How Biden helped create the student debt problem he now promises to fix

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In 10 weeks' time Joe Biden will lay "Joe's vision for America" at the feet of Iowa's caucus-goers in the hope that the first voters in the Democratic presidential race will put him on the road to the White House.

Among his promises is that he will fix the student loan crisis saddling 45 million Americans with crippling debt now totalling a staggering $1.5tn. One idea is to allow people struggling to repay private student loans owed to banks and credit card companies to discharge them in bankruptcy.

The pledge is one of the most striking policies on offer from Democratic candidates in the 2020 race, given how the problem Biden now proposes to resolve came about in the first place. Private student loans were largely stripped of bankruptcy protections in 2005 in a congressional move that had the devastating impact of tripling such debt over a decade and locking in millions of Americans to years of grueling repayments.

The Republican-led bill tightened the bankruptcy code, unleashing a huge giveaway to lenders at the expense of indebted student borrowers. At the time it faced vociferous opposition from 25 Democrats in the US Senate.

But it passed anyway, with 18 Democratic senators breaking ranks and casting their vote in favor of the bill. Of those 18, one politician stood out as an especially enthusiastic champion of the credit companies who, as it happens, had given him hundreds of thousands of dollars in campaign contributions – Joe Biden.

Roots of the student loan crisis

Student debt has become a hot-button issue on the Democratic campaign trail. Candidates are vying to position themselves as having the most radical solution to the crisis, which now holds more than one in three young adults in its grip as well as 3 million Americans beyond the age of 60 still laboring to honor college loans they took out decades ago.

More than 1 million people default on their student loans every year. By 2023 the proportion of borrowers falling behind with repayments is expected to reach 40% – puncturing a massive hole in the system.

$123bn private student loans debt

But very little discussion has been devoted to how this monumental disaster came about. How was it, for instance, that the sum of outstanding educational loans borrowed from private financial entities shot up from $56bn in 2005 to $150bn in just 10 years – contributing to an overall student debt burden second in the US only to home mortgages.

Until 2005, private student loans were eligible for bankruptcy protections just like other forms of private credit. But in that year Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, a law that made it vastly more difficult for struggling former students to rebuild their lives by discharging the debts and starting over.

Earlier this year, Biden tried to justify his backing of the 2005 act. His campaign spokesman told Politico that "knowing that the bill was likely to make it through the Republican-led Congress, he worked to moderate the bankruptcy bill and protect middle class families. He believed that if you have income and consumer debts you can pay, you should agree to a repayment plan that you can afford."

Dig into the record, and you find a more complicated story that puts Biden in a less flattering posture. His offer to the caucus-goers of Iowa when they gather on 3 February is in effect that he will reverse a damaging provision that in 2005 he himself voted through.

Despite his protestations, it is indisputable that Biden was an avid supporter of the 2005 bill as a whole and of its overall thrust of tightening up the bankruptcy code largely to the benefit of lenders at the expense of distressed families who would find it harder to file for bankruptcy.

"Biden was one of the most powerful people who could have said no, who could have changed this. Instead he used his leadership role to limit the ability of other Democrats who had concerns and who wanted the bill softened," said Melissa Jacoby, a law professor at the University of North Carolina at Chapel Hill specialising in bankruptcy.

Other leading Democrats and consumer advocates did say no. In the Senate debate on the 2005 bill, Ted Kennedy was scathing about its implications.

“This legislation breaks the bond that unites America, it sacrifices Americans to the rampant greed of the credit card industry,” he said. Kennedy warned that even before the new provision kicked in young people were dropping out of college “because of the costs of student loans – they can’t pay them”.

Warren warned of bill’s impact on women

When an earlier version of the bill was in front of Congress, a respected law professor at Harvard law school was so incensed by its terms that in 2002 she wrote an entire paper decrying Biden’s forceful support of it. The author – Elizabeth Warren – said the changes would be to the detriment of one group above all others: women.

“Senator Biden supports legislation that will fall hardest on women,” she wrote. “Why? The answer will have to come from him … He is a zealous advocate on behalf of one of his biggest contributors – the financial services industry.”

Warren, whose decision to enter politics was inspired in no small part by her experiences of fighting Congress over bankruptcy laws, goes on to note in her essay that Biden’s “energetic work on behalf of the credit card companies has earned him the affection of the banking industry and protected him from any well-funded challengers for his Senate seat”.

Warren’s suspicion that Biden’s enthusiasm for toughening bankruptcy laws came from his close ties to the credit card companies persists to this day. Professor Jacoby said: “I don’t know how else to explain his stance on bankruptcy policy for financially distressed families other than his relationship with the consumer credit industry. There really isn’t another plausible explanation.”

As a US senator from Delaware, a state that hosts many of the largest financial corporations in the country, that relationship came naturally. So friendly were his links with the Delaware-incorporated MBNA, a major credit card company since taken over by Bank of America, that back in 1999 he felt it necessary to declare: “I’m not the senator from MBNA.”

Campaign finance watchdogs underline the point. In the 2003-2008 senatorial election cycle, Biden received more than $500,000 in help from credit card companies, financial services and banks, the Open Secrets database shows.

In the lead up to the 2005 bankruptcy act, Biden tried to justify his support for the legislation by pointing to abuse of the bankruptcy system by people who should at least pay back some of their debts. By requiring better-off borrowers to repay what they could afford, private lenders would be able to reduce their interest rates to the benefit of all consumers.

Neither claim was born out by events. Later reviews found that the level of abuse in the student loan system was relatively insignificant; nor did the removal of bankruptcy protections from private student loans lower interest rates.

“The evidence is not there – making bankruptcy laws more protective of lenders did not lead to more access and cheaper credit,” Jacoby said.

What the 2005 act did do was to herald an explosion in private student loans. Lenders, confident in the knowledge that it would be much more difficult in future for debts to be discharged, opened their arms wide to new borrowers.

Today, the total of outstanding private student loans stands at $123bn. That is only about 8% of the overall $1.5tn debt mountain, but it is responsible for much of the human suffering with the average private student loan debt amounting to almost $14,000 a person.

Higher interest rates

Most outstanding student loans are owed to the federal government. Discharging federal student loans in bankruptcy is similarly tightly proscribed, but the pain of those restrictions is heavily tranquilised by schemes that help borrowers who fall into trouble including loan forgiveness.

Private student loans by contrast have no such cushion. The only hope for a borrower falling behind in repayments is if they can prove “undue hardship” – a standard that is almost impossible to meet and that often involves litigation costing thousands of dollars they do not have.

“Private student loans tend to have higher interest rates than federal loans, are far less flexible when borrowers are struggling, and are not eligible for programs like income-driven repayment or loan forgiveness,” said Adam Minsky, a bankruptcy attorney who takes on student loans cases.

In Joe’s Vision, Biden points to an attempt in 2015 by the Obama administration, in which he was the vice-president, to allow at least some private student loans to be discharged in bankruptcy. He promises that a Biden presidency would enact that legislation – effectively reversing his earlier 2005 vote.

But other than that he has remained largely silent on the subject and has not offered a retraction of his earlier voting record. The Guardian asked the Biden campaign to respond to the accusation that his support of the 2005 act, encouraged by his close ties to Delaware corporations, has made it harder for millions of Americans struggling with private student loans. There was no immediate reply.

So far on the Democratic presidential trail the subject of Biden’s role in the 2005 reforms has attracted remarkably little attention. The former vice-president has had to atone for his treatment of Anita Hill when she accused the US supreme court justice nominee Clarence Thomas of sexual harassment in 1991 and for his support of the 1994 crime bill that heralded mass incarceration, but on student loans he has largely avoided scrutiny.

Warren – no longer a law professor, a political rival now – made a passing reference to his record on bankruptcy on the day Biden launched his presidential bid in April. “At a time when the biggest financial institutions in this country were trying to put the squeeze on millions of hard-working families, Joe Biden was on the side of the credit card companies,” she said.