUCATION OPPORTUNITY, A REPORT OF THE ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE (February 2001). This report demonstrates that excessive unmet need prevents even highly qualified low-income and minority students from attending four-year institutions. Statistics from 1997 reveal that the percentage of what is considered highly and very highly qualified high school graduates who enroll in college demonstrate 66.9% of high-income student enroll compared to 47.1% of low-income students. The same study reveals that within the same population of students 60.6% of the non-Hispanic white students enrolled compared to 28.6% of the African-American students.

86. Id.

87. See supra note 58. There is also institutional financial aid available from the private and public colleges and universities. This financial aid tends to be directed towards merit based recruiting, academically or athletically, rather than need based.

88. In 1982, 9.6% of the total state grant aid was merit-based awards. By 1998, 18.6% of the total state grant aid was merit-based awards.

89. See supra note 85.
made access to higher education less affordable for most families, not just low-income families, prompted the federal government to take a proactive approach. During the early 1990s, the federal government attempted to address this problem by increasing the amount of financial aid available per student. The federal government, made some changes to the Higher Education Act to design a system whereby access to postsecondary education would be available to all students who qualified, regardless of their financial circumstances.

The 1992 Reauthorization of the Higher Education Act established a single formula for determining eligibility for all Title IV student aid programs. The clear objective behind the decision to increase the grants was to increase the possibility for financially needy students to access college. Despite the Act's objective, the results tell a different story. Although there was an increase in the amounts awarded in the grants and in the actual number of grants awarded for the 1992-93 fiscal year, this increase was not enough to counter the simultaneous rising tuition costs.

In the 1992-93 fiscal year, approximately 4,002,045 students received grants averaging $1,543 per award. During this time, more than $6,000,000 in Pell Grant awards were distributed to students. By 1995-96, the amount of total Pell Grants awards decreased to $5,500,000 distributed to students. As a direct result of decreases in the dollar amounts allocated to the grants, the number of students receiving grants decreased to approximately 3,611,821 students and the average awarded was reduced to an average $1,515 per student, per fiscal year. The end result demonstrates that there has been a steady decline in the number of recipients receiving awards corresponding with a mediocre increase in the average award distributed to students.

90. See id.
92. Id. This provision provides as a stated goal "to ensure access to postsecondary education by providing direct grants to help financially needy undergraduate students meet the cost of their education at participating postsecondary institutions."
94. Id. A student may apply for Federal Pell Grant by submitting a Free Application for Federal Student Aid, which is processed by the Department of Education. Once processed the student is notified of his assistance through the Student Aid Report (SAR). The institutions calculate each student's award in accordance with a formula in the authorizing statute. Institutions then report to the Department of Education on all Federal Pell Grants funds distributed to students enrolled at school.
95. FEDERAL PELL GRANT PROGRAM END-OF-YEAR REPORT 2005-2006, U.S. DEPARTMENT OF EDUCATION.
96. Id.
97. Id.
98. Id. The table incorporates the statistics cited within this Article.
Statistics of the Federal Pell Grant Program Selected Years

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of recipients</th>
<th>Average Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985-86</td>
<td>2,813,489</td>
<td>$1,279</td>
</tr>
<tr>
<td>1992-93</td>
<td>4,002,045</td>
<td>$1,543</td>
</tr>
<tr>
<td>1993-94</td>
<td>3,755,675</td>
<td>$1,506</td>
</tr>
<tr>
<td>1994-95</td>
<td>3,674,967</td>
<td>$1,502</td>
</tr>
<tr>
<td>1995-96</td>
<td>3,611,821</td>
<td>$1,515</td>
</tr>
</tbody>
</table>

By 1999-2000, the average Pell Grant award was $1,915 which seemingly resulted in an increase of funds available to low-income families. During this same year almost 3,763,710 students were Pell Grant recipients. Given the steady increase in both student recipients and average Pell Grant amounts awarded in previous years, if one were to only evaluate the hard numbers it would appear that Congress had achieved its intended result namely, making access to higher education more available to low-income students.

By 2001-2002, the average award was $2,298 and there were approximately 4,340,879 Pell Grant recipients. By 2003-2004, the average award was $2,473 and there were approximately 5,139,638 Pell Grant recipients. During the same time period tuition increases were at an all time high. With the tuition rates increasing at incredible rates and Pell Grant amounts improving at a slower rate, the overall effect was a decrease in the overall effect of the award when compared with the cost of attendance. The net effect is that the Pell Grant Program has lost the purchasing power it had in 1976 and, as a result, covers a smaller percentage of the higher education expenses.

99. James B. Steadman, Federal Pell Grant Program of the Higher Education Act: Background and Reauthorization (2003) at 9. The appropriated amounts for Pell Grants are specified in annual appropriation legislation for the U.S. Department of Education. This set legislation sets the amount for the maximum appropriated award that can be made during the fiscal year. The annual appropriated amounts are determined well in advance of the year they are intended to support. The appropriated amount is different from the authorized maximum Pell Grant which is specified in the Higher Education Act. Since the appropriated amounts are budget for future expenditures, if the numbers are inaccurate it could result in a small amount actually awarded to the students. Additionally, Pell Grants are not designed to pay 100% of higher education costs thus actual amounts awarded are usually lower than the maximum appropriated amount and the maximum authorized amounts.

100. Id. at 14.
101. Id.
102. Id. The table incorporates the statistics cite within the Article.
103. Supra notes 64-66 and accompanying text.
From 1992-1996, the years leading up to the passage of the Taxpayer Relief Act of 1997, there was a steady decline in the average award granted. By fiscal year 1999-2000, both the numbers of Pell Grant recipients and average grant award amounts were starting to increase, but not enough to overcome the rise in tuition rates. A comparison of the maximum Pell Grant awarded for institutional cost of attendance reveals that in the year 1975-1976, Pell Grant awards represented 84% of the cost of attendance, with a substantial decrease by 1985-86 to 57% and another decline in 2000-2001 when Pell Grants awards represented 39% of the cost of attendance. By 2006-2007 the percentage of Pell Grant awards had decreased again, down to 32% of the cost of attendance.

In evaluating the effect of the loss in purchasing power of the Pell Grant attributed to the increase in tuition rates and shifting federal resources from grants to loans, again, there is disparate impact on African Americans. For example, in October 2003, there were 16,600,000 students enrolled in college at the undergraduate and graduate level. Among this group actually receiving grants, 68% were non-Hispanic white students, and 13% were African-American students. Among the 13% African-American students in college, 34% were attending part-time. This demonstrates that non-Hispanic Whites make up a majority of enrollment rates as well as a substantial majority of grant recipients and grant amounts received, despite the fact that African Americans have a higher rate of poverty.

---

104. See supra note 85.
107. Id.
108. Id.
persons in the lowest income tax brackets, the Higher Education Act should be amended to provide a minimum percentage of federal aid in the form of Pell Grants for persons in the lowest income tax bracket. By implementing a minimum percentage, the student can combine other assets and resources to ensure that funds will be available for a minimum of four years of academic study at a higher education institution. Another more radical proposal is to abolish the tax subsidies and replace them with more Pell Grant appropriations. This is a truly radical approach in that it would be the first time since the HEA of 1965 that financial assistance was provided to low-income families in a way that also facilitated beneficial use and actual access to higher education.

B. Student Loan Program

One of the reasons the 1992 Reauthorization of the Higher Education Act provisions failed to increase enrollment rates for low-income students, can be found in the same Act, which provided the formula to qualify for financial aid. Another related provision within the Act raised the student loan limits available to students and made it easier for students to qualify for loans. In doing so, the aforementioned formula calculates the student loan as a form of aid, replacing a percentage of what had been historically provided as grants. With this change, less grant aid was available and a new form of federal aid emerged to the forefront—student loans. By changing the formula for financial assistance and relying on student loans as a source of financial assistance, the federal government was not prepared for the negative impact this change would have on financially needy students.

It is understandable why the federal government would seek an alternative to providing "free" money to low-income individuals. The process of finding those alternatives involved the 1992 Reauthorization of the Higher Education Act, which made several major changes to the federal financial aid system. One such major change was an increase in loan limits for the Stafford loan program and the availability of unsubsidized loans. This is important

109. See Susan Dynarski, Tax Policy and Education Policy: Collision or Coordination? A Case Study of the 529 and Coverdell Savings Incentive, TAX POLICY AND THE ECONOMY, NATIONAL BUREAU OF ECONOMIC RESEARCH, Vol. 18, (2004). In this case study the author stated when looking at the costs of the tax credits, the education tax benefit makes up approximately 4% of the total aid provided to students in 2006. This percentage seems low but when translated to dollars, the government paid roughly $6 billion dollars in tax subsidies in 2006 for education tax benefits.

110. Supra note 93.

111. Supra note 67. In 1981, loans accounted for 45% and grants accounted for 52% of federal student financial aid. In 2000, loans represented 58% of the federal student financial aid and grants represented 41% of financial aid. See also Trends in Student Aid: 2004, THE COLLEGE BOARD (2006) available at www.collegeboard.com (reporting federal loans make up 51% of a student’s financial aid award while Pell grants make up approximately 12.7% of the total award).

112. In 1988 Congress renamed the Guaranteed Student Loan Program, which initiated out
because the loans are not need-based and the ability to repay loans are not important factors considered when determining who qualifies for these loans.\textsuperscript{114} The assumption being made is that the student is permitted to borrow money now to pay for the expenses incurred to pay for his or her own college education; therefore, postsecondary education is available. Incurring student loan debt results in deferring the cost of education, not decreasing the cost of education. Once the student has graduated he or she has the ability to earn a living with a higher paying job and an improved ability to repay the money borrowed. The idea is great, in theory, but in reality this is far from the truth.

Students across the economic spectrum are borrowing money to pay for college.\textsuperscript{115} This fact alone does not demonstrate the predicament caused by student loans replacing grants. This problem is demonstrated by the financial consequences of borrowing money which have not been very similar across the economic spectrum. Mainly, students from the above median to high-income families may favor student loans because their affordability issues may have more to do with the family's unwillingness to pay the increasing expenses of college.\textsuperscript{116} In other words, high-income families have a choice regarding whether they should choose to pay for college expenses, allow the student to borrow money in the student loan program, or pursue other options.

Because the student loan interest rates tend to be lower than the typical commercial loans, high-income family may strategically decide that paying college expenses may not be the optimal use of money when low rate, subsidized student loans are available. Also, students from higher earning households, who choose to borrow, have family members who can assist with finding higher paying jobs, repayment of loans incurred, and the actual loan amount borrowed will tend to be less. Students from low-income households tend not to have connections to gain coveted professional positions, and lack family members with the ability to assist in the repayment of loans incurred, and the loan amount will tend to be substantial because the repayment amount

\begin{flushleft}
\textsuperscript{113} Susan Choy, \textit{Paying for College, Changes Between 1990 and 2000 for Full-Time Dependent Undergraduates}, National Center for Education Statistics (2004). In 2002-03 the federal government provided seventy two billion dollars in student aid for undergraduate and graduate study, of that amount sixteen billion was in grant aid and forty nine billion was in guaranteed loans and five billion in education tax credits.

\textsuperscript{114} A need test is still conducted to determine eligibility.

\textsuperscript{115} Losing Ground, \textit{A National Status Report of the Affordability of American Higher Education}, NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION (2002). In 1989-1990 approximately 55\% of low-income students were borrowing compared to 18\% of students from high-income backgrounds. In 1999-2000 approximately 62\% of low-income students were borrowing compared to 42\% of higher income students.

\textsuperscript{116} Jerry Sheehan Davis, \textit{College Affordability: Overlooked Long-Term Trends and Recent 50-State Patterns}, USA GROUP FOUNDATION. Available at www.luminafoundation.org/publications/collegeaffordability.
\end{flushleft}
will usually represent a higher percentage of the net income.\textsuperscript{117}

An examination of the volume of student loans provides a better idea on the subject of how student loans have impacted low-income students. Over the past decade grant aid has increased by 84\%, while the number of education loans issued to students has increased by 137\%.\textsuperscript{118} In addition, as a result of the substantial amount of loans incurred by low-income borrowers, defaults have become a significant problem for the federal government and borrowers.\textsuperscript{119} For the borrower, a default on a student loan will necessarily impact an individual's creditworthiness and, consequently, general economic wellbeing. The likelihood of encountering such a problem is not remote because student loan repayment obligations commence about six months following graduation.\textsuperscript{120}

With such a brief period of time to gain employment, the risk of default is higher for individuals from the low-income families because, as previously mentioned, the higher income students will tend to have both, better job prospects and family members with the ability to assist in repayment. Beyond that, graduating low-income individuals will have a high debt to earnings ratio that will adversely affect their credit rating and might prevent employment in certain government positions because the large debt makes them a security risk. Therefore, without the connections for higher paying jobs coupled with the possible obstacles to government jobs, low-income individuals run a higher risk of defaulting.

Another federal government response is available to assist with the substantial debt students are incurring; a provision of the Internal Revenue Code permits for a deduction to reduce taxable income for the student loan interest paid during the course of the taxable year.\textsuperscript{121} Generally speaking, if one meets the income requirements, one may be able to deduct some or all of the interest he or she pays on his or her student loan during the taxable year.\textsuperscript{122}

\textsuperscript{117} Supra note 125. (In 1989-1990 low-income students in fourth to fifth years at public four-year institutions were borrowing about $7,600 and by 1999-2000 they were borrowing approximately $12,900 which represents a substantial increase for these students because such amounts represent a large percentage of the family's income. In 1989-1990 high-income students at these same institutions were borrowing approximately $6,000 and by 1999-2000 they were borrowing approximately $11,900 which does not represent the same increase because such amounts send to represent a small percentage the family's income).


\textsuperscript{119} ADAM STOLL, FEDERAL STUDENT LOANS: TERMS AND CONDITIONS FOR BORROWERS (2004).

\textsuperscript{120} Student Aid on the Web, http://www.studentaid.com. After graduating or dropping below half time the grace period to begin payment is 6 months for a Federal or Direct Stafford Loan.

\textsuperscript{121} I.R.C. §221 (2007).

\textsuperscript{122} I.R.C. § 221(b)(1) (2007). The maximum deduction allowed, beginning in the year 2001, is $2500 dollars. The income limitations are set forth in I.R.C. §221(b)(2) and states the limitation is based on modified adjusted gross income. Any amount that would be allowable is
In order for the loan to qualify for this favorable tax treatment, the loan must be a qualified education loan\footnote{See I.R.C. § 221(d)(1)-(2) (2007).} and the loan must have been incurred for an eligible student enrolled at least half-time.\footnote{See id. § 221(d)(3). The term eligible student has the same meaning at defined in § 25A(b)(3).} While the interest deduction is beneficial for those who qualify, it is not a factor in creating educational opportunities because the benefit is only available after a student has already earned taxable income after attending college. Furthermore, this assistance does not offer a solution to the overall debt amount.

### III. The Taxpayer Relief Act of 1997

Congress realized immediate action was necessary to address the rising cost of education. Congress, however, approached the problem indirectly by turning to the Internal Revenue Code. The 1997 Taxpayer Relief Act (TRA’97) was not specifically designed to address the shortcomings and problems with the Pell Grant and student loan programs. Congress instead attempted to open an additional route to achieve the desired result of increasing availability of higher education to low-income individuals and families. TRA’97 initiated a number of education incentive provisions designed to assist with college expenses. There was no mention of the Pell Grant or student loan problems specifically in TRA’97, however, there was certainly an impact on how students would pay for college after TRA’97 was implemented.

The relevant programs under TRA’97 are the Hope Scholarship Credit, Lifetime Learning Credit, Coverdell Education Savings Account and Qualified Tuition Programs. While each of these provisions will be discussed in detail, it is important to note these provisions had little, if any, effect on enrollment rates of low-income students. Again, the research will demonstrate that the remedy initiated to increase enrollment rates for the neediest members of our society were really benefiting members of middle and high-income families. Because the assistance provided in TRA’97 was in the form of tax relief, some of the effects were not evident until the first tax returns were filed in 1999.

#### A. Comparison of the Hope Scholarship Credit and Lifetime Learning Credit

The Hope Scholarship and Lifetime Learning Credits are both education incentives initiated as part of the Taxpayer Relief Act of 1997.\footnote{I.R.C. § 25A (2007)} While there are distinctions that will be demonstrated, these two education incentives are reduced by the excess of the taxpayer’s modified adjusted gross income over $50,000 dollars ($100,000 in the case of married taxpayers) bears to $15,000 ($30,000 in the case of married taxpayers). During the 2005 taxable year, the modified adjusted gross income had to be less than $65,000 for single taxpayer and less than $150,000 in the case of married taxpayers. This provision was amended by P.L. 107-16 § 901 and provides for a sunset in the year 2010.

\footnote{See I.R.C. § 221(d)(1)-(2) (2007).}

\footnote{See id. § 221(d)(3). The term eligible student has the same meaning at defined in § 25A(b)(3).}

\footnote{I.R.C. § 25A (2007)
similar enough that discussion should be combined for efficiency. The Hope Scholarship is a tax credit initiated for the purpose of making the first two years of college attainable to anyone who is attending college for the first time, changing careers, or continuing education. The credit is available to taxpayers who can pay tuition and fees upfront. Any additional financial subsidy, such as grants, scholarships or other tax free assistance results in a reduction of the credit amount available for the taxpayer to claim as a deduction on his or her tax return.

As initially enacted, the Hope Scholarship was designed for use by low and middle-income individuals who were pursuing college, graduate degrees, or vocational training. In order to qualify for the Hope tax credit, an individual student must attend a university, community college, or vocational school as approved by the Higher Education Act for eligibility to participate in the administration of student aid program administered by the Department of Education (DOE). The student must be seeking a degree or certificate and enrolled at least half time and free of any convictions of a federal or state felony offense for possession or distribution of a controlled substance.

As initiated the maximum allowable credit was $1,500. Currently, the credit amount permissible for an eligible student is $1,650 for each of the first two years of postsecondary education.

As initiated, the credit phased out for joint filers who reported a modified adjusted gross income (AGI) between $80,000 and $100,000 for joint filers and single filers who reported $40,000 to $50,000 of AGI. Currently, the credit phases out when the taxpayer has a modified AGI over $45,000 to $55,000. In the case of joint filers it phases out when the taxpayer has a

---

128. Id.
129. Id.
130. See supra note 125, at (b)(1). The applicable limit is further defined in § 25A(b)(4) as an amount equal to two times the dollar amount in effect under paragraph (1)(A) for such taxable year.
131. See Id. at (b)(3).
132. Id. at (d)(2)-(3). Generally, the modified adjusted gross income is determined by taking the adjusted gross income and adding back items previously deducted such as foreign income, student loan interest, and individual retirement accounts.
133. 1997 Tax Legislation, Law Explanation and Analysis, Taxpayer Relief Act of 1997, CCH 1997. The amounts of credit that may be claimed for the tax year is reduced by (but not below zero) by an amount that bears the same ratio to the amount which would be taken into account as the excess of the taxpayer's modified AGI over $40,000 (or $80,000 in the case of joint filers) bears to $10,000 (or $20,000 in the case of joint filers). The formula to use in the case of a taxpayer filing single is the sum of Hope credit and lifetime learning credit multiplied by the modified AGI minus $40,000/10,000. These income ranges were indexed for inflation after the year 2000.
134. Supra note 125.
modified AGI of $90,000 to $110,000. The Lifetime Learning Credit is a similar provision enacted to assist adults who returned to college, changed careers, or want to upgrade skills. Similar to the Hope Credit, it also assists juniors, seniors, graduate, and professional degree seeking students. To qualify for the credit the student must attend an eligible community college, university, or vocational school as described under the Hope Credit.

As originally enacted, the Lifetime Learning Credit allowed the taxpayer to claim a credit to reduce his or her taxable income up to 20% of qualified tuition and fees paid for the first $5,000 of qualified expenses paid per taxable year and, beginning January 1, 2003, the credit allows up to 20% of the first $10,000 of qualified expenses for the taxable year. The taxpayer is allowed this credit for an unlimited number of years and available for bachelor degrees and professional degrees. As initiated, the maximum credit allowable for any taxable year was $1,000 and currently $2,000 is the maximum award allowable. The credit phases out at the same income levels as discussed earlier in the Hope Scholarship.

While the Hope Scholarship and the Lifetime Learning Credit have similar features and restrictions, the Lifetime Learning Credit is distinguishable because eligible students are not required to enroll half-time and are not required to seek a degree. Thus, a student who may be enrolled in a vocational school would qualify for this credit or a student who may be enrolled less than half-time would also qualify for this credit. Though these distinctions may appear to broaden the availability to low-income students, a larger problem emerges which directly affects the ability of the typical low-income student to take advantage of this benefit and other available programs.

135. Id. If the taxpayer is married, then he or she must file a joint return, otherwise the credit is unavailable.
136. Supra note 127.
137. Supra note 133. Eligible education institutions are defined in § 482 of the Higher Education Act of 1965(20 U.S.C. §1088). Generally these institutions are accredited postsecondary educational institutions that offer credit toward a bachelor's degree, an associate's degree or other recognized postsecondary credential. Some vocational institutions and proprietary institutions are eligible education institutions.
138. Supra note 125. The paid expenses are subject to limitations. The amount which would (but for this subsection) be taken into account as a credit against income tax for the taxable year shall be reduced (but not below zero) by the amount which bears the same ratio to the amount which would be taken into account as the excess of the taxpayer's modified AGI for the taxable year over 10,000 (20,000 in the case of a joint return). See infra, note 148. Qualified expenses include tuition and fees, course related fees, books; equipment required for an eligible institution. Room and board fees are not included
139. § 482 of the Higher Education Act of 1965(20 U.S.C. §1088) The taxpayer is not limited to bachelor and professional degrees. This discussion presumes the first two years of community college exhausted the tax credits available under the Hope credit.
140. Id.
141. Supra notes 133-135 and the accompanying text.
142. I.R.C §25A(c)(2)(B) (2007). The Lifetime Learning Credit may be claimed for any course at an eligible institution that helps an individual acquire or improve job skills.
First, a student must be enrolled at least half-time to be eligible for Stafford loans.\textsuperscript{143} Therefore, if a student enrolled less than half-time, he or she would qualify for the Lifetime Learning Credit, but would not qualify to receive money from the Stafford Loan.

Another distinction is that the credit is available to only one student per tax filer.\textsuperscript{144} A taxpayer with multiple children enrolled in college at the same time is only allowed to take the credit to reduce the tax liability for expenses against the expenses of one child. Recognizing the typical low-income family would not have the ability to pay the expenses of two children upfront without other tax free subsidies, this restriction seems counter to the overall goal of making higher education more available.

A prerequisite for receiving these credits is already having sufficient earned taxable income. The credit is above the line, meaning, a taxpayer does not have to submit an itemized income tax return to receive this tax credit.\textsuperscript{145} In addition, if the student received other scholarships, or grants as his only source of finances, which did not result in earned, taxable income, that student would not be allowed to claim any portion of the credits. Therefore, while these credits may be available to those student taxpayers in the low-income levels, these credits are not beneficial to low-income taxpayers, as it relates to access to higher education, as will be demonstrated in the following discussion.

Taxable income is not enough to qualify to receive this credit. That taxable income must be sufficient such that a resulting tax is due in the amount of at least $2,000 in order to claim the full credit. Excess taxable income is required because this particular credit is nonrefundable.\textsuperscript{146} For example:\textsuperscript{147} Student Taxpayer (single, no dependants) worked part-time and attended

\textsuperscript{143} \textit{DEPARTMENT OF EDUCATION, THE STUDENT GUIDE 2005-2006 2}, available at http://www.studentaid.ed.gov/students/attachments/siteresources/Stud_guide.pdf (2005). At schools measuring progress in credit hours and semesters, trimesters, or quarters, "half time" is at least six semester hours or quarter hours per term for an undergraduate program. You must be attending school at least half time to be eligible for a Stafford Loan. Half-time enrollment is not a requirement to receive aid from the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal Perkins Loan programs.

\textsuperscript{144} \textit{Hope and Lifetime Learning Credits, I.R.C. § 25A(b)(1) (2007).}

\textsuperscript{145} Above the line deductions refer to deductions used to determine the adjusted gross income. The adjusted gross income level is where the line is determined. If a deduction is deemed below the line, then a taxpayer must itemize his return to receive the benefit of the deduction. An example of a below the line deduction is home mortgage interest. The above the line deductions are more valuable because they will always reduce your taxable income and this tax benefit may be used whether or not the taxpayer itemizes deductions on the tax return. An example of an above the line deduction is the student loan interest.

\textsuperscript{146} A non refundable tax credit is a credit which prevents the tax owed to the government from going below zero. If the credit were able to drop below zero, the taxpayer would be entitled to a refund from the government.

\textsuperscript{147} The following example is for the purpose of illustrating how a nonrefundable credit would operate in this simple circumstance. The example assumes Student Taxpayer has no other income, deductions or credits and pays for tuition and fees at a qualifying higher education institution.
college for the entire 2007 taxable year. Assume she earned $10,000 for the taxable year, did not withhold any taxes during the taxable year, and her qualified expenses for attending college were $10,000. Under the Lifetime Learning Credit, she would be eligible to receive the first $2,000 paid as a credit to reduce her tax liability when she filed her 2007 income tax return. With a standard deduction of $5,350 and personal exemption $3,400 the resulting tax due is $250.\(^\text{148}\) Once the credit is applied, $250 of the credit will reduce the tax liability down to $0. If this were a refundable credit, the taxpayer would be due a tax refund of $1,750. Since this credit is nonrefundable, the student would not owe any taxes and remaining $1,750 credit would never be used.

Students must hold at least a part-time job for the credit to be available. This would not be a problem, except that the money earned in the part-time time job would be used to reduce the grant amount, that would otherwise be available, to the student under the Pell Grant program.\(^\text{149}\) This reduction is necessary because the increased income is a factor that affects the EFC and results in a reduction of the grant amount ultimately awarded to the student.\(^\text{150}\) For instance, a student who earned $10,000 and whose parents earned $22,000 for the 2008-2009 fiscal year would be expected to contribute $2,695 toward his education.\(^\text{151}\) While the student may still qualify for the Pell Grant, the expected contribution would be considered an asset of the student’s and thus reduce the overall financial need. This is an exasperating result for students who are categorized as low-income because it appears that the reward for working hard to earn money to pay for education expenses is undermined. The final analysis demonstrates that as the student saves money in one pocket, the government, by reducing the Pell Grant amount, effectively takes money from another pocket.

Ironically, the interplay of the federal subsidy programs provides a disincentive to work and attend college. Unless the Hope Credit or the Lifetime Learning Credit would result in more savings than relying on grants

\(^{148}\) I.R.C § 63(c) (2007). A standard deduction is a dollar amount that reduces the amount of income subject to tax. The amount of standard deduction is based on a taxpayer's filing status. The standard deduction rate for a single person for the 2007 taxable year is $5,350. I.R.C § 151(d) (2007). Exemptions also directly reduce your taxable income. You are allowed a personal exemption for yourself, your spouse if married filing jointly, and each person you can claim as a dependent. The personal exemption amount for a single taxpayer for the 2007 taxable year is $3,400.


\(^{150}\) JACQUELINE E. KING, STATUS REPORT ON THE PELL GRANT PROGRAM 17 (2003). (The EFC concept considers income and assets. The more income a student has, the more he or she has to contribute to his or her educational experience).

\(^{151}\) See supra note 149. This calculator omits those input variables that have a relatively minimal impact on the EFC results, substituting average values. The input variables were for a family of four with one dependent child in college.
alone, these tax credits are not beneficial to low-income students. Another issue is that these credits cover such a small percentage of education expenses.\(^{152}\) A further consideration regarding access to these resources is the timing. Timing is important in this context considering the assistance is in the form of tax credits. By illustration, a student currently enrolled in a qualified institution must pay the qualified expenses during the current semester, but is eligible to receive the assistance only when the income tax return is filed. This is problematic, since these students are unlikely to have the ability to pay the costs upfront in the first place. For low-income students, waiting for what can be an entire year to receive a portion of the proceeds substantially undercuts the benefit.

**B. Tax Reform Recommendations for the Hope and Lifetime Learning Credits.**

The Hope Credit and the Lifetime Learning Credit must be reformed. The typical low-income student must rely on financial aid in order to cover the bulk of higher education expenses. As demonstrated, Pell Grants and the tax credits have not been synchronized and, consequently, the ability to use one program necessarily inhibits the ability to use the other during the same academic year. Thus, a person who receives a Pell Grant or other tax free expenses must subtract the qualified education expenses from those tax free expenses received before applying the Hope Credit to determine how much credit is available.\(^{153}\) This is true despite the fact that there may still be unmet expenses necessary to pay for college, such as room and board because the credit is not available for those expenses.

Furthermore, these programs lack vertical equity.\(^{154}\) High-income students need less assistance than low-income students. In order to create fairness, academically equal students should have the same opportunities to pursue higher education. Under the current financial aid system, students from middle and high-income classes have an advantage, financially. These students already have the advantage of family members with the financial ability to assist with college expenses. With these new tax credits, the high and middle income students have another resource designed to facilitate access to higher education. This is true despite the fact that high-income taxpayers have more ability to pay college expenses without governmental financial assistance. The current design of the tax education incentives offers the greatest benefit to affluent individuals, while the working poor would likely receive no benefit.\(^{155}\)

\(^{152}\) This is specifically addressing costs incurred at a public four-year institution of higher learning for low-income students. If considering attendance at a private college or university, the percentage of assistance is substantially less.


\(^{154}\) Vertical equity is the premise that people who are wealthier should pay more taxes to create fairness with respect to financial ability to pay.

\(^{155}\) See generally Andrew Pike, *No Wealthy Parent Left Behind: An Analysis of Tax*
To create vertical equity, more credits should be available to those persons in the lowest income bracket. This goal is attainable, without additional federal government expenditures, by reducing the amount available as a credit as the taxpayer’s income increases. By shifting a greater benefit to the lower income students, the final result yields a reduction in the overall cost of attendance.

Currently, with respect to these credits, all students are created equally and receive the same benefit. The students in the low-income population would have to analyze all financial aid available and how the different aid awards interrelate in order to determine which federal assistance would yield the best result. Applying for college and financial aid is confusing enough; an additional burden of deciphering the various financial aid options to low-income students is likely to deter them from making the inquiry.

Even if a taxpayer accepted the challenge of analyzing the different programs, more often than not, the Hope and Lifetime Learning Credits will likely fall short of providing the best financial assistance. The reason is because of the inherent disadvantage to low-income students of paying the tuition expenses upfront and receiving the financial benefit much later. In addition, the requirement of taxable income would obligate the student to bear the burden of holding at least one part-time job while attending college. These combined facts create a deterrent to pursue these credits, even if the end result yields a greater financial benefit.

These issues must be resolved in favor of making these credits more available. One suggestion is to simplify the process. By detaching the credits from the EFC for a student whose income falls at or below the poverty level, the student’s other assistance would not be diminished. Additionally, these credits should be available when no other tax free assistance is used by the student to provide for the same qualified expenses. Students should be allowed to take advantage of any federal tax-free assistance they qualify for, up to at least 75% of financial aid need, as it was designed in the Higher Education Act of 1965, to pay for necessary college expenses. In furtherance of this goal, both the Hope Credit and the Lifetime Learning Credit should be refundable credits only to students who qualify as low-income. Refundable credits are justified in this manner because they provide relatively larger benefits to lower-income families, who may bear more of the burden of income shocks or may be more likely to base their spending decisions on current, after-tax income.¹⁵⁶

Likely objections to using refundable credits in this way are the potential for fraud, administrative burden, and compliance costs.¹⁵⁷ “With respect to fraud, there is no reason in theory, and no empirical evidence in practice, why

---


¹⁵⁷. Id.
there should be a 'cliff effect' precisely at the point of positive income tax liability.\textsuperscript{158} The potential for fraud in this instance is more unlikely than other cases where refundable credits are allowed because of the ease of verifying enrollment and payment of qualified expenses. A legitimate concern is that offering refundable credits could increase administrative and compliance costs by creating incentives for individuals that are currently non-filers to begin filing.\textsuperscript{159} While such costs should be taken into account, they should not be overstated to justify a restriction to offer these credits as refundable credits.\textsuperscript{160} "Currently non-filers represent a relatively small share of the households who stand to gain from restructuring tax incentives into refundable credits."\textsuperscript{161}

These particular credits should qualify as refundable credits to provide a material incentive to pursue higher education in the form of a refund, albeit partial, for expenses previously paid. This statement is based on the presumption that a refund received as a result of paying college expenses in year one will be used to pay college expenses in year two. To permit this result would actually provide some conceivable legitimacy to the claim that this credit is available to low-income students and has beneficial effect.

\textbf{C. Coverdell Education Savings Account}\textsuperscript{162}

This untaxed trust account, previously known as Education Individual Retirement Account, was also established by the Taxpayer Relief Act of 1997. TRA'97 created this new tax favored education incentive provision for low and middle income parents.\textsuperscript{163} The purpose of the Education Savings Account was to provide an incentive for families to save money now for higher education expenses expected to occur in the future.\textsuperscript{164}

As originally enacted, contributions of $500 per year into this account were exempt from federal taxation and the account was owned by the child beneficiary as a trust account.\textsuperscript{165} The contribution level has increased to $2,000 per year per beneficiary and now ownership remains with the contributor parent until the child becomes 18 years of age.\textsuperscript{166} The parents are allowed to

\begin{itemize}
\item [\textsuperscript{158}] Id.
\item [\textsuperscript{159}] Id.
\item [\textsuperscript{160}] Id.
\item [\textsuperscript{161}] Id.
\item [\textsuperscript{163}] Id.
\item [\textsuperscript{164}] Supra note 133.
\item [\textsuperscript{165}] Id.
\item [\textsuperscript{166}] Economic Growth and Tax Relief Reconciliation Act of 2001, 26 U.S.C.A. §401, (P.L. 107-16) amended §530(b)(1)(A)(iii) by striking "$500" and inserting "$2,000". Once the limit was increased to two thousand dollars, the definition of education expenses was expanded to
contribute up to $2,000 for each beneficiary until that beneficiary becomes 18 years of age. When the beneficiary of the account becomes 18 years of age, the contributions must cease and ownership changes to the beneficiary. The funds in the account must be used by the beneficiary’s 30th birthday.167 If the named beneficiary does not attend college, the account can be rolled over to the account of a family member.168

As implemented, the interest earned on these accounts accumulates tax-free. This interest would never be subject to taxation unless the beneficiary withdraws an amount that exceeds qualified expenses during a taxable year.169 The excess amount would then be subject to federal income taxation and an additional 10% tax penalty.170

Contributions are phased out for taxpayers whose income range between $95,000 and $110,000 for taxpayers filing as single and between $190,000 and $220,000 for married taxpayers filing joint returns.171 Qualified institutions and qualified expenses include those previously discussed in with respect to Hope Credit and Lifetime Learning Credit.172 A noted distinction with this education incentive provision is the ability to cover room and board expenses if the student resides on campus.173

Some of the problems with the Coverdell are analogous to the problems previously discussed with Hope Credit and Lifetime Learning Credits. The fact that money must be saved in advance is certainly an impediment since the typical low-income families need every cent of money earned to pay basic living expenses. Anytime a person is faced with paying for food to eat and saving for a future benefit, the “choice” is really not a choice.

Other limitations of this provision can be found when evaluating it in conjunction with the Hope Credit and Lifetime Learning Credit. The Internal Revenue Code (the Code) specifically states the total higher education expenses shall be reduced when other benefits provided by Code Section 25A of the Internal Revenue Code have been used.174 The resulting problem lies in the coordination of benefits. The ability to use one program inhibits the ability to use other programs despite there still being unmet financial expenses.

include primary and secondary education.
171. Supra note 166.
172. Supra note 167 at (b)(2). Eligible expenses also include some expenses incurred in pursuit of elementary and secondary education for this credit.
D. Qualified Tuition Programs (Section 529 Plans)\(^{175}\)

Qualified Tuition Programs, previously known as the Qualified State Tuition Program, was established by the Taxpayer's Relief Act of 1997 for the purpose of providing an incentive for families who may not qualify for a great deal of financial aid assistance, but who cannot otherwise afford to pay for college outright, to save for college expenses.\(^{176}\) The Tax Reconciliation Act of 2001\(^{177}\) further expanded this provision to make it more flexible in application and further define limitations.\(^{178}\) The plan is actually divided into two sections, Section 529 Prepaid Savings Plan and Section 529 Savings Plan.\(^{179}\)

Both plans include room and board expenses up to a specified level (generally the school's posted room and board charge, or $2,500 per year for a student living off-campus and not at home) as qualified education expenses.\(^{180}\) Both plans can be used at public and private institutions, and both plans permit tax-free transfers from the beneficiary to a broader range of family members. The tax on earnings attributable to Section 529 Prepaid Plan and Section 529 Savings Plan is deferred until the earnings are distributed from the state tuition plan. If the distribution is used to pay for qualified expenses at an eligible institution, then the earnings may be tax-free.\(^{181}\) While these plans are very similar in qualifications and restrictions, and are often used interchangeably, the function and purpose of each plan dispels the notion that they are, in fact, interchangeable.

\(^{175}\) I.R.C. § 529 (2007). The plan is named after the formal name of the section of the Internal Revenue Code.

\(^{176}\) Supra note 133.

\(^{177}\) Supra note 166.

\(^{178}\) Id. As amended the act included, in part, programs established by a State or its agencies or by one or more eligible education institutions and allowed unused portions to rollover to another family member once during every twelve month period.


\(^{180}\) I.R.C. § 529 (e)(3) (2007). Qualified higher education expenses means tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution; and expenses for special needs services in the case of a special needs beneficiary which are incurred in connection with such enrollment or attendance and room and board expenses of those students who are enrolled at least half-time. This provision was amended by P.L. 207-16 § 901 providing for a sunset provision in the year 2010.

\(^{181}\) I.R.C. § 529(c)(3)(B) (2007). The earnings on the distributions are not taxable unless the amount distributed is greater than the beneficiary's expenses adjusted qualified education expenses. An adjusted qualified education expense is the total amount of qualified education expenses reduced by any tax-free education assistance, which includes but not limited to Pell grants, scholarships, fellowships and Veteran's education assistance. This reduction clearly creates a disincentive to low-income individuals and families to save money for college.
1. Section 529 Prepaid Savings Plan

The Prepaid Section 529 plans allow students to lock in future tuition rates at in-state public colleges at current prices and are usually guaranteed by the state. The prices are guaranteed by the state and receive favorable tax treatment because prepaid tuition plans are operated by state governments. Prepaid Section 529 plans increase in value at the same rate as tuition. Therefore, the award amount is equal to the amount of tuition prepaid. As a result, the plan works like a tuition insurance policy. The disadvantage of the prepaid plan is demonstrated in the lack of flexibility. The advantage of Prepaid Section 529 plans is to hedge against economic downturns where state governments are most likely to reduce funding for postsecondary schools causing universities to raise tuition to replace lost revenue.

In order for the prepaid plan to work in its most advantageous manner, the beneficiary of the plan must cooperate and attend a college or university within the state. If a beneficiary for whom the plan was established attends an out of state university, then a formula is used to establish how much to pay for tuition at that university. Therefore while the money saved within the plan will be helpful to reduce expenses, there is likely to be a remaining balance after the money in the plan is applied to the tuition.

2. Section 529 Savings Plan

The Section 529 Savings Plans are tax-exempt investment savings programs designed to encourage individuals to save for anticipated future education related expenses. The savings plan does not allow a lock on tuition rates as with the prepaid plan. Similar to any other investments, the funds invested in these plans are subject to market conditions, therefore the savings may not be sufficient to cover the entire college costs. On the other hand, because this method of saving is riskier it offers a greater chance of achieving higher returns on the investment. As with the prepaid plans the savings plans are operated by state governments and receive the same favorable

182. I.R.C. § 529(b)(1)(A) (2007) The money saved in the prepaid plans are usually exempt from state and local income taxes as well as federal income tax.
183. Id.
184. Id.
185. Id.
186. Id.
187. I.R.C. § 529(b)(6) (2007). At the inception the plans were tax-deferred, meaning the tax owed was held in abeyance until the beneficiary of the plan was eighteen years of age at which time the tax due upon each withdrawal was taxed at the beneficiary’s rate. The savings are now tax-free at both the state and federal levels. With a low impact on need-based financial aid eligibility, because they are treated as an asset of the account holder, instead of as a resource to the student.
tax treatment. Because this contribution plan is not limited to the tuition costs, as with the prepaid plan, federal law requires safeguards on Section 529 savings plans to prevent contributions in excess of those necessary for qualified higher education expenses. There are no phase-outs for the income level of the family and no age restrictions to contribute to this contribution based plan.

3. Impact of 529 Plans on Access to Education

The benefits of the 529 Prepaid and 529 Savings programs make it clear these programs are not designed to benefit low-income individuals and families. If there is any doubt, consider the income limitation to make contributions. There is none, not even as it relates to a percentage of one’s income. A wealthy person could easily take advantage of the savings plan by contributing a large sum of money, allowing the money to grow tax free, and the ultimate distributions would not be subject to Federal Income Taxation while used to fund a private university education. While there is no limitation on how many taxpayers may save for the prepaid and savings plans, clearly when the plans were formulated, the architects of the plans viewed middle and high-income students as the likely recipients.

Economic Growth Tax Relief Reconciliation Act of 2001 provided additional benefits to individuals taking advantage of all the aforementioned education incentive provisions. The first benefit relevant to this discussion is the ability to rollover the accumulated funds to another beneficiary. This provision allows a person who has money remaining in the account to transfer the money to another account to benefit another qualified beneficiary. The other benefit provided for by the Reconciliation Act is the ability to make distributions from the account to pay qualified expenses and the gains are never subject to federal income taxation.

An explanation of the potential windfall necessitates an inquiry into whether a societal benefit is derived from subsidizing a wealthy person’s education. Wealthy families have disposable income which allows them to take full advantage of the ability to contribute large amounts of money into an account.

188. Id. The contribution limit is set by the individual states and usually equates to seven years of postsecondary education, which includes graduate studies. The median contribution amount was $235,000.
189. Supra note 155.
190. The contributor would receive the most benefit by contributing $60,000 to cover a five year period. This amount and time represents the maximum annual gifts a donor can make without gift tax consequences.
191. See supra note 166.
192. Supra note 182. (Rollovers refer to transferring the assets into another person’s existing, or new qualified account without adverse tax consequences).
194. See supra note 188.
investment account to grow tax free for a number of years. It is imprudent education policy to lessen support to those families with the greatest financial need while providing much greater levels of support to those families with greater financial resources.

IV. HOW THE EDUCATION INCENTIVE PROVISIONS INTERRELATE WITH EACH OTHER AND OTHER HIGHER EDUCATION LEGISLATION

The programs discussed above tend to not interrelate to the advantage of the taxpayer, especially low-income taxpayers. For instance, we have seen that the Hope Scholarship and Lifetime Learning Credit have similar provisions and restrictions. We have also seen that current tuition fees and expenses at four-year public institutions currently average at least $6,000 per semester. Assuming a student within his or her first two years of college does not receive any other form of federal aid, if this student elects to take advantage of the Hope Scholarship, then he or she will not be eligible to elect the Lifetime Learning Credit, even if the Hope Scholarship does not pay all of the higher education expenses of attending school. In fact, if a taxpayer is claiming a Hope Scholarship for a student, none of that student’s expenses are usable to claim a Lifetime Learning Credit for that year.

The Section 529 Plans provide for a reduction in qualified expenses when the Hope Scholarship and Lifetime Learning Credit are claimed. If a low-income student were to choose the Hope Scholarship, because an individual taxpayer may not deduct more than $1,650 of tuition expenses from their taxes, they are burdened with the remaining education expenses without much relief. Consequently, the use of any of the education incentive provisions necessarily works to reduce the amount of funds available from the other federally subsidized programs.

Another factor which disadvantages low-income students in the pursuit of higher education is that the aid is in the form of a tax credit, so it is used to reduce the amount of taxes payable in a current year for expenses paid in a prior year. By providing current tax relief, presumably there is a greater ability to save. The intent of the Section 529 Plans and the Coverdell Savings Accounts was to increase savings by increasing after-tax returns. The intent

195. Id. As a consequence, wealthy persons are able to shift capital away from taxable investments and have the assets grow income tax free, and if set up properly could also avoid the gift tax as well as the estate tax. Discussions of the estate and gift tax issues related to this topic are beyond the scope of this Article.

196. Id.


of the need-based system is to give less aid to those with higher assets. These purposes are not in direct conflict but clearly are at odds. The savings programs are designed to provide a subsidy to create an incentive. The need based system is designed to provide assistance to someone who lacks the ability and might not ever have the ability to save and pay his or her own college expenses. One set of rules applied to students who are not similarly situated clearly will not result in equal opportunities to access higher education. Reducing Pell Grants and shifting resources to savings type plans creates an advantage to middle and high-income families, at the expense of lower income families.

B. Impact of Recent Legislation

With the passage of Higher Education Reconciliation Act (HERA) of 2005 the federal government addressed the crises of rising tuition costs leading to lack of access to college for low-income students. While appearing to address the rising cost of education and the issue of access to higher education for low-income students, the government took advantage of the opportunity to ensure college access for middle and high-income students. By eliminating Section 529 Plans as well as Coverdell savings accounts, as an asset of the student in determining the cost of attendance, the student’s EFC is reduced. By reducing the EFC of the families using the education incentive provisions, the student will have a greater ability to qualify for need based aid, such as the Pell Grant. The natural assumption is such a provision will certainly be helpful for low-income students; however, low-income families are not the typical taxpayers who have the ability to take advantage of these education savings plans. Therefore, in addition to the education incentive provisions, the middle and high-income students have a greater ability to qualify for other federal financial aid. In addition, the Section 529 Plans and Coverdell savings accounts were scheduled to expire on December 31, 2010. With the passage of the Pension Protection Act of 2006 the tax-free distributions were made permanent. After 2006, middle and high-income students will continue to receive federal subsidies to support their access to higher education.

When the Higher Education Access Act of 2007 (HEAA 2007) passed the House and the Senate, in an apparent statement of victory, the Chairman of

200. Id.
203. THE COLLEGE BOARD, TRENDS IN STUDENT AID 25 (2006). About 54% of the benefits of the education tax credits inure to families whose adjusted gross incomes are between $50,000 and $100,000. About 11% of the benefits of these credits inure to families whose adjusted gross incomes are below $25,000.
206. Supra note 202.
the Committee on Education and Labor, George Miller, stated,

Today is a momentous day for students and families struggling to pay for college. This bill will help ensure that no qualified student is prevented from going to college because of the cost. With the College Cost Reduction and Access Act signed into law, millions of students will receive much needed help to pay for college.\textsuperscript{207}

It was, however, predictable that the measure implemented would fall short of actually making that access available to students in the lowest income class. One purpose of the HEAA 2007 was to amend and extend the Higher Education Act of 1965.\textsuperscript{208} The federal government made specific authorizations to increase grants to low-income students.\textsuperscript{209} However, HEAA 2007 does not make specifications for a minimum percentage of coverage to address the problems with inflation and tuition increases. Instead, the maximum Pell Grant award is slated to increase from the $4,310 in 2007 to $5,400 by 2012.\textsuperscript{210} This increase amounts to approximately $200 per year for the next five years. As previously discussed, historically, inflation and tuition increases have occurred at a much higher rate.

The current provisions of HEAA 2007 do not provide enough assistance to students attempting to gain access to higher education. The primary focus of the HEAA 2007 deals with student loans and repayment terms to lenders.\textsuperscript{211} HEAA 2007 overlooks the fact that repayment assistance occurs after the higher education has been achieved. Because student loans encumber low-income individuals, any assistance to make such loans more affordable is a welcomed step, but the crisis regarding access should not be overlooked or neglected because other favorable provisions have been made and low-income individuals might receive a tenuous benefit.

\textbf{C. Policy Recommendations}

In order to provide meaningful access to low-income students, HEAA 2007 should have provisions that encourage matriculation and retention. One such suggestion is to shift subsidies to public universities that promote programs specifically designed to pay for the low-income student’s higher education. While this may seem an insurmountable task, Harvard University has implemented an initiative designed to encourage talented students from families of low and moderate income to attend.\textsuperscript{212} The Harvard plan offers a

\textsuperscript{208} H.R. 5, 110\textsuperscript{th} Cong. (1st Sess. 2007).
\textsuperscript{209} See supra note 203.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Harvard Expands Financial Aid For Low- and Middle-Income Families, HARVARD
program whereby any student whose parents earned less than $60,000 in the previous year may receive an education, at no expense.\footnote{213} The Harvard model financed this endeavor by earmarking funds to finance the project.\footnote{214} Another model was implemented by Yale University to reduce or eliminate costs of education to low-income families. Under the Yale model, similar to the Harvard model, any student whose parents earned less than $60,000 in the previous year would receive an education at no expense.\footnote{215} By implementing these initiatives, both Harvard and Yale have demonstrated that making access to education for low-income students is important and achievable.

The efforts at Harvard and Yale Universities are commendable and should be emulated. Nevertheless, these aforementioned programs will impact only a small percentage of the low-income population. The vast majority of low-income students do not attend elite private universities; they attend public colleges and universities.\footnote{216} Until the public colleges and universities have an incentive to implement such initiatives, the vast majority of the low-income population will not have fair access to higher education. Because the vast majority of low-income students will likely attend public universities, it probably is not feasible to have the same policies as the Harvard or Yale model.

A suggestion to model such programs is to provide assistance that calculates a minimum percentage of financial aid for students who are living at or below the poverty line. By providing for a minimum percentage of financial aid, the formula would automatically adjust as the cost of education increases. Financial assistance alone, in the form of increased Pell Grants by an arbitrary amount, will not be sufficient to address the unmet need as tuition and other expenses continue to soar.

By conditioning specific federal subsidies to promote specific programs, the federal government would promote access to education by providing clear direction to state colleges and universities, that making higher education available to everyone is a priority. With elite universities paving the way, there is really no good reason why state colleges and universities cannot promote

\footnote{213. Id. (The $60,000 threshold represents a $20,000 adjustment from the 2004 implementation threshold.)}

\footnote{214. Harvard Announces New Initiative Aimed At Economic Barriers To College, HARVARD UNIVERSITY GAZETTE (March 30, 2006), available at http://www.hno.harvard.edu/gazette/daily/0402/28-finaid.html. (The Harvard initiative has other excellent features but for purposes of this Article, the author will limit the recommendation to the financial analysis. The author acknowledges the other features are certainly invaluable in preparing and assisting low-income in the pursuit of higher education).}


initiatives that have a similar impact.

V. IMPACT OF WELFARE REFORM ON ACCESS TO HIGHER EDUCATION

Another relevant provision that directly impacted access to higher education, despite the fact that the Act never mentioned higher education specifically, was the Welfare Reform Bill of 1996 (Welfare to Work Act). The relevant portions of the Act set a time limit on entitlements to receive welfare, and cash assistance to welfare recipients. The Act also required most welfare recipients to engage in job activities, including work experience, community service, job training, and vocational education for a minimum of twenty-five hours per week. These provisions are relevant to this discussion about access to higher education because if a welfare recipient were enrolled in college full time during the time in which this bill became law, then he or she would be required to secure a job in order to continue to remain eligible to receive welfare assistance.

As a result of the employment requirement under the Welfare to Work Act, the student would likely be required to reduce credit hours to part-time status which would result in a longer period of time for degree completion. This is a counterproductive result because having a college degree is more likely to afford the opportunity to emerge from poverty and out of the welfare system permanently than gaining temporary employment for the purpose of satisfying a work requirement. Did the federal government really intend to promote liberation from welfare or was this another way to deny low-income families the access to education in order to keep them in poverty?

There has been an absence of public acknowledgement of the adverse impact of this law as it applied to welfare recipients who were enrolled, or who wanted to enroll, in a college or other degree seeking program because our society tends to view welfare recipients as the enemy draining the financial resources of the working Americans. The following quote amply illustrates the message:

Legitimate complaints – for safety, legal rights, and access to higher education that allow a life without poverty (and abuse), are not accorded to welfare mothers, simply because their poverty is proof that they

---

218. Id.
219. VIVIAN C. ADAIR & SANDRA L. DAHLBERG, RECLAIMING CLASS: WOMEN, POVERTY, AND THE PROMISE OF HIGHER EDUCATION IN AMERICA 12 (2003). The general public tends to presume three general assumptions as true when considering policy reform for welfare recipients: (1) the general welfare recipient does not want to work; (2) the recipient is receiving an enormous amount of money at a great cost to society; and (3) the recipient wants to remain on welfare for as long as possible.
rejected marriage and middle-class values.\textsuperscript{220}

The general public tends to support the idea that welfare recipients should be required to work, because the general public tends to not have a true understanding of what it takes to liberate oneself from the welfare system permanently. It is unreasonable to believe that working for minimum wage while trying to provide for a family is a meaningful way to emerge from poverty. Equally unreasonable is the assumption that welfare recipients choose to remain in poverty.

As previously stated, obtaining higher education is crucial to determining whether a person will emerge from poverty, because it is such a critical factor in determining whether a person will gain meaningful employment. In order to be successful in most higher education endeavors, the individual seeking the higher education opportunity must make the educational experience a high priority. If a low-income student is required to work to receive assistance to obtain some of the basic necessities of life, then he or she will necessarily place a greater emphasis on the ability to provide for himself or herself and/or his or her family at the expense of the educational experience. In addition, by reducing credit hours to part-time student status, the student’s path toward a degree will necessarily take longer, increasing the likelihood that the student may not graduate.

\textit{B. Policy Recommendations}

While a student is not required to enroll at least half-time to qualify for a Pell Grant, the percentage of Pell Grant amount he or she is eligible for will be reduced if he or she does decide to enroll less than half-time. While the overall expenses may be less because the student is enrolled for less than half-time, once the student loses the Federal Pell Grant amount, there is no other form of financial aid, which does not require repayment, to replace the lost grant amount. By attending college on a part-time basis, the time necessary to complete requirements to graduate is necessarily increased, and the incidental expenses, in turn, are likely to increase, making this option more expensive over time. For that reason, the requirement to work to qualify for welfare may have the anomalous effect of making it substantially less likely that a recipient will complete his or her degree.

If the goal is to motivate low-income individuals to work in order to emerge from poverty, then initiatives must make the pursuit of a postsecondary education a priority. The government (both federal and state) must be willing to make the investment financially and support the premise with legislation. Specific ways to make the investment, from a financially sound position, would be to permit participating in a degree seeking program to satisfy the welfare

\textsuperscript{220} \textit{Id.}
work requirement.\footnote{221 THOMAS KARIER, THE LEVY ECONOMICS INSTITUTE OF BARD COLLEGE WELFARE COLLEGE STUDENTS: MEASURING THE IMPACT OF WELFARE REFORM (Policy Note 2000/3), http://www.levy.org/pubs/pn/pm00_3.pdf.} A more constructive method of addressing the balance between liberating individuals from the welfare system and ensuring access to higher education is allowing welfare recipients, while enrolled at least half-time in a higher education program, to satisfy the work requirement or engaging in job activities, by earning academic credit.

VI. CONCLUSION

As stated earlier, the impetus of the education incentive provisions of the Taxpayer Relief Act of 1997 was to provide the opportunity of a college education to low-income families. Since the inception of the Taxpayer Relief Act, the government has favored using the tax code to provided financial assistance through tax credits, deductions, and federally subsidized loans over Pell Grants.

The education incentive provisions of the Taxpayer Relief Act of 1997 have failed to achieve the intended goals. The design flaw of having the relief provided in the form of tax credits and the manner in which the credits are designed make them inaccessible by low-income students. In order to obtain the benefit of a tax credit, the low-income student would need enough taxable income that would amount to more than the standard deduction because these tax credits are nonrefundable. Consequently, the typical low-income student taxpayer would not qualify to receive the benefit of these tax credits.

An inherent flaw in the Hope Credit and Lifetime Learning Credit, as they relate to providing access to education for low-income students are in the requirement to pay the money upfront and receive relief when you file your annual income tax return the following year. The programs are further flawed by the limited amount of money available for the credit. Even if low-income students managed to secure a job that produced taxable income, the requirement to pay the fees upfront, coupled with the fact that these credits are nonrefundable, would tend to prevent these students from taking advantage of this opportunity. This is so because low-income individuals are less likely to generate enough taxable income to take advantage of the credit because they tend to not have a tax liability or the tax liability is insufficient to take advantage of these credits.

If the desire is to ensure these students are serious about obtaining higher education, and to be sure the subsidies are, in fact, used to pay for education expenses, then these credits should be refundable for persons in the lowest income tax brackets, once proof of payment is submitted. If these credits were refundable, these credits would provide direct financial support for education
expenses that were previously paid, by low-income students. The allowance of a refundable credit provides assistance to those who truly had to make a sacrifice to pay for college and facilitates the goal that persons in the lowest income levels have a better opportunity to pursue higher education.

The education incentive provisions lack vertical equity. The lack of vertical equity is made apparent by the fact that the same credit amounts are available to low-income taxpayers and high-income taxpayers. This is so despite the fact that high-income taxpayers have more ability to pay for their education. More credits should be available to those persons in the lowest income bracket. This goal is attainable by reducing the credit amount as the taxpayer's income increases. Those persons in the higher tax bracket should have a smaller amount available as a credit than persons in the lower income tax bracket. By implementing this model, the federal government, without making additional expenditures, could shift current credits to the lower income student by increasing the amount of credit available to them and reducing the amount of credit provided to the higher income students. This model of taxation, providing more relief at the lower level and less relief at higher level, make the system fairer and again, provides more assistance to the students who need it most. This recommendation works in conjunction with the recommendation to make the credits refundable to low-income individuals and families.

The low-income families have the least ability to save. In order to encourage savings, the government should provide an incentive to save by providing matching funds up to a certain amount or certain percentage for those students in the lowest income bracket. By providing this additional resource the scales become more balanced because there are more resources provided to low-income taxpayers and there is a direct benefit and incentive to make the sacrifice to save for college (aside from the benefit of attending college).

Another recommendation is that the federal government should require the state schools to implement a policy to develop programs to assist low-income students with the quest to remain in college and graduate as a condition for receiving federal subsidies. State colleges and universities should certainly model the Harvard and Yale University plans to make higher education more affordable to low-income students. One other way for states to facilitate this goal is to consider tuition freezes or tuition increases capped at 2% for those individuals in the low-income tax brackets during times of tuition increases.

As previously discussed, states tend to have the steepest increases in tuition during times of economic recession. While respecting that the primary concern of the states during a recession is raising money, we are remiss as a society if we forget that the overall objective is to make higher education at least available for low-income taxpayers. In order to facilitate this goal, there must be mechanisms in place to ensure that, once enrolled; finances are not the reason a person would not ultimately graduate from an institution of higher
education. The problem becomes magnified when there are multiple members of a family enrolled in higher education simultaneously. Such circumstances make it particularly difficult for a family to afford the tuition increases when they are probably already operating in a deficit. The tuition freezes will prevent those students from being forced out of school and will bring them closer to becoming a tax paying member of society.

United States Congressional policy has made a good effort towards making access to higher education available to low-income students. Now is the time to evaluate the current programs and make improvements that will actually bring us closer to achieving the goal of making higher education more accessible for low-income students. Few would debate the point that the positive effects of education are cumulative. Education not only benefits the individual who receives it, but also the individual’s family, community and society at large. Society will receive an indirect benefit because those persons will become productive members of society, breaking the cycle of poverty. “Think about it: Every educated person is not rich, but almost every education person has a job and a way out of poverty. So education is a fundamental solution to poverty.”

---