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## Public or Private University - New Legislation Caps Veterans' Educational Choices That Could Cost Less.

Whitney Howe

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**PUBLIC OR PRIVATE UNIVERSITY? NEW LEGISLATION  
CAPS VETERANS' EDUCATIONAL CHOICES THAT  
COULD COST LESS**

**WHITNEY HOWE\***

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\* St. Mary's University School of Law, Candidate for J.D., May 2013; The University of Texas at San Antonio, B.A. Criminal Justice *magna cum laude*, 2009. The author was also affected by Post-9/11 Veterans Educational Assistance Improvements Act of 2010, which inspired her to write this Comment with the hope of giving a voice to all similarly situated GI Bill beneficiaries. The author would like to thank the following individuals, who helped make this Comment possible: Mr. Jason Hebert and Mrs. Jennifer Zarka, who selflessly provided their stories; the Volume 14 Editorial Board and Staff of *The Scholar: St. Mary's Law Review on Minority Issues*, with special thanks to her *Scholar* Comment Advisor, Chris Konneker, for his thoughtful insight and guidance; her parents, Jim and Jean Howe, for their unconditional love and encouragement; and, finally, her friends and loved ones who willingly read multiple drafts and entertained many conversations about the topic.

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I. INTRODUCTION

Long live the GI Bill of Rights!<sup>1</sup>

Promoted as “one of the most significant pieces of legislation ever produced by the federal government,”<sup>2</sup> the GI Bill affords hundreds of thousands of active duty service members, veterans, or their beneficiaries the opportunity to obtain an education, a better job, and helps to boost the economy every year. In fact, those were the objectives advanced for the creation of the very first GI Bill in 1944,<sup>3</sup> and they still ring true today. Now, more than ever, veterans are depending on the GI Bill to make a better life for themselves and their families after years of service to our great nation.

Millions of people have been drawn to service in the U.S. military because of GI Bill benefits.<sup>4</sup> In 2010, 680,118 active duty service members, veterans, or their beneficiaries were using the GI Bill at thousands of

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1. DENNIS W. JOHNSON, *THE LAWS THAT SHAPED AMERICA: FIFTEEN ACTS OF CONGRESS AND THEIR LASTING IMPACT* 202 (2009) (quoting Clark Kerr, Pres. Emeritus, Univ. of Cal.).

2. See JOHNSON, *supra* note 1 (acknowledging that this view was held by social scientists, educators, and historians, to name a few); R.B. Pitkin, *How the First GI Bill Was Written: Part I*, AM. LEGION MAG., Jan. 1969, at 24, 24 (pointing out that never before had there been “a law to help all veterans get back on their feet”); *The GI Bill’s History—Born of Controversy: The GI Bill of Rights*, DEP’T OF VET. AFF., [http://www.gibill.va.gov/benefits/history\\_timeline/index.html](http://www.gibill.va.gov/benefits/history_timeline/index.html) (last updated Feb. 9, 2012) (noting that the GI Bill had social, economic, and political impacts on the United States). Furthermore, nothing had ever been done to help service members whose lives had been uprooted by war to readjust to civilian life *immediately* upon discharge. Pitkin, *supra*. This was something the American Legion believed every war had proven was needed. *Id.*

3. Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-268, tit. II, ch. IV, 58 Stat. 284, 287.

4. *Federal Education Benefits*, AM. LEGION, <http://www.legion.org/mygibill/federalbenefits> (last visited Mar. 17, 2012).

colleges and universities nationwide.<sup>5</sup> Mr. Jason Hebert and Mrs. Jennifer Zarka were just two of those 680,118, and in the spring semester of 2011 they were faced with a situation that neither of them had ever dreamed of nor were, they adequately prepared to deal with. They were both in their second semester of law school at St. Mary's University School of Law in San Antonio, Texas. They both proudly and selflessly served the United States of America for many years on active duty service or by supporting a spouse who was, and they both were using the GI Bill to pay their tuition and fees. Additionally, Mr. Hebert and Mrs. Zarka were confronted with a very difficult and unexpected decision that was due to recent legislative changes to the way the GI Bill applied to students attending private schools. They had to decide whether to switch to a public, state-funded law school in order to remain unaffected by the legislative changes, or continue at St. Mary's University School of Law, a private university, and somehow come up the difference between the GI Bill's new tuition cap and the cost of continuing their legal education, or discontinue their legal education all together.

Mr. Jason Hebert, a six-year Air Force veteran who served in both Operation Iraqi Freedom and Operation Enduring Freedom had dreamed of becoming a lawyer even before he separated from active duty.<sup>6</sup> Mr. Hebert enlisted in the Air Force in January 2001 and regularly worked fourteen-hour shifts, six days a week as a military policeman.<sup>7</sup> After the attacks of September 11, 2001, Mr. Hebert deployed to both Qatar and Saudi Arabia, was later trained as a hostage negotiator, and became part of his military base's Hostage Negotiations Team.<sup>8</sup> For his selfless efforts

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5. VETERANS BENEFITS ADMIN., U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT FISCAL YEAR 2010, at 32 (n.d.), available at [http://www.vba.va.gov/REPORTS/abr/2010\\_abr.pdf](http://www.vba.va.gov/REPORTS/abr/2010_abr.pdf) [hereinafter ANNUAL BENEFITS REPORT]. There were approximately 800,369 individuals trained across all programs sponsored by the VA in fiscal year 2010. *Id.* Of those, 247,105 were Montgomery GI Bill beneficiaries, 365,640 were Post-9/11 GI Bill beneficiaries, and 67,373 were Montgomery GI Bill Selected Reserve beneficiaries. *Id.* The remaining individuals were using programs such as Dependents' Educational Assistance, Post-Vietnam Era Veterans Educational Assistance Program, and the Reserve Educational Assistance Program. *Id.*

6. Interview with Jason Hebert, Juris Doctor Candidate, St. Mary's Univ. Sch. of Law, in San Antonio, Tex. (Sept. 20, 2011) (on file with *The Scholar: St Mary's Law Review on Minority Issues*) [hereinafter Hebert Interview].

7. *Id.* At the time, Mr. Hebert was an Airman First Class and worked elite gate guard duty. *Id.* He typically worked six days on duty, with three days off. *Id.* A typical day included reporting ninety minutes early for his shift in order to retrieve his weapon from the armory as well as attending a daily briefing regarding security threat levels and any ongoing activity from the shift of policemen he was replacing. *Id.* After his twelve-hour shift was complete, he would return his weapon to the armory and brief the oncoming shift.

8. *Id.* During his deployment to Qatar, Mr. Hebert regularly worked night shift, guarding the perimeter of the military installation from insurgent attacks. *Id.* While in

in protecting our country's safety, Mr. Hebert was prestigiously recognized twice as the Security Forces Staff Level Airman of the Year for his major command, and earned both an Achievement Medal and a Commendation Medal.<sup>9</sup>

Throughout his demanding daily schedule and multiple deployments, Mr. Hebert still found time to pursue his education, and ultimately his dream of becoming a lawyer.<sup>10</sup> He took classes four nights a week after his excruciatingly long shifts and even attended classes on Saturdays as well.<sup>11</sup> Mr. Hebert finished his undergraduate degree in 2007, separated from the military and very seriously considered applying to law school.<sup>12</sup> However, at the time, the Montgomery GI Bill benefits were not enough to cover the cost of law school, and after months of trying to work out the financial details, he began working on his master's degree in public administration instead.<sup>13</sup>

The day Mr. Hebert learned that the Post-9/11 GI Bill had been implemented and that he would finally be able to use his well-earned education benefits to pay for law school, he registered for the Law School Admissions Test.<sup>14</sup> He was accepted into the class of 2013 at St. Mary's University School of Law, quit his civilian job, and enjoyed an extremely successful first semester of law school.<sup>15</sup> At that time, Mr. Hebert and his wife were expecting their first child and depended on the Post-9/11 GI Bill to pay for his tuition and fees, as well as support their growing family on a day-to-day basis.<sup>16</sup>

In the spring of 2011, Mr. Hebert received a letter from the Department of Veterans Affairs stating that on January 4, 2010 President Obama

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Saudi Arabia, he served on the Protective Service Detail for the U.S. Embassy and provided security for high-profile personnel in transit to other locations. *Id.* Mr. Hebert served over 250 security missions and safely transported more than one thousand personnel. *Id.*

9. *Id.* The Security Forces Staff Level Airman of the Year for Air Education and Training Command is among the most prestigious levels of recognition one can be awarded in a Major Command, and Mr. Hebert was twice recognized as such. *Id.*

10. *Id.*

11. Hebert Interview, *supra* note 6. Mr. Hebert ultimately obtained his Bachelor's degree from Wayland Baptist University in June 2001. *Id.*

12. *Id.* At the time, Mr. Hebert was working in the Report & Analysis section as a magistrate court liaison where he assisted Special Assistant U.S. Attorneys with trial preparations. *Id.* He credits them as his mentors who motivated him and convinced him to pursue his dream of attending law school. *Id.*

13. *Id.* Mr. Hebert notes that the Montgomery GI Bill was not enough to cover the cost of law school, nor did the Bill provide any allowances for living expenses.

14. *Id.*

15. *Id.* Mr. Hebert quit his job as a YA-02, or GS-11 equivalent. *Id.* He was also on St. Mary's University School of Law's Deans List for the spring 2011 semester. *Id.*

16. Hebert Interview, *supra* note 6.

had signed the Post-9/11 Veterans Educational Assistance Improvements Act of 2010 (hereinafter Post-9/11 Veterans Educational Assistance Improvements Act).<sup>17</sup> The letter stated that the act effectively limited the maximum tuition and fee payments paid to students attending private and foreign schools to \$17,500 annually.<sup>18</sup> As St. Mary's University School of Law costs approximately \$29,000 annually for full-time enrollment, and approximately \$17,000 annually for part-time enrollment,<sup>19</sup> Mr. Hebert immediately became concerned that he would either have to apply to transfer to a public law school, finance the difference between the \$17,500 limit and the cost of tuition, or discontinue his legal education.

When he learned of the \$17,500 tuition cap that was to be implemented in August 2011, he was angry and felt a deep sense of betrayal.<sup>20</sup> He had left a great job to pursue his dream, and put his faith in the government that it would see him through his endeavors, especially after his years of service to the country.<sup>21</sup> Feeling as if the rug had been pulled from underneath him, he realized how the Post-9/11 Veterans Educational Assistance Improvements Act would affect him and struggled with the decision with which he was now confronted.<sup>22</sup>

However, Mr. Hebert's story is not unique. Mrs. Jennifer Zarka, also a law student at St. Mary's, found herself in the same situation as Mr. Hebert. Mrs. Zarka is the dependent spouse of an active duty U.S. Air

17. Letter from Dep't of Veterans Affairs, to Jason Hebert, Juris Doctor Candidate, St. Mary's Univ. Sch. of Law (Feb. 23, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter Hebert Letter]. See generally, Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 111-377, 124 Stat. 4106 (amending "title 38, United States Code, to improve educational assistance for veterans who served in the Armed Forces after September 11, 2001, and for other purposes").

18. Post-9/11 Veterans Educational Assistance Improvements Act of 2010, sec. 103, §3313(e); Hebert Letter, *supra* note 17. The letter briefly discussed the tuition cap by noting that "[t]uition and fee payments are simplified for those attending public schools, and a national yearly maximum is created for those enrolled in private or foreign schools (effective August 1, 2011)." Hebert Letter, *supra* note 17. The letter also helpfully pointed out that "[i]ndividual state caps are removed; all net public in-state charges are covered," and that the Yellow Ribbon Program could be used to pay tuition and fee costs in excess of the cap. *Id.*

19. *Law School Budget Fall 2011/Spring 2012*, ST. MARY'S UNIV., <http://www.stmarytx.edu/law/index.php?site=stMarysLawTuitionFees> (last visited Mar. 27, 2011) [hereinafter *Law School Budget*]. The costs listed were for tuition, and the law school estimates that the *total* cost of attendance, including costs such as transportation, housing, etc., range from nearly \$47,000 for full-time enrollment to nearly \$35,000 for part-time enrollment. *Id.*

20. Hebert Interview, *supra* note 6.

21. *Id.*

22. *Id.*

Force officer.<sup>23</sup> Mrs. Zarka's husband transferred his Post-9/11 GI Bill benefits to her in early 2010 so that she could attend law school, her life-long dream.<sup>24</sup> They made this important decision together, as Mrs. Zarka quit her job to attend law school and Lt. Col. Zarka would incur an additional month of active duty service commitment for every month of GI Bill benefits Mrs. Zarka used.<sup>25</sup> Additionally, Lt. Col. and Mrs. Zarka estimated that the out-of-pocket expenses they would incur as a result of Mrs. Zarka's law school endeavors would cost them approximately \$1,200 to \$2,000 annually because the Post-9/11 GI Bill did not provide a book stipend for spouses of active duty sponsors.<sup>26</sup>

Furthermore, Mrs. Zarka's choice of universities was strictly limited to St. Mary's because her husband was stationed at Lackland Air Force Base in San Antonio, Texas.<sup>27</sup> In order to attend a public law school and escape the \$17,500 tuition cap placed on private schools, Mrs. Zarka would have had to move to another city, away from her husband and their home in San Antonio.<sup>28</sup> Not only would this have split up her military family during a time of war, but it would also have imposed a tremendous financial burden on them, if they chose to support two households instead of one.<sup>29</sup>

Mrs. Zarka also enjoyed a successful first semester of law school during which the Post-9/11 GI Bill paid for all of her tuition and some of the

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23. Video: Interview with Jennifer Zarka, Juris Doctor Candidate, St. Mary's Univ. Sch. of Law, in San Antonio, Tex. (Sept. 9, 2011) (on file with *The Scholar*, *St. Mary's Law Review on Minority Issues*) [hereinafter Zarka Interview]. Mrs. Zarka's husband, Lieutenant Colonel (Lt. Col.) Zarka, is a pediatric radiologist in the U.S. Air Force. *Id.* Lt. Col. Zarka has been a proud member of the U.S. Air Force since 1993. *Id.*

24. *Id.* When Lt. Col. Zarka first discovered that he could transfer his GI Bill benefits to Mrs. Zarka, he forwarded an email to her concerning the possibility of transferring his education benefits, with a note that simply asked "Law school?" *Id.*

25. *Id.* In fact, Mr. Zarka will incur an additional three years of active duty service commitment because he transferred the entirety of his GI Bill benefits to Mrs. Zarka. *Id.*

26. *Id.* Lt. Col. and Mrs. Zarka determined this amount would pay for Mrs. Zarka's textbooks and supplies during each academic year. *Id.* Spouses of active duty sponsors are not eligible to receive either the \$1,000 annual book stipend or the monthly housing allowance. *Transfer of Post-9/11 GI Bill Benefits to Dependents (TEB)*, DEP'T OF VET. AFF., [http://www.gibill.va.gov/benefits/post\\_911\\_gibill/transfer\\_of\\_benefits.html](http://www.gibill.va.gov/benefits/post_911_gibill/transfer_of_benefits.html) (last visited Mar. 27, 2011). Interestingly, children of active duty sponsors are eligible to receive the \$1,000 annual book stipend. *Id.*

27. Zarka Interview, *supra* note 23. Because Lt. Col. Zarka is a pediatric radiologist, there are only two places in the entire U.S. Air Force where he can be stationed. He can either be stationed at Lackland AFB, Texas or at Travis AFB, California.

28. *Id.*

29. *Id.*

associated fees.<sup>30</sup> However, in the spring semester of 2011 she learned of the tuition cap placed on private universities by the Post-9/11 Veterans Educational Assistance Improvements Act through other students at her law school.<sup>31</sup> She never received any notification of the legislative changes to the Post-9/11 GI Bill,<sup>32</sup> whereas other students were notified via letter sent by the Department of Veterans Affairs.<sup>33</sup> She stated that her “heart sank” upon learning of the changes because Mrs. Zarka thought she would either have to discontinue her legal education or incur a large amount of debt to continue law school.<sup>34</sup> Furthermore, Mrs. Zarka pointed out that at the time, the Yellow Ribbon Program was not available to her because she was a dependent spouse of an active duty service member.<sup>35</sup>

After some inquiry into changes, Mrs. Zarka discovered that there was a bipartisan bill on the floor of the House of Representatives called the Restoring GI Bill Fairness Act of 2011, (hereinafter Restoring GI Bill Fairness Act), which would essentially remove the tuition cap and “grandfather-in” students already enrolled in programs at private universities.<sup>36</sup> Mr. Hebert and Mrs. Zarka responded to the legislative changes the only way they knew how. They spent months writing letters and rallying friends and family to write letters and make phone calls to U.S. Senators and Representatives, encouraging them to vote in favor of the

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30. *Id.* Mrs. Zarka points out that she paid less than \$1,600 out of her own pocket for tuition, fees, books, and supplies during her first year of law school in 2010–2011 because the post-9/11 GI Bill paid for the substantial majority of her tuition and fees. *Id.*

31. *Id.* When Mrs. Zarka initially learned of the planned changes to her GI Bill benefits, her husband was deployed to Afghanistan in support of the war. *Id.*

32. Zarka Interview, *supra* note 23. Upon hearing about the legislative changes to the GI Bill from other students, Mrs. Zarka was forced to conduct her own inquiry into the issue in order to learn about the changes. *Id.*

33. See Letter from Dep’t of Veterans Affairs to author (Feb. 23, 2011) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (referencing the impending educational benefit changes due to the post-9/11 Veterans Educational Assistance Act of 2010).

34. Zarka Interview, *supra* note 23. Mrs. Zarka points out that she felt the implementation of the \$17,500 cap was not what she and her husband had signed up for, nor were the changes to the GI Bill what they had anticipated, especially when Lt. Col. Zarka would incur three additional years of active duty service commitment. *Id.*

35. *Id.* She also remarks that there is a substantial difference between the amount—\$1,200 to \$2,000—she expected to pay per year for law school and the approximately \$15,000 per year that she would be required to pay after the tuition cap was implemented. *Id.*

36. *Id.*



Restoring GI Bill Fairness Act.<sup>37</sup> Fortunately, the act was signed into law on August 3, 2011.<sup>38</sup>

Although the Restoring GI Bill Fairness Act has resolved Mr. Hebert's and Mrs. Zarka's quandary by removing the tuition cap for students already enrolled in programs at private universities before January 1, 2011, the \$17,500 limit continues to pose a problem for active duty service members, veterans, and their beneficiaries who entered programs at private universities after that date. Unfairly, the cap *only* applies to those who pursue education at a private or foreign university, regardless of whether they are undergraduate, graduate, or post-graduate students.

This Comment begins by focusing on the history of the GI Bill as it was initially introduced in 1944, followed by its transitions into the Korean and Vietnam War Era GI Bills, the Veterans Educational Assistance Program, the Montgomery GI Bill in 1984 and the Post-9/11 GI Bill in 2008. Next, this Comment briefly addresses the Yellow Ribbon Program, followed by a discussion of the changes implemented by the Post-9/11 Veterans Educational Assistance Improvements Act, including the disparity between the amounts of educational assistance provided to students attending public or private universities, and the reasoning behind the legislation. Next, this Comment discusses the Restoring GI Bill Fairness Act of 2011, which effectively removes the \$17,500 tuition cap for some students enrolled in programs at private universities, but leaves the limit in place for others.

Part III examines the constitutionality of the \$17,500 tuition limit from an Equal Protection standpoint. In doing so, this Comment will evaluate the classifications created by the legislation, determine the level of scrutiny to which the relevant provisions of the Post-9/11 Veterans Educational Improvements Act should be subjected, and argue that the legislation does not pass even the rational basis test. Parts IV and V of this Comment further argues that the tuition cap is harmful to veterans and illogical because it is totally inconsistent with and contrary to the original and continuing legislative intent of the GI Bill. Furthermore, in

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37. *Id.* In these letters, they asked their representatives and friends to seriously consider the situation and the effects of the legislation. *Id.* Mrs. Zarka comments that she knows of at least sixteen of her friends and family members who wrote letters to elected officials and only one person received a personalized response. *Id.* She notes that she only received form letters in response to the emails and letters she composed. *Id.* Ironically, these form letters mostly explained the changes to the GI Bill and touted the benefits of the new changes, but did not acknowledge the \$17,500 tuition cap. *Id.* I also wrote letters to government representatives. Most of the responses I received were also form letters and acknowledged that the elected official had voted for the very changes that would be detrimental to continuing my educational endeavors.

38. Restoring GI Bill Fairness Act of 2011, Pub. L. No. 112-26, 125 Stat. 268, 269.

Part VI, this Comment points out several different ways in which the Yellow Ribbon Program is ineffective and fails to bridge the gap between the tuition cap and actual tuition costs at private schools.

After the constitutionality of the disparity between public and private university tuition rates is examined, and the arguments that the law is both illogical and harmful to veterans are made, focus will shift to possible solutions. Part VII suggests several alternative solutions, including either removal of the tuition cap through repeal of the disparate portion of the bill as it relates to public and private universities, or application of the tuition cap to all educational institutions. Finally, this Comment suggests possible changes to the Yellow Ribbon Program.

## II. HISTORY OF THE GI BILL

Approximately four million Americans served in World War I, and upon separation servicemen received little more than a railroad ticket home and \$60 in separation pay.<sup>39</sup> While the median education level of these servicemen was sixth grade, only disabled veterans were eligible to receive federal funding for rehabilitative or professional training.<sup>40</sup> After the war, many civilian workers had lost their jobs and most returning war veterans found themselves unemployed, uneducated, and in the grips of the Great Depression.<sup>41</sup>

During the early 1920s, Congress provided World War I veterans with some degree of hope by promising them a bonus that was to be payable in 1945.<sup>42</sup> However, these hopes were dashed when the Senate rejected the legislation,<sup>43</sup> marking one of the biggest letdowns for American veterans in our nation's history. In 1944, in an effort to avoid the missteps following World War I, President Franklin D. Roosevelt, Congress, and veteran's organizations were determined not to allow the failures of pre-

39. JOHNSON, *supra* note 1, at 209. Approximately two million of those service members were volunteers and had served overseas while the other half did not leave the United States. *Id.*

40. *Id.* In the Air Expeditionary Force alone, there were more than 121,000 illiterate service members. *Id.*

41. *Id.* at 203. This is due to the fact that “[a]t the same time, thousands of workers in war-related industries were being laid off, with no unemployment compensation to cushion the shock.” *Id.* at 209.

42. *Id.*

43. *See id.* (noting that President Herbert C. Hoover was a major proponent of the legislation's rejection); *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2. In response to the letdown, veterans' groups marched on Washington D.C. during the summer of 1932. *Id.* They demanded full payment of their bonuses, which they did not receive. *Id.* At that point, some veterans went home, but others decided to stay until they were paid. In response to altercations with police officers that resulted in the deaths of two veteran marchers, the protesters were kicked out of the city. *Id.*

vious veterans' legislation to be repeated.<sup>44</sup> Millions of veterans were returning home from World War II, which provided a perfect opportunity for redemption.<sup>45</sup>

The American Legion carefully drafted a bill which called for GI benefits to be centralized under the Veterans Administration (VA) and was centered around the idea of helping veterans readjust to life in the civilian world.<sup>46</sup> After tumultuous debates over specific provisions of the bill between the House and the Senate,<sup>47</sup> the American Legion mobilized its twelve thousand posts to "canvass for millions of signatures" for use in a petition urging Congress to pass the bill.<sup>48</sup> On June 22, 1944, President Roosevelt signed the bill into law.<sup>49</sup> Originally named the Servicemen's Readjustment Act of 1944,<sup>50</sup> the legislation became known forever as the GI Bill of Rights,<sup>51</sup> or simply the GI Bill.<sup>52</sup>

44. JOHNSON, *supra* note 1, at 203. "For the first time since the Homestead and Land Grant College Acts of 1862, the Congress planned ahead for the eventual return of war veterans." *Id.*

45. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

46. JOHNSON, *supra* note 1 at 214. The American Legion was the most important veterans' organization to come into existence in response to the war. *Id.* at 203.

The American Legion . . . believed it to be the duty, the responsibility and the desire of our grateful people to see to it that those who served actively in the armed forces in [World War II] not only should not be penalized as a result of their war service, but also that upon their return to civil life they should be aided in reaching that position which they might normally have expected to achieve had the war not interrupted their careers.

Pitkin, *supra* note 2, at 24, 51.

47. See *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2 (observing that the bill very nearly died when the House and Senate came together to deliberate on each of their versions). Both the House and Senate were deadlocked on the bill's provisions concerning unemployment, but were able to agree on home loan and educational provisions. *Id.*

48. JOHNSON, *supra* note 1, 216. As a result; thousands of letters, telegrams, and phone calls poured in to members of Congress in support of the GI Bill. Pitkin, *supra* note 2.

49. JOHNSON *supra* note 1, at 213. President Roosevelt "transformed the face and future of American Society" with the penstroke used to sign the first GI Bill. Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and Modernization of Education Benefits Under the Post-9/11 Veterans Assistance Act of 2008*, 2 VETERANS L. REV. 185, 185 (2010).

50. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, tit. 2, 58 Stat. 284, 289.

51. JOHNSON, *supra* note 1, at 203. An American Legion publicist is credited with coining the phrase, "calling for a 'bill of rights for GI Joe and GI Jane.'" *Id.* The American Legion was the most significant veterans' group to call for post-World War II veterans' benefits. *Id.* at 213. As the primary "champion" of the GI Bill, the American Legion helped draft the language of the bill and used its substantial organizational pressure to ensure the bill was enacted. *Id.*

Touted as one of the most significant legislative works ever created by the federal government,<sup>53</sup> the GI Bill of 1944 marked the first time in the history of the United States that a single piece of legislation provided veterans returning from war with a comprehensive list of benefits, including low-cost home loans, unemployment compensation, and educational benefits.<sup>54</sup>

While educating veterans was only one provision of the bill originally drafted by the American Legion, it was the GI Bill's education provision that has had the most significant impact on American society.<sup>55</sup> These education benefits provided for up to four years of tuition and fee payments up to \$500 per year.<sup>56</sup> Significantly, the bill allowed veterans to use the entitlements for education and training programs of their choice at "any approved educational or training institution at which he chooses to enroll."<sup>57</sup> This included the choice between public and private educational institutions.<sup>58</sup> In fact, veterans who chose even the most expensive, private Ivy League schools could more than afford the tuition and fees charged there, simply by using GI Bill benefits.<sup>59</sup> The bill also included a

52. *Id.* at 218.

53. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2. Some scholars say:

Higher education, which had been the privilege of the fortunate few, became part of the American dream—available to all citizens who served their country through military service. No longer were the hopes and expectations of young Americans of modest economic means restricted because the key to advancement—higher education—was beyond their reach. Few, if any, more important pieces of legislation have been enacted by Congress, and no government investment has paid higher dividends to us all.

Buckley & Cleary, *supra* note 49.

54. JOHNSON, *supra* note 1.

55. *Id.* Other provisions of the American Legion's bill included unemployment compensation, adequate hospitalization, veteran's employment and placement services, military discharge review, home, small business, and farm loans, fast settlement of claims for disability, and centralization of all veterans' services in the Veterans Administration, to name a few. Pitkin, *supra* note 2. During the first six years of the original GI Bill's existence, more than 2.2 million veterans were educated at colleges and universities across the nation, perpetuating a strong relationship between American students, higher education, and the federal government. JOHNSON, *supra* note 1, at 204.

56. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, §§ 400(b)(2), (5), 58 Stat. 284, 289; JOHNSON, *supra* note 1, at 218.

57. Servicemen's Readjustment Act of 1944, § 400(b)(3), 58 Stat. at 288–89.

58. *See id.* § 400(b)(11), 57 Stat. 43 at 290 ("As used in this part, the term 'educational or training institutions' shall include all public or private elementary, secondary, and other schools furnishing education for adults . . .").

59. JOHNSON, *supra* note 1, at 222. "In the early 1940s, the average annual tuition was \$91 for a four-year public college and \$273 for private colleges; even the most expensive private universities, such as the Ivy League schools, charged less than the \$500 allotted for GI Bill tuition and fees." *Id.*

monthly living allowance of \$50 per month for a veteran without dependents, or \$75 per month for a veteran with dependents.<sup>60</sup>

As a result of the legislation's enactment, millions of World War II veterans opted for education instead of flooding the job market after returning from the war.<sup>61</sup> Between the GI Bill's enactment in 1944 and the program's end in 1956, approximately 7.8 million World War II veterans benefitted from the GI Bill's education and training provisions.<sup>62</sup> Some scholars have said that the inundation of veterans directly into the job market after the war could have initiated another collapse of the economy.<sup>63</sup> Instead, the newly educated servicemen helped to establish a large middle class and nationwide prosperity.<sup>64</sup> After nearly sixteen years of providing educational opportunities to veterans, the original GI Bill program terminated on July 25, 1956.<sup>65</sup>

In June 1950, American troops were fighting the Korean War, and Congressman John Rankin was already drafting a new veterans' bill.<sup>66</sup> Known as the Veterans' Readjustment Assistance Act of 1952 (hereinafter the Korean War Era GI Bill), it provided for up to thirty-six months of training, but at a significantly reduced tuition rate.<sup>67</sup> In fact, instead of the generous \$500 tuition and fee stipend provided by the Servicemen's Readjustment Act of 1944, the Korean War Era GI Bill allowed for only \$110 per month if the veteran did not have any dependents, \$135 per month if he had one dependent, or up to \$160 per month if he had more than one dependent.<sup>68</sup> These amounts had to cover tuition and fees, books, and other supplies.<sup>69</sup>

Although each eligible veteran could "select a program of education or training to assist him in attaining an educational, professional, or vocational objective at any educational institution or training establish-

60. Servicemen's Readjustment Act of 1944, § 400(b)(6), 58 Stat. at 289.

61. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

62. *Id.* These numbers are remarkable because many lawmakers and educational policy experts projected that only eight to twelve percent of returning World War II veterans would take advantage of the educational benefits offered by the GI Bill. JOHNSON, *supra* note 1, at 221.

63. Buckley & Cleary, *supra* note 49, at 188.

64. *Id.*

65. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

66. JOHNSON, *supra* note 1, at 224.

67. See Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, § 214(a)(2), 66 Stat. 663, 665 ("[T]he period of education or training to which an eligible veteran shall be entitled under this title shall not, except as provided in subsection (b), exceed thirty-six months . . .").

68. *Id.* § 232(a)(1), 66 Stat. at 668-69.

69. JOHNSON, *supra* note 1, at 224.

ment,”<sup>70</sup> including private schools,<sup>71</sup> state-supported institutions benefitted tremendously from the Korean War Era GI Bill because their tuition rates were lower.<sup>72</sup> Although private universities and colleges vehemently fought for additional funds to cover the more costly tuition and fees charged at their schools, they were ultimately unsuccessful.<sup>73</sup> Korean War Era veterans likely “chose” public educational institutions over private colleges or universities because they could not afford to pay the difference in costs from their own pockets.

On January 31, 1965, upon termination of the Korean War Era GI Bill, some 2.4 million Korean War veterans had used the educational benefits to attend a college, university, or other training program such as on-the-job training or on-the-farm training.<sup>74</sup> In total, the Korean War Era GI Bill provided more than \$4.5 billion in educational benefits to veterans.<sup>75</sup>

The following year, Congress passed the Veteran’s Readjustment Benefits Act of 1966,<sup>76</sup> also known as the Vietnam Era GI Bill, which included several monumental changes from the previous GI Bills. The Vietnam Era GI Bill marked the first time that military personnel on active duty service were eligible for educational benefits, and it was retroactive for veterans who had served since the Korean War.<sup>77</sup> By the time the bill’s eligibility period came to a close twenty-three years later, more than 5.1 million veterans had used the benefits for the college and university programs of their choice, both public and private.<sup>78</sup> The Vietnam Era GI Bill afforded more than \$42 billion in education benefits to veterans.<sup>79</sup>

Following the Vietnam Era GI Bill, Congress implemented the Post-Vietnam Era Veterans Educational Assistance Act,<sup>80</sup> which was significantly less generous than previous versions of the bill. The Act devised a Veterans’ Educational Assistance Program (VEAP) that required servicemen to contribute financially to the program.<sup>81</sup> Essentially, the servicemen had to buy their way into the program by making contributions from their monthly paychecks. The government matched the servicemen’s contributions two-to-one, providing \$2 for every \$1 supplied by the

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70. Veterans’ Readjustment Assistance Act of 1952, § 221, 66 Stat at 665.

71. *Id.* § 201(6), 66 Stat. at 664.

72. JOHNSON, *supra* note 1, at 224.

73. *Id.*

74. *Id.* at 225.

75. *Id.* at 224.

76. Veterans’ Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12,

77. *Id.* § 1652, JOHNSON, *supra* note 1, at 225.

78. JOHNSON, *supra* note 1, at 225.

79. *Id.* at 226.

80. Post-Vietnam Era Veterans’ Educational Assistance Act of 1977, Pub. L. No. 94-502, 90 Stat. 2392.

81. *Id.* sub. ch. II, 90 Stat. at 2395; JOHNSON, *supra* note 1, at 226.

member.<sup>82</sup> The member could contribute a maximum of \$2,700 and the government would match that with an amount not to exceed \$5,400.<sup>83</sup> This program was met with limited success and was ultimately reformed into what would become known as the Montgomery GI Bill.

In 1981, Gillespie V. "Sonny" Montgomery introduced legislation that would once again overhaul the GI Bill.<sup>84</sup> The bill was enacted in 1985 upon its signing by President Ronald Reagan and came to be known as the Montgomery GI Bill.<sup>85</sup> It is still in effect today and consists of two components: the Montgomery GI Bill Active Duty (MGIB-AD)<sup>86</sup> and the Montgomery GI Bill Selected Reserve (MGIB Selected Reserve).<sup>87</sup> Under the MGIB-AD program, education benefits are available to veterans who first entered the active duty component of the U.S. Armed Forces after June 30, 1985 and served continuously for a minimum of three years, or were discharged from active duty due to a service-connected disability.<sup>88</sup>

Veterans are eligible for the MGIB-AD benefits upon their enlistment.<sup>89</sup> Although service members may choose not to participate in the program, active duty service members who do wish to participate are required to contribute \$100 per month for the first twelve months of their service, for a total contribution of \$1,200 to the MGIB-AD.<sup>90</sup> MGIB Selected Reserve members, should they choose to participate, are required to contribute the same amount within one year of completing two years of active duty service.<sup>91</sup> In return for the \$1,200 contribution, the MGIB-AD provides veterans with up to thirty-six months of educational benefits, which may be used for education through public or private universi-

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82. Post-Vietnam Era Veterans' Educational Assistance Act of 1977, sub. ch. II 90 Stat. at 2395. "Except as otherwise provided in this chapter, each monthly contribution made by a participant under subsection (a) shall entitle the participant to matching funds from the Veterans' Administration at the rate of \$2 for each \$1 contributed by the participant." *Id.*; GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS* 210 (2009).

83. JOHNSON, *supra* note 1, at 226; *see* Post-Vietnam Era Veterans' Educational Assistance Act of 1977, § 1622(a), 90 Stat. at 2395 (capping participants at a max contribution of \$2,700).

84. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

85. Veteran's Educational Assistance Act of 1984, Pub. L. No. 98-525, 98 Stat. 2492, 2554; Buckley & Cleary, *supra* note 49, at 199.

86. Veteran's Educational Assistance Act of 1984.

87. *Id.*

88. *Id.*; Buckley & Cleary, *supra* note 49, at 199.

89. Veteran's Educational Assistance Act of 1984, 98 Stat. at 2554; Buckley & Cleary, *supra* note 49, at 199.

90. Veteran's Educational Assistance Act of 1984, 98 Stat. at 2555; Buckley & Cleary, *supra* note 49, at 199.

91. Buckley & Cleary, *supra* note 49, at 199.

ties and colleges, technical or vocational courses, apprenticeships and on-the-job training, flight training, licensing and certification testing, and entrepreneurship training.<sup>92</sup>

Upon the service member's fulfillment of required service obligations and enrollment in an approved educational program, the Department of Veterans Affairs sends the monthly educational allowance directly to the member, from which he or she is responsible for paying all educational expenses.<sup>93</sup> As of October 1, 2011 the current amount of benefits payable under the MGIB-AD to veterans enrolled full-time in institutional training is \$1,473 per month.<sup>94</sup> Monthly benefit payments are proportional to enrollment; if the beneficiary is enrolled in less than full-time training, the monthly benefit payments will be proportionally reduced.<sup>95</sup>

Although generally regarded as a successful program and great recruitment tool, the available benefits fall considerably below the continually rising cost of tuition.<sup>96</sup> For example, the average cost of a public undergraduate education during the 2009–2010 academic year was \$16,712, including tuition, room, and board.<sup>97</sup> The average cost of a private undergraduate education during the same time period was \$32,184.<sup>98</sup> The deficiency—between the actual cost of a public undergraduate education and the available benefits from the MGIB-AD—require the veteran to come up with nearly \$5,000 to cover the total annual cost of her education.<sup>99</sup> When the cost of attendance at a private university is considered, the difference between the available MGIB-AD benefits and cost is astounding.

In response to increasing complaints from frustrated veterans, their supporters, and the American public,<sup>100</sup> and in response to the terrorist attacks on September 11, 2001, President George W. Bush signed the Post-9/11 Veterans Educational Assistance Act of 2008 (hereinafter Post-9/11 GI Bill) into law on June 30, 2008.<sup>101</sup> The Post-9/11 GI Bill specifically acknowledges that “[s]ervice on active duty in the Armed Forces has

92. *Montgomery GI Bill Active Duty (MGIB-AD)*, DEP'T OF VET. AFF., [http://www.gibill.va.gov/benefits/montgomery\\_gibill/active\\_duty.html](http://www.gibill.va.gov/benefits/montgomery_gibill/active_duty.html) (last visited Mar. 27, 2012).

93. Buckley & Cleary, *supra* note 49, at 200.

94. *Montgomery GI Bill Active Duty (MGIB-AD)*, *supra* note 92.

95. *Id.*

96. Buckley & Cleary, *supra* note 49, at 203.

97. *Digest of Education Statistics—Table 345*, NAT'L CTR. EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d10/tables/dt10\\_345.asp](http://nces.ed.gov/programs/digest/d10/tables/dt10_345.asp) (last visited Mar. 27, 2012).

98. *Id.*

99. Based on an eight-month academic year the veteran would receive \$11,784, but would have to pay \$16,712, for a difference of \$4,928.

100. Buckley & Cleary, *supra* note 49, at 203.

101. Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 122 Stat. 2357.



been especially arduous for the members of the Armed Forces since September 11, 2001,” and that the Montgomery GI Bill is “outmoded and designed for peacetime service in the [military].”<sup>102</sup> Furthermore, it was enacted with the idea that comprehensive educational benefits help “reduce the costs of war, assist veterans in readjusting to civilian life after wartime service, and boost the United States economy, and has a positive effect on recruitment for the Armed Forces.”<sup>103</sup>

The Post-9/11 GI Bill went into effect on August 1, 2009 and is available to veterans who have an aggregate of thirty-six months, or more, of active duty service, all of which must have taken place after September 10, 2001.<sup>104</sup> Benefits are also available to veterans who were medically discharged due to a service-connected disability, with thirty consecutive days, or more, of active duty service.<sup>105</sup> Veterans are eligible for up to a total of thirty-six months of education benefits, awarded at varying percentages based on the aggregate number of days of active duty service.<sup>106</sup>

As enacted in 2008, educational benefits included “tuition and fees up to the regularly-charged cost of the most expensive public institution in the state or the full tuition of the actual institution attended, whichever is less . . . .”<sup>107</sup> Departing from earlier versions of the GI Bill, payments for tuition and fees under the Post-9/11 GI Bill are disbursed directly to the educational institution, rather than to the veteran or beneficiary.<sup>108</sup> Veterans may also receive a stipend for housing “based on the housing allowance under 37 U.S.C. Section 403 for the city in which the institution is situated.”<sup>109</sup> Furthermore, veterans are entitled to receive \$1,000 per year stipend for books, supplies, and equipment.<sup>110</sup>

Interestingly, veterans may transfer their Post-9/11 GI Bill benefits to a spouse or child,<sup>111</sup> and each month of transferred benefits reduces the number of benefits to which the veteran is entitled. The veteran must transfer benefits to his or her beneficiary while still in the Armed Forces, and specify the beneficiary and the amount of benefits to be transferred. Additionally, a veteran must have served ten years in order to transfer his

102. *Id.* §§ 5001(2–4), 122 Stat. at 2358.

103. *Id.* §§ 5001(3–5), 122 Stat. at 2358.

104. 122 Stat. at 2359; Buckley & Cleary, *supra* note 49, at 204.

105. Buckley & Cleary, *supra* note 49, at 204.

106. Post-9/11 Veterans Educational Assistance Act of 2008, 122 Stat. at 2362; Buckley & Cleary, *supra* note 49, at 204.

107. Buckley & Cleary, *supra* note 49, at 205. See Post-9/11 Veterans Educational Assistance Act of 2008, 122 Stat. at 2363 for the text of the provision.

108. Buckley & Cleary, *supra* note 49, at 204–05.

109. *Id.* at 205.

110. *Id.*

111. 51,658 beneficiaries received transferred GI Bill benefits from a service member or veteran during fiscal year 2010. ANNUAL BENEFITS REPORT, *supra* note 5, at 38.

or her benefits, but a spouse may use the transferred benefit after six years of service if the veteran agrees to serve an additional four years.<sup>112</sup>

In many cases, the most expensive in-state tuition allowance was more than enough to pay for the cost of education at private institutions. Thus, the veteran or his or her beneficiary had a wide range of choices for continuing education. In the event that a private college or university charged more than the most expensive in-state tuition, these institutions could voluntarily participate in the Yellow Ribbon Program.<sup>113</sup> Through an agreement with the Secretary of Veterans Affairs, colleges and universities that choose to participate in the Yellow Ribbon Program provide up to fifty percent of the excess charges not covered by the Post-9/11 GI Bill, which the Department of Veterans Affairs matches.<sup>114</sup>

However, not everyone is eligible to participate in the Yellow Ribbon Program; spouses and dependent children are not eligible for the program, nor are veterans entitled to less than the maximum Post-9/11 GI Bill benefit. Furthermore, colleges and universities choose the rate at which they participate in the Yellow Ribbon Program and are not required to contribute fifty percent of the remaining tuition and fee charges. Unfortunately, this program often leaves many veterans and their transferees without the resources to pay for the educational program of their choice.

On January 4, 2011, President Barack Obama signed the Post-9/11 Veterans Educational Assistance Improvements Act of 2010 into law.<sup>115</sup> This legislation made significant changes to the way veterans may use their educational benefits. These changes included provisions for calculating the monthly housing allowance, discontinuing break or interval pay, and most shockingly, removing individual state tuition maximums while instituting a \$17,500 per year tuition cap applicable *only* to students attending private and foreign institutions.<sup>116</sup>

112. Buckley & Cleary, *supra* note 49, at 206–07.

113. *Yellow Ribbon Program*, U.S. DEP'T VET. AFF., [http://www.gibill.va.gov/gi\\_bill\\_info/ch33/YRP/Yellow\\_ribbon.htm](http://www.gibill.va.gov/gi_bill_info/ch33/YRP/Yellow_ribbon.htm) (last updated Nov. 6, 2009).

114. Buckley & Cleary, *supra* note 49, at 210.

115. Letter from Keith M. Wilson, Dir. Educ. Serv., Dep't of Veterans Affairs, to students (Feb. 23, 2011) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

116. *Id.*

Monthly housing allowance benefits are prorated based upon rate of pursuit, rounded to the nearest multiple of [ten] . . . .

. . . .

Break or interval pay is no longer payable under any VA education benefit program unless under an Executive Order of the President or due to an emergency situation such as a natural disaster or strike . . . .

. . . .

On August 3, 2011 Congress passed Public Law 112-26, which directly addressed the \$17,500 tuition cap placed on private and foreign institutions.<sup>117</sup> Known as the Restoring GI Bill Fairness Act of 2011, the law authorized the VA to pay more than the aforementioned tuition limit for certain students attending private colleges and universities in seven states—Arizona, Michigan, New Hampshire, New York, Pennsylvania, South Carolina, and Texas—but no others.<sup>118</sup> To qualify for the increased payment, students must have been enrolled in the same college or university program since January 4, 2011, and the program for which the total amount of tuition and fees during the 2010–2011 academic year must have exceeded \$17,500.<sup>119</sup>

Although there are a lucky few students enrolled in private university programs which meet these narrow qualifications who are no longer subject to the \$17,500 tuition cap, thousands of students who are not enrolled in programs meeting these narrow specifications or those who are newly enrolling in such programs are unexpectedly and unfairly forced to find additional funds. They are forced to acquire funding to cover the cost difference between the Post-9/11 Veterans Educational Assistance Improvements Act benefit limit of \$17,500 and the actual cost of tuition and fees, simply because they chose to pursue education at a private or foreign institution rather than a public one, and because the government imposed an arbitrary tuition cap on private and foreign institutions.

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Tuition and fee payments are simplified for those attending public schools, and a national yearly maximum is created for those enrolled in private or foreign schools . . . Individual state caps are removed; all net public in-state charges are covered[.] Private and foreign school costs are capped at \$17,500 annually[.]

*Id.*

117. PUBLIC LAW 112-26: RESTORING GI BILL FAIRNESS ACT OF 2011 (H.R. 1383), HOUSE COMM. ON VETERANS' AFFAIRS (ND), *available at* <http://democrats.veterans.house.gov/legislation/112th/HR1383.pdf>.

118. *Id.* WILLIAM MA ET AL., CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 1383: RESTORING GI BILL FAIRNESS ACT OF 2011, at 3 (May 18, 2011), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/123xx/doc12309/hr1383.pdf>.

119. PUBLIC LAW 112-26: RESTORING GI BILL FAIRNESS ACT OF 2011, *supra* note 118; U.S DEP'T VETERANS AFF., RESTORING GI BILL FAIRNESS ACT OF 2011 QUESTIONS AND ANSWERS (n.d.), *available at* [http://www.gibill.va.gov/documents/factsheets/PL1383\\_Q&A.pdf](http://www.gibill.va.gov/documents/factsheets/PL1383_Q&A.pdf) html (last updated Mar. 12, 2012).

### III. CONSTITUTIONAL ANALYSIS: EQUAL PROTECTION UNDER THE LAW

#### A. *Equal Protection Does Not Allow the Distinction Between Public & Private Schools*

Active duty military, veterans, and dependent GI Bill beneficiaries have been unfairly, irrationally, and arbitrarily subjected to differential treatment based on the school they wish to attend. The Equal Protection Clause of the Fourteenth Amendment declares that: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>120</sup> While there is no constitutional provision that expressly prevents the federal government from denying equal protection of the laws,<sup>121</sup> the United States Supreme Court has held that the Equal Protection requirements apply to the federal government by way of the Fifth Amendment’s Due Process Clause.<sup>122</sup> Furthermore, the Court has recognized that Equal Protection requirements are identical, regardless of whether the challenge is to the state or federal government.<sup>123</sup>

To analyze an Equal Protection claim, one must answer the most basic Equal Protection question: “Is the government’s classification justified by a sufficient purpose?”<sup>124</sup> However, to answer this question, one must determine what classifications have been created, which level of scrutiny should be applied, and whether the government’s action meets that level of scrutiny.

##### 1. The Classification

The government has taken a group of similarly situated people, veterans and GI Bill beneficiaries, and divided them into two classifications: those who attend or desire to attend public universities, and those who attend or wish to attend private universities.<sup>125</sup> While veterans and GI Bill beneficiaries are not a suspect class,<sup>126</sup> this distinction is clearly discriminatory against students who currently attend or wish to attend private universities. Those students are limited to an annual tuition and fee

120. U.S. CONST. amend XIV, § 1.

121. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 684 (4th ed. 2011).

122. *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954); CHERMERINSKY, *supra* note 121, at 684–85.

123. CHERMERINSKY, *supra* note 121, at 685.

124. *Id.* at 689.

125. *See generally* Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 112-377, 124 Stat. 4106 (codified at 38 U.S.C. §§ 3301–3324 (Supp. IV, Vol. 4 2011)) (explaining the public-private classification).

126. *See Fielder v. Cleland*, 433 F. Supp. 115, 118 (E.D. Mich. 1977) (establishing that veterans are not “identifiable as a discreet group or class of persons by any set of criteria”).

rate of \$17,500 annually, whereas students at public universities are allowed unlimited amounts of tuition and fees each year.<sup>127</sup>

## 2. The Level of Scrutiny

The Supreme Court has stipulated that different types of discrimination warrant varying levels of scrutiny.<sup>128</sup> Every law challenged under Equal Protection analysis must meet, at a minimum, the requirements of the rational basis test.<sup>129</sup> The rational basis test is generally used for non-fundamental, economic equal protection challenges.<sup>130</sup> Although the Court has stated the requirements for the Rational Basis test in various ways, Justice Pitney in *Royster Guano Co. v. Virginia*<sup>131</sup> wrote that: “[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>132</sup> Simply stated, the rational basis test is not fulfilled when the “application of the provision is totally lacking in rationale justification, or is patently arbitrary.”<sup>133</sup>

The rational basis test is the appropriate level of scrutiny for analyzing the classifications created by the Post-9/11 Veterans Educational Assistance Improvements Act because education is not a fundamental right.<sup>134</sup> Rather, the basis of the classification is economic because the amount of

127. See generally Post-9/11 Veterans Educational Assistance Improvements Act of 2010 (explaining the allowed tuition and fee rates).

128. CHEMERINSKY, *supra* note 121, at 687. Generally, discrimination based upon race, national origin and alien status is subject to strict scrutiny, the highest level of scrutiny. *Id.* Intermediate scrutiny is applied to discrimination concerning gender and discrimination against children with non-married parents. *Id.* Finally, the rational basis test is the minimum level of scrutiny which laws challenged under equal protection analysis are subjected. *Id.* at 688.

129. *Id.* at 688.

130. *Id.* at 695.

131. 253 U.S. 412 (1920).

132. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

133. See *Felder v. Cleland*, 433 F. Supp. 115, 118 (E.D. Mich. 1977) (applying the rational basis test to situations concerning challenges to veterans education benefit legislation). The opinion states that:

In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.”

*Id.* (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

134. See *id.* at 118 (“[T]here is no basis in federal law to support the classification of [educational interests] as ‘fundamental.’ Rather, this is an economic benefit bestowed by the government upon certain citizens who meet specific qualifications.”).

tuition and fees paid to veterans is contingent upon the type of institution chosen.<sup>135</sup>

Furthermore, the intermediate and strict scrutiny tests are inappropriate in this analysis. Intermediate scrutiny is generally used for gender-based discrimination and discrimination against children born of unmarried parents.<sup>136</sup> Strict scrutiny is applied when discrimination is based on race, national origin or alien status, to name a few.<sup>137</sup> Because none of those situations are relevant here, the rational basis test applies.

### B. *The Government's Action Does Not Pass the Rational Basis Test*

In determining whether the law passes muster under an Equal Protection analysis, there must be a legitimate purpose for the legislation.<sup>138</sup> The Court has traditionally been quite deferential to the government in analyzing issues where the rational basis test applies, and has held that a purpose is legitimate if it advances a traditional "police power," including public health, safety, or morals.<sup>139</sup> Because these categories are very broad, it is rare that a law does not pass the rational basis test, although it is not unheard of.<sup>140</sup> However, the Post-9/11 Veterans Educational Assistance Improvements Act's purpose is neither legitimate, nor squarely fits into one of the aforementioned categories.

#### 1. The Purpose of the Post-9/11 Veterans Educational Assistance Improvements Act

According to Senator Daniel Akaka from Hawaii, the purpose of the tuition cap imposed by the Post-9/11 Veterans Educational Assistance Improvements Act is to provide for "a streamlined, less complex . . . program," which will "simplify payments."<sup>141</sup>

Instead of a complex and sometimes inequitable benefits calculation based on a State-by-State determination, this measure would provide that if an individual is enrolled in a program of education at a public institution of higher learning, VA would pay the cost of tuition and fees. If an individual is enrolled in other than a public institution, VA would pay up to a national cap that will be adjusted annually

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135. *See id.* (establishing that GI Bill benefits are an economic benefit given to veterans by the government).

136. CHEMERINSKY, *supra* note 121, at 687.

137. *Id.*

138. *Id.* at 695, 697.

139. *Id.* at 697.

140. *Id.* at 698.

141. 156 CONG. REC. S8953 (daily ed. Dec. 13, 2010) (statement Sen. Daniel Akaka (D-Haw.)).

based on increases in the cost of education. [Senator Akaka's] measure sets the initial cap at \$17,500.<sup>142</sup>

In an effort to "simplify" the educational benefit system, the government set a patently arbitrary tuition and fee cap at \$17,500, which left many veteran students to wonder where that number originated. The cap was originally set at \$20,000 and was based on a "nationally recognized, baseline amount."<sup>143</sup> The baseline was determined by the "national average of the highest in-state tuition and fees payable for Post-9/11 GI Bill users."<sup>144</sup> However, the Congressional Budget Office estimated that a figure in the \$17,000 range would be an appropriate baseline for veteran students in 2011, so the amount of tuition and fees payable was reduced to \$17,500.<sup>145</sup>

## 2. The Post-9/11 Veterans Educational Assistance Improvements Act's Purpose is Illegitimate

Notably, the primary problem with the Post-9/11 Veterans Educational Assistance Improvements Act's stated purpose is that simplifying the education benefit distribution system is merely an excuse for administrative convenience, which is an arbitrary and illegitimate purpose, even under the rational basis standard. However, the 2010 legislation is not the first instance in which the government has dictated the ways veterans could use the educational benefits they earned through years of service to the United States.

In *Fielder v. Cleland*,<sup>146</sup> four U.S Armed Forces veterans and students who were attending Detroit College of Business challenged a provision of the Veterans Education and Employment Act of 1976 on Equal Protection grounds.<sup>147</sup> This legislation implemented a law that required the VA to deny eligible veterans enrollment in any course in which more than eighty-five percent of the students already enrolled in the course had

142. *Id.* at S8954.

143. *Iraq and Afghanistan Veterans of America: Hearing of the Econ. Opportunity Subcomm. of the H. Veterans Affairs Comm.*, 111th Cong. 20 (Feb. 25, 2010) (statement of Tim Embree, Legislative Assoc., Iraq and Afghanistan Veterans of Am.) (available at [http://media.iava.org/testimonies/Embree\\_HVAC022510.pdf](http://media.iava.org/testimonies/Embree_HVAC022510.pdf)).

144. See S. REP. NO. 111-346, at 25 (2010) (noting that the "maximum cap would be computed based on figures obtained from the Department of Education's National Center for Education Statistics. The figure used would be the average of established charges at all institutions (public and private) in the United States for a baccalaureate degree for the most recent academic year").

145. *Id.*

146. 433 F.Supp 115 (E.D. Mich. 1977).

147. *Fielder v. Cleland*, 433 F. Supp. 115, 117 (E.D. Mich. 1977).

some or all of their tuition and fees paid by the VA.<sup>148</sup> The legislation also required that the course must have been in existence for a minimum of two years before a veteran could use his or her education benefits to enroll in the course.<sup>149</sup> The two rules applied to both public and private universities alike.<sup>150</sup>

The students claimed that the eighty-five percent rule and the two-year rule discriminated against veterans who wanted to use their educational benefits at institutions that did not meet those requirements, where other federal education grants were not subject to similar conditions.<sup>151</sup> Because education is not a fundamental right, and is instead, an economic benefit, the court applied the rational basis test to their claims.<sup>152</sup> The *Fielder* court held that the veterans' claims confused an arguably imperfect statutory classification with one that is completely lacking in rational justification.<sup>153</sup> The *Fielder* court pointed out that there are a number of valid criticisms that may be directed at the subject of legislation, such as mechanistic application or extraordinary amounts of paperwork administration.<sup>154</sup> However, the court emphasized that these were merely imperfections, not a basis for arguing irregularity.<sup>155</sup>

Furthermore, the court stated that it could consider the "plain language of the law, its stated purpose, relevant legislative history and even the sound legal argument of counsel," but it could not consider individual opinions or conclusions.<sup>156</sup> In *Fielder*, the stated purpose of the legislation was to minimize abuse of the VA education program by programs that provided minimal educational benefits to unwary veterans.<sup>157</sup> The court determined that Congress and the VA clearly had a legitimate interest in ensuring that veteran's educational benefits were neither abused

148. *Id.*

149. *Id.*

150. *See id.* at 118 (pointing out that originally the rule was applicable to public educational institutions outside the veteran's own state or to private colleges outside the veteran's normal commuting distance; however, the rules were extended to apply to all educational institutions, public and private, in 1976).

151. *See id.* (comparing the veteran's educational provisions to other federal grants such as the Basic Education Opportunity Grant and the Supplemental Educational Opportunity Grant).

152. *Fielder*, 433 F. Supp. at 118.

153. *Id.*

154. *Id.* at 119.

155. *See id.* (elaborating on the idea that these imperfections do not "compel the conclusion that the legislation is patently arbitrary or totally irrational in its basis").

156. *Id.* at 118-19.

157. *See Fielder v. Cleland*, 433 F. Supp. 115, 119 (E.D. Mich. 1977) (arguing that if an educational institution was not established well enough to attract sufficient nonveteran and nonsubsidized students to the program, it had a greater potential for abuse of Veterans Administration educational programs).



nor wasted, and that the rules were rationally related to this legitimate purpose.<sup>158</sup> Thus, the legislation at issue in *Fielder* did not violate the Equal Protection Clause.<sup>159</sup>

While fiscal responsibility and conservation of federal funds are undoubtedly legitimate purposes which pass muster under the rational basis test, the Post-9/11 Veterans Educational Assistance Improvements Act's stated purpose is neither of the aforementioned legitimate purposes. Because the Post-9/11 Veterans Educational Assistance Improvements Act's stated purpose is to streamline a previously complicated system of allocating education benefits,<sup>160</sup> it can be distinguished from *Fielder*.

First, the discrimination in *Fielder* was directed at all eligible veterans enrolled in courses in which eighty-five percent of the enrolled students in any course had all or some of their tuition and fees paid by the Veterans' Administration and at those courses that had not been in existence for at least two years.<sup>161</sup> This rule applied equally to all veteran students, regardless of whether they were attending a public or private university. In contrast, the Post-9/11 Veterans Educational Assistance Improvement Act's discrimination negatively affects only those students who attend private universities. Students at public educational institutions are awarded unlimited amounts of benefits to finance their enrollment in any course of their choice, while private school students are arbitrarily treated differently and only awarded benefits up to a limited amount.

Next, the Post-9/11 Veterans Educational Assistance Improvements Act's imposition of a tuition cap as a remedy for the "confusing nature" of the Post-9/11 Veterans Educational Assistance Act of 2008's payment scheme is merely an excuse for administrative convenience. The very wording used in the legislation's purpose—simplify, streamline—denotes administrative convenience,<sup>162</sup> which is not a legitimate basis for distinguishing between groups of people in an Equal Protection analysis.<sup>163</sup>

158. *Id.*

159. *Id.*

160. 156 CONG. REC. S8953 (daily ed. Dec. 13, 2010) (statement of Sen. Daniel Akaka (D-Haw.)).

161. *Fielder*, 433 F. Supp. at 117.

162. Leslie W. Abramson, *Equal Protection and Administrative Convenience*, 52 TENN. L. REV. 1, 1-2 (1984). Administrative convenience is just one of many justifications for state actions that create classifications. *Id.* at 1. The rationale for the government's interest in administrative convenience is the amount of time and expense necessary to determine propriety of a regulation on an individual basis. *Id.* at 2.

163. See *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (establishing that administrative convenience did not justify imposing on unsuccessful, imprisoned appellants, the duty to reimburse the county for court transcript costs when convicted defendants who were not imprisoned were not subject to reimbursement requirements); *Tassian v. People*, 731 P.2d 672, 675 (1987) ("Administrative convenience, by itself, does not constitute a valid basis for

Not only is the government's attempt at administrative convenience unconstitutional, it is an outright failure. In attempting to streamline a previously complex payment schedule the government still ended up with multiple education benefit payment schedules that must be maintained: those for public institutions and those for private institutions. This failure is compounded by the fact that the Department of Veterans Affairs continues to maintain complicated Yellow Ribbon Program participation schedules, and not every educational institution participates in the program, and those that do participate may do so at dizzyingly different levels.<sup>164</sup>

Finally, although the legislative history of the Post-9/11 Veterans Educational Assistance Improvements Act clearly states its purpose as streamlining a complicated process, there may be an unexpressed, ulterior motive. Senator Tom Harkin—a major proponent of the aforementioned act, including the tuition cap—would have one believe that private, for-profit universities are essentially taking advantage of the native veteran's educational benefits while providing them with worthless degrees.<sup>165</sup> While this may be true in some instances,<sup>166</sup> it certainly does

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the imposition of disparate treatment upon persons who, with respect to the activity in question, are basically in the same position as others who are not singled out for different treatment.”).

164. *Yellow Ribbon Program*, *supra* note 113.

165. TOM HARKIN, U.S. SENATE HEALTH, EDUC., LABOR AND PENSIONS COMM., BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS 11 (Dec. 2010), *available* at <http://harkin.senate.gov/documents/pdf/4eb02b5a4610f.pdf>. Senator Harkin points out that military families and veterans are important to for-profit schools for a variety of reasons. *Id.* at 7. He suggests that these beneficiaries are attractive to for-profit schools because the recent expansion of benefit eligibility resulted in a larger group of potential students and subsequently an expanding potential revenue source, because the benefits do not require repayment and therefore have no effect on loan repayment rates, and because military educational benefits do not count towards the 90/10 rule. *Id.* The 90/10 rule requires that “no more than [ninety] percent of revenues come from federal financial aid dollars.” *Id.* Senator Harkin's report veils accusations of worthless degrees from for-profit schools by questioning whether the payment of portions of veterans education funds to “for-profit schools with questionable outcomes achieves the success sought for our active duty military and veterans.” *Id.* at 12. Interestingly, a degree's value may be misrepresented in several ways. Cheryl L. Auster, Comment, *Promising a Better Future but Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the Effect of the New Program Integrity Rules*, 13 SCHOLAR 631, 651 (2011). Value misrepresentation can manifest through false representation of a school's accreditation status or a potential graduate's professional licensure possibilities, the misrepresentation of the ability to transfer class credits to other schools, and by overstatement of post-graduate employment opportunities. *Id.*

166. In 1977, another challenge to the eighty-five percent rule was rejected because the court could not legally determine that the “popularity of any given course with non-federally assisted students is an unreliable indicator of the course,” although it was an

not appear to be the case when, in light of the legislative changes negatively affecting students attending private universities, these educational institutions are among the most willing and generous Yellow Ribbon Program contributors.<sup>167</sup> Of the fourteen publicly traded, for-profit institutions, most commonly known are the University of Phoenix, ITT, and DeVry.<sup>168</sup> In every state in which these three educational institutions have a branch location, they award Yellow Ribbon benefits to an unlimited number of students in all divisions of the school.<sup>169</sup> Additionally, they have entered into an agreement with the VA to contribute up to \$99,999.00 per student, per year—the highest level of Yellow Ribbon Program participation possible.<sup>170</sup>

### 3. The Distinction between Public and Private Universities is Arbitrary

According to the United States Supreme Court, the word “arbitrary” means to be “without adequate determining principle . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with references to principles, circumstances, or significance . . . decisive but unreasoned.”<sup>171</sup> This definition of arbitrary applies to the distinction between public and private universities created by the Post-9/11 Veterans Educational Assistance Improvements Act because it too, is decisive but unreasoned. This legislation should be struck down, just as other laws implementing arbitrary distinctions have been held unconstitutional.

For example, in *Williams v. Vermont*,<sup>172</sup> the state drew an arbitrary distinction between cars purchased by state residents in other states and cars purchased outside the state before a person became a resident.<sup>173</sup> Vermont assessed a vehicle use tax every time a car was registered in the state.<sup>174</sup> Under the law, the vehicle tax was not imposed if the automobile was purchased in Vermont, by a Vermont resident, and subject to a sales tax.<sup>175</sup> However, if a person bought a vehicle outside the state

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imperfect means of achieving the desired result of “discourag[ing the] establishment of educational programs of dubious value for the sole purpose of attracting unwary veterans with federal money to spend.” *Rolle v. Cleland*, 435 F. Supp. 260, 262–63 (1977).

167. See *infra* text accompanying notes 168–69.

168. Auster, *supra* note 165, at 636.

169. *Yellow Ribbon Program Information 2011-2012 School Year*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/gi\\_bill\\_info/ch33/yrp/yrp\\_list\\_2011.htm](http://gibill.va.gov/gi_bill_info/ch33/yrp/yrp_list_2011.htm) (last visited Mar. 27, 2012).

170. *Id.*

171. *United States v. Carmack*, 329 U.S. 230, 243 n.14 (1946).

172. 472 U.S. 14 (1985).

173. *Williams v. Vermont*, 472 U.S. 14, 14 (1985).

174. *Id.*

175. *Id.*

before moving into Vermont, the law assessed the tax when the car was registered there.<sup>176</sup>

The complainant in *Williams* purchased a car in Illinois and then moved to Vermont.<sup>177</sup> When he attempted to register the car in Vermont without paying the required use tax, the Department of Motor Vehicles refused to register the vehicle.<sup>178</sup> The complainant alleged that the Fourteenth Amendment's Equal Protection Clause forbade the state from failing to credit the sales taxes he had paid in another state, against the Vermont tax.<sup>179</sup> The Supreme Court held that an individual's residence at the time of purchase was a wholly arbitrary basis for distinguishing Vermont registrants.<sup>180</sup> Furthermore, the Court specified that both groups of registrants were similarly situated because each was a Vermont resident, each with an obligation to pay tax.<sup>181</sup> The Court could not identify a purpose for the law other than favoring residents over non-residents.<sup>182</sup> Thus, there was no rational relation for the distinction between the registrants to serve the statutory purpose; the Court invalidated the law, finding it to be a violation of the Equal Protection Clause.<sup>183</sup>

Much like the arbitrary distinction between registrants in *Williams*, the distinction between GI Bill beneficiary students and their choice of educational institution is also arbitrary. Although the GI Bill's discrimination is not in-state versus out-of-state, it is quite similar because it arbitrarily distinguishes between students attending state owned universities and those attending non-state owned universities. The legislation discriminates against those attending non-state funded, private universities by providing unlimited funding to state-owned public institutions. All of the GI Bill beneficiary students are similarly situated because they either served a sufficient amount of time in the military to be eligible for education benefits or were the dependent beneficiary of someone who did.<sup>184</sup> Like the discrimination in *Williams*, the government is favoring state entities over non-state entities. Other than administrative convenience, which is not a legitimate purpose, there appears to be no purpose for the

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176. *Id.*

177. *Id.*

178. *Williams*, 472 U.S. at 16.

179. *Id.*

180. *Id.* at 23.

181. *Id.*

182. CHEMERINSKY, *supra* note 121, at 699.

183. *Williams*, 472 U.S. at 24.

184. For example, Mr. Jason Hebert and Mrs. Jennifer Zarka, similarly situated in that they are both GI Bill beneficiary students, even though they each had different experiences in obtaining the benefits.

\$17,500 tuition and fee cap that is applicable only to students at private schools other than favoring public, state-funded universities over private educational institutions. Just as the *Williams* legislation was held to be unconstitutional, the Post-9/11 Veterans Educational Assistance Improvements Act should likewise be struck down.

Likewise in *Zobel v. Williams*,<sup>185</sup> the state of Alaska set up a dividend program to distribute profits to citizens from its Prudhoe Bay oil reserve.<sup>186</sup> Under the dividend program, every adult resident received one dividend increment for every year of in-state residency subsequent to Alaska's first year of statehood, 1959.<sup>187</sup> The issue was “[w]hether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizens residence violates the equal protection rights of newer state citizens.”<sup>188</sup> Appellants claimed that the distribution program violated their Equal Protection rights—specifically, their constitutionally protected right to establish residence in Alaska and to enjoy full rights of citizenship therein on equal terms as all other Alaska citizens.<sup>189</sup>

The Court applied rational basis scrutiny and held that the dividend created fixed, permanent distinctions between perpetually increasing numbers of bona fide residents, based entirely on the length of time they have been a resident of the state.<sup>190</sup> Although the state advanced several reasons justifying the distinctions created by the dividend program, the Court held that the State's interests were not served in any way by giving larger dividends to people who had lived in the state longer than others.<sup>191</sup> Furthermore, the Court held the only apparent justification for

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185. 457 U.S. 55 (1982).

186. *Zobel v. Williams*, 457 U.S. 55, 56 (1982).

187. *Id.* at 55.

188. *Id.* at, 56.

189. *Id.* at 58.

190. *Id.* at 59–60.

191. *Zobel*, 457 U.S. at 61, 65. Some of the reasons given for justifying the distinctions include the “apportionment of benefits in recognition of undefined ‘contributions of various kinds, both tangible and intangible, which residents have made during their years of residency.’” *Id.* at 61. The Alaskan legislature established the dividend program in order to accomplish several purposes. *Id.* First, they hoped “to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans.” *Id.* Second, they sought “to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state.” *Id.* Finally, they wanted “to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.” *Id.* The Court determined that none of these enumerated purposes were furthered by providing long-term residents larger payouts. *Id.* at 65.

the retrospective program was to favor well-established residents over newly established residents, which is constitutionally impermissible.<sup>192</sup>

Interestingly, the Court analogized Alaska's arbitrary apportionment of oil reserve dividends based on length of residency to Connecticut's tuition rates that were determined by length of residency.<sup>193</sup> The Court posed the question that "if the States can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence . . . ?"<sup>194</sup> The Court answered this question by pointing out that the reasoning Alaska used could potentially "open the door to state apportionment of other rights, benefits, and services according to length of residency."<sup>195</sup> Furthermore, allowing the distinction would permit states to divide citizens into escalating numbers of permanent classes, a result that is also constitutionally impermissible.<sup>196</sup>

The Court's analogy in *Zobel* also extends to the \$17,500 tuition cap imposed by the Post-9/11 Veterans Educational Assistance Improvements Act. Similar to the Alaska dividend program, the Act distributes funds to people in different amounts based on an arbitrary categorization: the

192. *Id.* at 65. The Court previously established in *Vlandis v. Kline* that it violates the Due Process Clause of the Fourteenth Amendment to arbitrarily distinguish between new residents and established residents for the purposes of college tuition. *Vlandis v. Kline*, 412 U.S. 441, 454 (1973). In *Vlandis* the plaintiff's were challenging a Connecticut statute that made an out-of-state student's status "permanent and irrebuttable" for as long as they remained a student at the university, regardless of whether they became a state resident during that period or not. *Id.* at 442-43.

193. *Zobel*, 457 U.S. at 63 (citing *Vlandis v. Kline*, 412 U.S. 441, 449-50 & n.6 (1973)).

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination.

*Vlandis*, 412 U.S. at 452. Essentially, all residents must be afforded the opportunity to prove their residency and claim in-state tuition costs; the State cannot deny current residents simply because they moved from out of state to attend college. *Zobel*, 457 U.S. at 64.

194. *Zobel*, 457 U.S. at 64. That "would permit the states to divide citizens into expanding numbers of permanent classes" and "[s]uch a result would be clearly impermissible." *Id.*

195. *Id.*

196. *Id.* The Court explained the potential problems that would result from recognizing Alaska's argument that distributing larger dividends to long-term residents is fair because they have paid more taxes to the community. *Id.* at 63. During the legislative debate over the measure, Alaska's representative indicated that if not for the skill, ability, and money brought by the state's newer residents, the pipeline, from which the dividends were to be paid, would not exist. *Id.*

public or private classification of the educational institution they attend. Here, the government has accomplished exactly what the *Zobel* Court predicted would result from allowing the oil dividend legislation to stand. The government has apportioned education benefits on a sliding scale based on an arbitrary distinction. Just as it is impermissible in an Equal Protection analysis to divide funds among citizens based on the length of time they have been a resident of the state, or to apportion tuition rates on the same basis, it should be impermissible to apportion funds based solely on the type of educational institution chosen by the veteran or dependent beneficiary.

Equal Protection principles do not allow states or the federal government to deny people equal protection of the laws unless the classification is based on a justification rationally related to a legitimate governmental interest. The disparity in treatment between veterans and dependent beneficiaries attending public universities and those attending private universities does not pass the rational basis test because administrative convenience is not a legitimate governmental interest, and because the United States Supreme Court has not allowed other arbitrary classifications—like those concerning vehicle taxes and oil dividends—to pass rational basis analysis in other situations. Thus, something must be done to resolve the unequal treatment fostered by the Post-9/11 Veterans Educational Assistance Improvements Act.

#### IV. THE POST-9/11 VETERANS EDUCATIONAL ASSISTANCE IMPROVEMENTS ACT IS HARMFUL TO VETERANS

While the Post-9/11 Veterans Educational Assistance Improvements Act may be an overall improvement from previous educational benefit acts, the improvements come at the expense of, and harm to, some veterans.<sup>197</sup> In an attempt to streamline the process, the legislation expanded benefit coverage by “pilfering benefits from a potentially-significant number of student veterans.”<sup>198</sup> When the Post-9/11 Veterans Educational Assistance Improvements Act was signed into law, some veterans attending private schools saw an increase in GI Bill funding based on the \$17,500 national average, while thousands of veterans in many states saw a significant and detrimental decrease in funding. The tuition cap clearly

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197. Armin Rosen, *New G.I. Bill Chops Student Vet Benefits*, FRUMFORUM, (Mar. 24, 2011, 12:01 AM), <http://www.frumforum.com/new-gi-bill-chops-student-vet-benefits> (discussing the positive impacts of past G.I. Bills and the drawbacks of the most Post-9/11 Act).

198. *Id.* Specifically, “starting in August, tuition assistance for veterans attending private schools will be capped at \$17,500 a year, partly to resolve a nagging inconsistency within the [P]ost-9/11 GI Bill.” *Id.* “Under that law, students at private institutions received money equal to the tuition and fees at the most expensive public school in their college’s state.” *Id.*

limits the ability of veterans and dependent beneficiaries in those states to pay for their education and perhaps forces significant numbers of them to either change or abandon their educational plans altogether.<sup>199</sup>

Furthermore, the legislation discourages veterans from seeking higher education and from using a benefit that they earned through years of unwavering service to the United States.

#### V. THE POST-9/11 VETERANS EDUCATIONAL ASSISTANCE IMPROVEMENTS ACT IS CONTRARY TO THE ORIGINAL INTENT OF THE GI BILL

In 1944 millions of veterans were returning home from fighting in World War II,<sup>200</sup> and President Franklin D. Roosevelt, Congress, and veterans' organizations such as the American Legion meticulously drafted the Servicemen's Readjustment Act of 1944 in order to help veterans transition back into civilian life after their service to the United States.<sup>201</sup> Additionally, the original GI Bill was meant to help boost the economy and keep veterans from flooding the job market by providing them with educational benefits.<sup>202</sup> One educational benefit was to provide veterans with a four-year education at *any* approved institution of higher learn-

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199. Daniel Caldwell, *Is the "New" Post-9/11 GI Bill Really a "Win" for Vets?*, VANTAGE POINT: DISPATCHES FROM U.S. DEP'T VET. AFF. (Dec. 30, 2010), <http://www.blogs.va.gov/Vantage/1027/is-the-new-post-911-gi-bill-really-a-win-for-vets/>. For example, in 2010–2011, Mrs. Jennifer Zarka's husband was stationed at Lackland Air Force Base in San Antonio, Texas. Zarka Interview, *supra* note 23. In order for Mrs. Zarka to attend a public law school, she would have had to commute to Austin, Houston, or Dallas because San Antonio's only law school is St. Mary's University School of Law, a private university. *Id.* Had she not been "grandfathered in" by the Restoring GI Bill Fairness Act of 2011, she would likely have had to abandon her dreams of attending law school. *Id.*

200. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

201. JOHNSON, *supra* note 1, at 203.

President Franklin D. Roosevelt, the Congress, and the veterans' organizations were determined that the uncertainty and bitterness that accompanied the previous veterans' benefits legislation would not be repeated. For the first time since the Homestead and Land Grant College Acts of 1862, the Congress planned ahead for the eventual return of war veterans.

The official name of the legislation was the Servicemen's Readjustment Act of 1944, but it forever became known as the GI Bill of Rights after an American Legion publicist coined the phrase, calling for a "bill of rights for GI Joe and GI Jane." The American Legion was key to writing the basic contours of the legislation and putting pressure on Congress. Franklin Roosevelt was key to its passage; in a 1943 radio address to the nation, he urged Congress to enact legislation to assist soldiers returning from war.

*Id.*

202. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.



ing.<sup>203</sup> Veterans were free to choose from attending a public or private university—some of whom would choose to attend private Ivy League Universities.<sup>204</sup> As a result, the United States experienced an increase in the educated workforce and in its middle class.<sup>205</sup>

By fully funding veterans who choose to pursue a public education, and only funding up to \$17,500 for veterans who wish to pursue a private education, the Post-9/11 Veterans Educational Assistance Improvements Act severely departs from the original GI Bill's intent to provide education benefits for veterans who wish to pursue a higher education degree at *any* approved institution.<sup>206</sup> The tuition cap for veterans choosing to attend a private institution of higher learning presents several problems. To begin with, the tuition cap severely limits veterans' educational choices by dissuading them from attending private universities. This is a result of either the disparity between the tuition cap and actual tuition costs, or forcing them to rely on the largely ineffective Yellow Ribbon Program to bridge that gap. Furthermore, the tuition cap discourages some veterans from pursuing a higher education at all. Mrs. Zarka, for instance, was faced with a Hobson's choice when this legislation was implemented.<sup>207</sup> Mrs. Zarka was faced with the question of whether to continue her legal education at a private institution or to transfer to a public law school in another city.<sup>208</sup> Fortunately, Mrs. Zarka was "grandfathered in" by the Restoring GI Bill Fairness Act, and was able to continue her legal education at a private institution and continue to live with her husband, who is assigned to Lackland Air Force Base in San Antonio, Texas.<sup>209</sup> However, other veterans who are not "grandfathered in" by the Restoring GI Bill

203. See JOHNSON, *supra* note 1, at 222 (stating that students covered by the GI Bill paid \$91 for a four-year public education and \$273 for a four-year private education).

204. *Id.*

205. *Id.* at 227. The original GI Bill produced "450,000 engineers, 238,000 teachers, 91,000 scientists, 67,000 doctors, 22,000 dentists, and another one million college-educated men and women. . . . [Also] another five million men and women received other schooling or job training on the GI Bill, helping to create the modern middle class." *Id.*

206. Servicemen's Readjustment Act of 1944, § 400(b)(3), 58 Stat. at 288–89.

207. Zarka Interview, *supra* note 23. A Hobson's choice is an apparently free choice that offers no real or viable alternative. *Hobson's Choice*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/hobson%27s%20choice> (last visited Mar. 27, 2012). The term originated with Thomas Hobson, an English livery stable keeper, who required his customers to either take the horse closest to the stable door or no horse at all. *Id.*

208. Zarka Interview, *supra* note 23.

209. *Id.* To be "grandfathered in" by the Restoring GI Bill Fairness Act means that veterans who were enrolled in a private university by January 4, 2011, are not subject to the \$17,500 tuition limit when attending a private university. Amanda M. Fairbanks, *Military Veterans at Private Universities Fear Being Robbed of G.I. Bill Dollars*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/04/19/military-veterans-at-priv\\_n\\_851257.html](http://www.huffingtonpost.com/2011/04/19/military-veterans-at-priv_n_851257.html) (last updated June 6, 2011).

Fairness Act might well decide to put an end to their education, a result that completely undermines and marginalizes the original intent of the GI Bill.

VI. THE YELLOW RIBBON PROGRAM IS INEFFECTIVE IN BRIDGING THE GAP BETWEEN GI BILL BENEFITS AVAILABLE TO VETERANS ATTENDING PRIVATE OR FOREIGN INSTITUTIONS AND ACTUAL TUITION COSTS

Although many proponents of the Post-9/11 Veterans Educational Assistance Improvements Act argue veterans' private educational needs are met when coupled with the Yellow Ribbon Program, they fail to consider the ineffectiveness of the Yellow Ribbon Program. The Yellow Ribbon Program is ineffective for three reasons: first, the program does not apply to all GI Bill beneficiaries; second, universities voluntarily participate in the program; and third, the program allows universities complete discretion to determine any number of participants and amount of funds contributed to the program.

The Yellow Ribbon Program is ineffective in helping veterans who choose to pursue a private education because the program only applies to *eligible* veterans.<sup>210</sup> To be eligible for the maximum benefits of the Yellow Ribbon Program, a veteran must meet one of the following qualifications: the veteran must have served an aggregate period of at least thirty-six months of active duty service after September 10, 2001; the veteran must have been discharged honorably from active duty for a service-connected disability and have served at least thirty days continuously; or the beneficiary must be an eligible dependent entitled to a transfer of benefits from a veteran who meets one of the two criteria above.<sup>211</sup> Consequently, as a result of these stringent requirements, many veterans and beneficiaries are ineligible for Yellow Ribbon Program benefits, and they are forced to find funding somewhere else, or not pursue an education at all.

Another problem with the Yellow Ribbon Program is that the program is a completely voluntary program.<sup>212</sup> This is problematic because some universities might not be willing to enter into an agreement with the Department of Veterans Affairs to provide the difference in cost between

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210. *Yellow Ribbon Program*, *supra* note 113.

211. *Id.* However, children of veterans who died on active duty since September 11, 2001, are specifically exempted from Yellow Ribbon Program eligibility. *Id.*

212. *Benefits of the Yellow Ribbon Program*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/benefits/post\\_911\\_gibill/yellow\\_ribbon\\_program.html](http://gibill.va.gov/benefits/post_911_gibill/yellow_ribbon_program.html) (last visited Mar. 27, 2012).

the tuition cap and actual tuition costs.<sup>213</sup> Therefore, if a veteran chooses to apply to a private university, but that university has not volunteered to participate in the Yellow Ribbon Program, that veteran would be faced with the decision to find adequate funding, to consider a public education, or to put his education on hold.

Finally, the Yellow Ribbon Program is ineffective because it allows participating universities to determine the number of veterans it is willing to help financially.<sup>214</sup> For example, schools can choose whether it awards Yellow Ribbon benefits to one student,<sup>215</sup> 100 students,<sup>216</sup> or an unlimited number of students.<sup>217</sup> Moreover, Yellow Ribbon Program benefits are awarded on a first-come first-served basis,<sup>218</sup> which means that veterans attending private universities offering only a small or limited number of Yellow Ribbon scholarships may not receive any additional assistance to cover educational costs exceeding \$17,500.<sup>219</sup>

Universities that choose to participate in the Yellow Ribbon Program also designate the amount of contributions they will provide to the program on behalf of the student.<sup>220</sup> While any contribution is surely appreciated by a veteran who is faced with a \$17,500 tuition cap and a more

213. U.S. DEP'T OF VETERANS AFFAIRS, THE POST-9/11 GI BILL YELLOW RIBBON PROGRAM (Jan. 2010), available at [http://gibill.va.gov/documents/pamphlets/Yellow\\_Ribbon\\_Pamphlet.pdf](http://gibill.va.gov/documents/pamphlets/Yellow_Ribbon_Pamphlet.pdf). [hereinafter POST-9/11 GI BILL YELLOW RIBBON PROGRAM].

214. *Id.* One of the requirements to enter into an agreement with the Department of Veterans Affairs to participate in the Yellow Ribbon Program is for the university to state the number of veterans that they are willing to fund. *Id.*

215. *NC State Yellow Ribbon Program Information 2011-2012*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/gi\\_bill\\_info/ch33/yrp/2011/states/nc.htm](http://gibill.va.gov/gi_bill_info/ch33/yrp/2011/states/nc.htm) (last visited Mar. 27, 2012). One example of a private university granting only one Yellow Ribbon scholarship is Duke University School of Law. *Id.*

216. *See TX State Yellow Ribbon Program Information 2011-2012*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/gi\\_bill\\_info/ch33/yrp/2011/states/tx.htm](http://gibill.va.gov/gi_bill_info/ch33/yrp/2011/states/tx.htm) (last visited Mar. 27, 2012) (displaying data on Yellow Ribbon Program participation for the 2011-2012 academic year). For example, St. Mary's University School of Law, Dallas Baptist University, and Howard Payne University each award 100 Yellow Ribbon Program scholarships per year. *Id.*

217. *See CA State Yellow Ribbon Program Information 2011-2012*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/gi\\_bill\\_info/ch33/yrp/2011/states/ca.htm](http://gibill.va.gov/gi_bill_info/ch33/yrp/2011/states/ca.htm) (last visited Mar. 27, 2012) (displaying data on Yellow Ribbon Program participation for the 2011-2012 academic year). For example, Stanford University, University of San Diego (all non-law programs), and Webster University all provide unlimited numbers of Yellow Ribbon Program scholarships annually. *Id.*

218. POST-9/11 GI BILL YELLOW RIBBON PROGRAM, *supra* note 213.

219. *Id.* In theory, this means that a veteran who is wait-listed for admission to a program, or is accepted after other veterans, may not have the opportunity to participate in the program and receive additional funding. This further lends to the ineffectiveness of the Yellow Ribbon Program.

220. *Id.*

expensive actual tuition rate, the disparity in program contributions further exacerbates the ineffectiveness and inequality of the Yellow Ribbon Program.<sup>221</sup> Some GI Bill beneficiaries may receive substantially more than others, depending entirely on the university's voluntary participation level. Furthermore, because each university and college that participates in the Yellow Ribbon Program does so at such drastically different levels, the VA is forced to maintain yet another complex contribution schedule, which is in sharp contrast with the "simplification" goals of the Post-9/11 Veterans Educational Assistance Improvements Act.

Finally, the Post-9/11 Veterans Educational Assistance Improvements Act compounds the Yellow Ribbon Program's ineffectiveness because it increases the pressure on schools to pay a larger amount than they may have originally anticipated—the difference between actual educational costs and GI Bill benefit payments.<sup>222</sup> With the passing of the newest GI Bill legislation, schools will be forced to either "[d]ig in their pockets to keep their Yellow Ribbon Programs going, or tell their student Veterans to take on debt or find some other school to fulfill their educational goals."<sup>223</sup>

## VII. SUGGESTED SOLUTIONS TO THE DISPARATE TUITION RATES

The \$17,500 tuition cap imposed on veteran students attending private universities neither survives rational basis scrutiny under the Equal Protection Clause, nor is in accordance with public policy. There are, however, several ways the government could right this unjust wrong. For example, the government could (1) completely eradicate the tuition cap placed on students attending private schools and apply the laws to which public universities are subject, (2) implement the tuition cap equally to both public and private schools, or finally (3) leave the cap in place for

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221. See *CA State Yellow Ribbon Program Information 2011-2012*, *supra* note 217 (displaying data on Yellow Ribbon Program participation for the 2011-2012 academic year). Some programs, such as the University of San Francisco's Graduate MBSE-PT program, offer as little as \$170 per year, while other programs offer up to \$99,000 annually. *Id.*

222. Alex Horton, *Private School Tuition Cap Looms Over Vets*, VANTAGE POINT: DISPATCHES FROM U.S. DEP'T VET. AFF. (Mar. 11, 2011), <http://blogs.va.gov/Vantage/1707/private-school-tuition-cap-looms-over-vets/>.

223. *Id.*

[C]ollege presidents and advisory boards must look at every conceivable source of revenue to fill Yellow Ribbon coffers. That means going to the alums and asking them to give back to Vets, fund raise throughout the year, and create Veteran-only scholarships that can help zero out the difference after the tuition cap of \$17,500.

*Id.* Other schools, such as Columbia University in New York admit that they are not "sitting atop a pot of liquid cash" and are forced to solicit donations from foundations and wealthy alums to help bridge the tuition gap. Fairbanks, *supra* note 209.

private schools, but stipulate requirements for Yellow Ribbon Program participation in order to cover the cost differential.

#### A. *Eradicate Tuition Cap As Applicable to Private Universities*

Admittedly, the previous system of allocating payments based on the highest in-state tuition and fee schedule<sup>224</sup> was unnecessarily complex and required the VA to constantly maintain tuition and fee data for every state.<sup>225</sup> However, if the genuine goal of the Post-9/11 Veterans Educational Assistance Improvements Act is truly to “provide for a streamlined, less complex, and more equitable program”<sup>226</sup> for veterans, then the government should completely eradicate the unfair \$17,500 tuition cap as it applies to veteran and dependent GI Bill beneficiary students who currently attend or wish to attend private educational institutions.

If the goal is *simplicity*, it is completely illogical to have two separate systems of payment based solely on the classification of the educational institution. An easier solution to streamline the process would be to have one standard for all educational institutions—the standard applicable to public universities. If those attending public universities are eligible to receive the actual cost assessed by the educational institution for in-state tuition and fees, so should those attending private universities.<sup>227</sup> By removing the tuition cap and paying the actual cost of the student’s education, the government could effectively eliminate the inequalities

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224. See S. REP. NO. 111-346 (2010) (elaborating on the complex nature of allocating tuition and fee payments to educational institutions).

Section 3313(c) of title 38 provides for the payment of educational assistance to an institution of higher learning on behalf of an eligible individual pursuing a program of education. The amount of the payment is based on a percentage, as determined by length of active-duty service, of the amount of tuition and fees charged, not to exceed the most expensive in-State public undergraduate institution of higher education in the same State.

This payment scheme has resulted in benefits that are confusing, unpredictable and, in some cases, inequitable.

*Id.*

225. See *Montgomery GI Bill Active Duty (Chapter 30) Increased Educational Benefit*, U.S. DEP’T VET. AFF., [http://gibill.va.gov/resources/benefits\\_resources/rates/CH30/ch30\\_rates100111.htm](http://gibill.va.gov/resources/benefits_resources/rates/CH30/ch30_rates100111.htm) (last visited Mar. 27, 2012) (illustrating Montgomery’s tuition and fee data effective October 1, 2011).

226. 156 CONG. REC. S8953 (daily ed. Dec. 13, 2010) (statement of Sen. Daniel Akaka (D-Haw.)).

227. *Update of the Post-9/11 GI Bill, Hearing of the Econ. Opportunity Subcomm. of the H. Veterans Affairs Comm.*, 111th Cong. 4 (2010) (statement of Faith Deslauriers, Legislative Dir., Nat’l Assoc. of Veterans Program Admin.) (available at <http://democrats.veterans.house.gov/hearings/Testimony.aspx?TID=67843&Newsid=533&Name=%20Faith%20%20DesLauriers>).

previously imposed,<sup>228</sup> the differential treatment, and effectively simplify the process. These changes would also make the program substantially more *equitable*, because veterans would be eligible for the same benefit across the board—the educational institution of their choice.

However, Congressman Steve Buyer (R-Ind.) suggests that part of the motivation behind imposing the tuition cap was to pay for other enhancements of the Post-9/11 Veterans Educational Assistance Improvements Act,<sup>229</sup> such as the provisions that allow veterans to use their GI Bill benefits at non-degree vocational schools, on-the-job training, and apprenticeships.<sup>230</sup> While it is admirable that a variety of new types of training have been included, it should not come at the expense of other veterans' educational options. Not only is enhancing one veteran's opportunity to use educational benefits while limiting another's an improper motive, but it is also unfair and lends support to the proposition that the tuition cap should be eradicated. America's veterans have earned their education

228. *See id.* Ms. Deslauriers recommended that the government:

Eliminate the inequities among rates paid to eligible individuals for attendance at schools of different types—public, private, foreign, graduate, undergraduate, resident or non-resident. There should be elimination of the annual state tuition and fee maximums [which would also] improve the timing of certification, processing, payment and accuracy of those payments.

*Id.*

229. *See* 156 CONG. REC. H8464 (daily ed. Dec. 15, 2010) (statement of Rep. Steve Buyer (R-Ind.)) (noting that the Post-9/11 Veterans Educational Assistance Improvements Act of 2010 should have included a grandfather clause for students currently attending private universities, but that the clause was left out to pay for other provisions of the bill).

This bill should have included a provision to grandfather the current students in these high-cost States so they are not required to make up the difference in tuition, but the Members of the House Committee on Veterans' Affairs did not get that change, or any other change, for that matter. By . . . excluding a grandfather clause, the drafters of this bill were able to pay for their other enhancements of the bill. However, these enhancements are being done at the expense of some veterans to the benefit other veterans.

It is one of those things which we are always cautious about, cutting one veteran's benefit to benefit some other veteran. If you went out and surveyed the average student veteran, I believe they would oppose improving their own benefit at the expense of one of their comrades.

*Id.*

230. Melissa Ludwig, *GI Bill Is Set to Offer More School Options*, MYSA.COM, Sept. 17, 2011, <http://www.mysanantonio.com/new/education/article/GI-Bill-expands-to-vocational-programs-2175241.php>. This change will allow veterans to seek education at “police academies, massage therapy and flight schools, a move aimed at reducing unemployment rates for young veterans, particularly women.” *Id.*

benefits, and we should actively refrain from interfering with their use of these benefits.<sup>231</sup>

This proposed solution could be accomplished by repealing the \$17,500 cap as imposed on students attending private universities in the Post-9/11 Veterans Educational Assistance Improvements Act, or by amending the Restoring GI Bill Fairness Act so that its “grandfather” provisions are applicable to *all* students, even those who enter private educational programs after January 4, 2011.

Tim Embree, an Iraq War veteran, notes “[t]he fact that when people are talking about veterans’ issues that they actually start worrying about cost is really messed up . . . vets write a blank check when they’re service members.<sup>232</sup> Apparently, lawmakers are not prepared to write a blank check in return.”<sup>233</sup> However, lawmakers *should* be prepared to write a blank check in return, and removing the tuition cap completely is the most logical way to do that.

#### B. *Apply Tuition Cap to Both Public and Private Universities*

Alternatively, if the purpose of the legislation is not based *entirely* on the goal of streamlining a complicated tuition and fee payment schedule as stated, but is *actually* based on fiscally responsible, money-saving, or equal distribution initiatives,<sup>234</sup> the legislation could accomplish those goals as well, but in an equitable manner. The government could save money, distribute funds equally, and treat all veterans alike by imposing the \$17,500 tuition cap on all veteran and dependent GI Bill beneficiaries attending public institutions, as well as those attending private universities.<sup>235</sup> In the original GI Bill implemented after World War II, all beneficiaries were eligible to receive up to the same amount of education

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231. See *Restoring GI Bill Fairness Act of 2011*, 157 CONG. REC. H5471, 5472 (daily ed. July 25, 2011) (statements of Rep. Jeff Miller (R-Fla.) & Rep. Bob Filner (D-Cal.)) (emphasizing that the tuition cap effects only a small population of student veterans, but that they should not be subjected to the consequences of the legislation).

232. Rosen, *supra* note 197.

233. See *id.* (noting the country’s debt as a reason for the change in veterans’ education benefits).

234. See HARKIN, *supra* note 165 (reporting that although students who received Post-9/11 GI Bill benefits made up only 23.3 percent of the total beneficiaries, they received 36.5 percent of the funding).

235. See Hebert Interview, *supra* note 6. This is the solution Mr. Jason Hebert prefers. He points out that his main concern with the legislation is that a distinction has been arbitrarily created between those attending public and private schools. *Id.* However, Mr. Hebert believes that the \$17,500 annual limit should apply to all students using the GI Bill because, “while an unlimited cap is nice, [the] current economy is already strained.” *Id.* He also envisions that some for-profit universities would raise tuition rates to “gross levels because they know the government will pay the tab.” *Id.*

benefits to use at an educational institution of their choice.<sup>236</sup> This concept worked well then, and it would work well now.

This is especially true considering that some public institutions of higher education actually cost *more* than their private university counterparts. By placing the tuition limit only on those who attend or wish to attend private schools, the legislation actually caps educational choices that could cost less. For example, St. Mary's University in San Antonio, Texas is a private university. The annual cost of tuition and fees for every law student was \$29,406 for the 2011–2012 academic year.<sup>237</sup> This figure is based on thirty credit hours at \$960 per credit hour, plus \$606 in fees.<sup>238</sup> Compare this to the University of Texas at Austin School of Law (UT Austin) where a student's first year of law school at cost \$32,010 for the 2011-2012 academic year.<sup>239</sup> The private law school costs approximately \$2,600 *less* than the public law school, yet the St. Mary's student will be subjected to the \$17,500 tuition cap and forced to come up with the difference, while the UT Austin student will receive the actual cost of tuition and fees.<sup>240</sup>

The Post-9/11 Veterans Educational Assistance Improvements Act aims to simplify the fund allocation process, yet results in a shockingly unconstitutional disparity imposed only on the beneficiaries who wish to attend private universities. Not only does this Act *allow* this unfair distribution of benefits, it actually *advocates* for disbursing more education benefit funds to the public university student solely because of the classification of the institution.

Furthermore, this illogical disparity is not limited to graduate programs in Texas. Students attending a public undergraduate program in New York as in-state residents would be eligible to receive up to a maximum

236. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 400(b)(5), 58 Stat. 284, 289. Veterans were eligible to receive up to \$500 annually and could use these benefits at an institution of higher education of their choice. *Id.*

237. *Law School Budget*, *supra* note 19.

238. *Id.* The law school has estimated additional expenses for room, board, books, personal, and transportation needs. *Id.* These expenses, including tuition and fees, amount to \$46,566 per academic year. *Id.*

239. *Financial Aid Estimated Budget*, UNIV. TEX. AUSTIN SCH. L., <http://www.utexas.edu/law/finaid/costs/> (last visited Mar. 27, 2012). This amount is also based on 30 credit hours per year for a resident of Texas. *Id.* It should also be noted that the tuition rate decreases after a student's first year of law school at UT Austin. *Id.*

240. See *FAQ: I'm Going to an Expensive School, How Does That Work Under the New GI Bill?*, U.S. DEP'T VET. AFF., [https://gibill.custhelp.com/app/answers/detail/a\\_id/932/session/L3RpbWUvMTMyOTg1NjkxOS9zaWQvVIBPQzJoUms%3D](https://gibill.custhelp.com/app/answers/detail/a_id/932/session/L3RpbWUvMTMyOTg1NjkxOS9zaWQvVIBPQzJoUms%3D) (last visited Mar. 27, 2012) (providing information on how payment of educational benefits differs between public and private institutions). The public university student will receive unlimited amounts of tuition and fees for up to thirty-six months, as that is the maximum number of months any veteran may receive GI Bill benefits. *Id.*



\$48,826 per year<sup>241</sup> whereas students enrolled in general studies undergraduate coursework at Columbia University in New York City would incur only \$32,455 in tuition and fees during the same year.<sup>242</sup> But, when the Post-9/11 Veterans Educational Assistance Improvements Act is considered, the veteran student attending Columbia University would be limited to \$17,500 while the student attending the public university will receive \$31,326 more in education funding.

There is clearly a problem when two veterans have both served their country and both earned their GI Bill benefits, but one is limited to \$17,500 in tuition and fees simply because he chooses to attend a private school while the other is allowed unlimited amounts of benefits just because he chose to attend a public university. This unequal treatment is unconstitutional, unjustified, and unfair; the legislation should be amended to rectify the disparity.

Amending the Post-9/11 Veterans Educational Assistance Improvements Act so as to impose the \$17,500 tuition and fee cap on all educational institutions could eliminate this disparity, streamline the process, and save the government money. However, this option effectively restricts every veteran's choice of how and where to use the benefits he earned through years of service to the United States of America, to public universities and is not a better option than removing the tuition cap completely.

### C. *Stipulate Minimum Participation Levels for the Yellow Ribbon Program*

Many proponents of the Post-9/11 Veterans Educational Assistance Improvements Act have a laissez-faire attitude towards the provision of the act which implements the \$17,500 tuition cap because they assume that veterans and dependent beneficiaries can simply rely on the Yellow Ribbon Program to make up the difference in cost. At best, this is a poorly formed assumption. As previously discussed, the program is ineffective

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241. See *2010-2011 Maximum In-State Tuition & Fees for the Post-9/11 GI Bill*, U.S. DEP'T VET. AFF., [http://gibill.va.gov/gi\\_bill\\_info/ch33/tuition\\_and\\_fees\\_2010.htm](http://gibill.va.gov/gi_bill_info/ch33/tuition_and_fees_2010.htm) (last visited Mar. 27, 2012). A full-time undergraduate student is required to enroll in at least twelve credit hours per semester. *Id.* This figure is based on \$1,010 per credit hour for twelve credit hours, and up to \$12,293 per semester, for two semesters during the 2010-2011 academic year. *Id.*

242. See *Tuition Rates & Fees: 2010-2011*, COLUM. UNIV. STUDENT FIN. SERV., [http://www.columbia.edu/cu/sfs/docs/University\\_Tuition\\_And\\_Fees/tuition-fees-10-11.html](http://www.columbia.edu/cu/sfs/docs/University_Tuition_And_Fees/tuition-fees-10-11.html) (last visited Mar. 27, 2012). This amount is based on \$1,330 per credit hour, for twenty-four credit hours per year. *Id.*

because not all GI Bill beneficiaries are eligible for<sup>243</sup> nor will receive Yellow Ribbon benefits,<sup>244</sup> furthermore, not all universities participate at the same level<sup>245</sup> and some universities do not participate at all.<sup>246</sup>

While the Yellow Ribbon Program does accommodate the differences in cost for some students, it is a far cry from a legitimate answer or justification for imposing the tuition limit on private universities because participation is completely voluntary. Not all institutions participate, and those that do participate do so at drastically different levels.<sup>247</sup>

The inequitable benefits further instituted by the Yellow Ribbon Program could be sidestepped by stipulating minimum requirements for program participation. For example, potential legislation could require all schools that participate in the program to supply at least half of the cost difference between the GI Bill payments and the actual cost of tuition at that institution. A provision with these requirements would ensure that veterans attending private schools that are more expensive than the \$17,500 allowed are not required to pay out-of-pocket tuition and fee expenses because the VA will match the school's contribution. Furthermore, future legislation could require the schools that participate in the program to make Yellow Ribbon benefits available to *all* veteran and transferee GI Bill beneficiary students, rather than allowing the institution to select the number of students to which the program is offered.

However, this solution is probably the least palatable option for two reasons. First, because the Yellow Ribbon Program is completely voluntary for universities, mandating minimum participation levels may discourage universities from participating at all. Fewer universities participating in the program is counterproductive to achieving equal benefits for GI Bill beneficiaries. Second, the tuition cap already in place forces private university advisory boards and presidents to make a difficult decision: to either “[d]ig in their pockets to keep their Yellow Ribbon Programs going, or tell their student [v]eterans to take on debt or find

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243. See *Benefits of the Yellow Ribbon Program*, *supra* note 212 (providing the benefits of the Yellow Ribbon Program along with eligibility requirements to qualify for funding). In fact, only veterans who are eligible to receive 100 percent of the GI Bill benefit amount or their transferees may receive Yellow Ribbon Program Funding. *Id.* “Active duty service members and their spouses are not eligible for this program . . .” *Id.*

244. See S. REP. NO. 111-346 (2010) (estimating that “approximately 105,000 students will attend private and foreign institutions in 2011, and about 65,000 of them will receive funds through the [Yellow Ribbon Program]”).

245. See *Yellow Ribbon Program Information 2011-2012 School Year*, *supra* note 169 (allowing one to see which schools in each state participate in the program).

246. See *id.* (allowing one to see which schools in each state choose not to participate in the program).

247. *The GI Bill's History—Born of Controversy: The GI Bill of Rights*, U.S. DEP'T VET. AFF. (Feb. 9, 2012), [http://www.gibill.va.gov/benefits/history\\_timeline/index.html](http://www.gibill.va.gov/benefits/history_timeline/index.html).

some other school to fulfill their educational goals.”<sup>248</sup> By placing more stringent requirements on program participation, the legislation would be making that choice for them.

While active duty military, veteran, and dependent GI Bill beneficiary students attending private schools would likely prefer the tuition cap to be completely eradicated, the more fiscally responsible option would be to apply the tuition cap to all GI Bill beneficiaries, regardless of whether the educational institution is public or private. Nevertheless, the legislation should be repealed or amended to allow *all* veterans and GI Bill beneficiaries the same, equal opportunity to use the benefits they earned through service to our country, at the educational institution of their choice.

### VIII. CONCLUSION

Since 1944, various forms of the GI Bill have provided veterans returning from war with a comprehensive list of benefits,<sup>249</sup> most notably the equal opportunity to obtain an education at a college or university of his or her choice, regardless of whether the institution was a public or private institution.<sup>250</sup> Throughout the decades, the GI Bill has enabled millions of veterans to obtain an education,<sup>251</sup> which in turn helped boost the economy and ensure nationwide prosperity.<sup>252</sup>

More than seventy years after the creation of the original GI Bill, the various forms of the present-day GI Bill continue to provide educational opportunities for hundreds of thousands of active duty service members, veterans, and dependent beneficiaries every year.<sup>253</sup> Now, more than ever, these people are depending on the benefits they earned during years of service to our country. Yet some beneficiaries are unfairly subjected to arbitrary tuition caps while others are not.

The \$17,500 tuition cap implemented by the Post-9/11 Veterans Educational Assistance Improvement Act is neither constitutional nor logical. The legislation does not pass muster under rational basis scrutiny because

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248. Alex Horton, *supra* note 222. The author notes that forcing student veterans to find other ways to finance their education will “dilute the diversity of [the university’s] student body, disrupt reintegration and force students to make hasty financial decisions.” *Id.*

249. See JOHNSON, *supra* note 1, at 218 (noting highlights of the original bill as passed in 1944).

250. See Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, § 400(b)(3), (11), 57 Stat. 284, 288–290.

251. *The GI Bill’s History—Born of Controversy: The GI Bill of Rights*, *supra* note 2.

252. Buckley & Cleary, *supra* note 121, at 186.

253. ANNUAL BENEFITS REPORT FISCAL, *supra* note 5, at 36.

its purpose—simplification—is arbitrary and illegitimate.<sup>254</sup> The legislation is illogical because it is inconsistent with and contrary to the original intent of the GI Bill.<sup>255</sup> Furthermore, the tuition cap is harmful to veterans<sup>256</sup> and the Yellow Ribbon Program blatantly fails to bridge the gap between the \$17,500 tuition cap and the actual cost of tuition at private universities.<sup>257</sup>

As Iraqi War veteran Alex Horton so appropriately stated, “[t]he amount of human capital that Veterans have invested since September 11 can be measured in blood, sweat, limbs and peace of mind. We come hardwired to accomplish the next mission—we just need the tools to succeed.”<sup>258</sup> Those tools are *equal* education benefits for all active duty military, veterans, and dependent GI Bill beneficiaries.

By either removing the \$17,500 tuition cap on education benefits awarded to students attending private universities, applying the tuition cap to all GI Bill beneficiaries, or amending the Yellow Ribbon Program, the problem of unequal distribution of education benefits must be remedied. Finding a solution to the disparate treatment imposed by the Post-9/11 Veterans Educational Assistance Improvements Act is especially relevant today when the number of active duty service members, veterans, and dependent GI Bill beneficiaries will only continue to increase from the approximately 680,118 enrolled students in 2010.<sup>259</sup>

Legislators have already admitted there is a compelling problem with the tuition rate disparity created by the Post-9/11 Veterans Educational Assistance Improvements Act when they unanimously voted in favor of the Restoring GI Bill Fairness Act.<sup>260</sup> By authorizing the VA to pay more than the \$17,500 tuition cap for those students, like Mr. Jason Hebert and Mrs. Jennifer Zarka, who were already enrolled in a college or university program before January 4, 2011, legislators acknowledged that the tuition cap was arbitrary and unfair,<sup>261</sup> and they came together to fix the problem. Our nation’s representatives must come together once again to ensure that all active duty military, veterans, and dependent GI Bill beneficiaries have equal access to the education benefits they earned

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254. *See supra* Part III.

255. *See supra* Part V.

256. *See supra* Part IV.

257. *See supra* Part VI.

258. Horton, *supra* note 222.

259. ANNUAL BENEFITS REPORT FISCAL, *supra* note 5, at 36.

260. *Bill Summary & Status, 112th Congress (2011–2012), H.R. 1383, Major Congressional Actions*, THOMAS, <http://thomas.loc.gov/home/thomas.php> (enter “HR1383” into “search” area and select “Bill Number”; click “search”; follow “Major Congressional Actions” hyperlink) (last visited Mar. 27, 2012).

261. H.R. REP. NO. 112-81, at 4 (2011).

through years of service to our great nation, benefits that they deserve and should not be denied. Our nation's heroes deserve an amendment to the Post-9/11 Veterans Educational Assistance Improvements Act that applies to all GI Bill beneficiaries equally. In doing so, legislators have an opportunity to ensure a bright future for our veterans and our country.