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STUDENT LOANS, POLITICS, AND THE OCCUPY MOVEMENT: FINANCIAL AID REBELLION AND REFORM

KAMILLE WOLFF DEAN*

I. INTRODUCTION

We didn't come from wealthy families. When we graduated from college and law school we had a mountain of debt. When we married, we got poor together. We added up our assets and there were no assets. And we added up our liabilities and there were lot of liabilities—basically in the form of student loans¹

The President of the United States only paid off his student loans eight years ago.² The First Lady also scaled the mountain of higher education debt for decades.³ Barack and Michelle Obama are successful college graduates and professionals. In spite of their accomplishments and achievements as gainfully employed lawyers, the Obamas still had to answer the call of persistent and non-dischargeable student loan debt for a number of years after graduation. The Obamas were bound to make payments on their student loans even after they were faced with saving for their own children's college education. As the Obamas became homeowners, and then parents, they still had to shoulder the burden of student debt.⁴ The American Dream for the Obamas and millions of other Americans is clouded by the competing interest of student loan

* Associate Professor of Law, Thurgood Marshall School of Law, Texas Southern University. I thank Professors Akilah Folami and Janai Nelson for their insightful commentary on earlier drafts. I am grateful for the Summer Research Grant awarded by my institution for this project. I also commend the editorial staff for the careful review of this Article. I value the encouragement and support of my family, friends, and colleagues in publishing this writing.

1. Olivier Knox, *Obama: I Only Paid Off My Student Loans Eight Years Ago*, ABCNEWS.COM (Apr. 24, 2012), <http://abcnews.go.com/Politics/OTUS/obama-paid-off-student-loans-years-ago/story?id=16204817> (quoting President Barack Obama referring to himself and First Lady Michelle Obama during a speech at the University of North Carolina at Chapel Hill).

2. *Id.*

3. *See id.* (noting that the president stated both he and his wife had to pay off large student loans during their marriage).

4. *See id.* (quoting the President's statement that he and the First Lady were paying off their own student loans while trying to save for their daughters' education).

repayment.⁵

Student loans are now a fact of life for the majority of Americans pursuing a college education.⁶ Even graduates at the head of the class are strapped with a backpack of hefty student loan debt.⁷ No longer are grades and test scores the criteria for being awarded a financial aid package without the burden of loans. Scholarships and grants are shrinking as unsubsidized student loans increasingly fulfill student need in financing the sharply rising costs of higher education.⁸ Sustained growth in the higher education sector depends on a stable and affordable financial aid system to prevent students from being saddled with exorbitant debt upon graduation.

In the current state of affairs, student loan repayment may affect the credit and credibility of students, parents, and even grandparents.⁹ Students and their families may be compelled to submit to the unfavorable terms of private student loans as the

5. See also Alex Leary, *Rubio Still Bogged Down in Student Loan Debt*, TAMPA BAY TIMES (June 14, 2012), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/rubio-still-bogged-down-student-loan-debt> (reporting that Senator Marco Rubio, a lawyer and political player in the Republican Party, owes more than \$100,000 in student loan debt with Sallie Mae).

6. See Arthur M. Hauptman, *Politics First on Student Loans*, INSIDE HIGHER EDUC. (Apr. 30, 2012), <http://www.insidehighered.com/views/2012/04/30/hauptman-essay-why-student-loan-interest-rate-debate-focuses> (taking a comparative approach in noting the success of the New Zealand student loan system and the similar perils of politics influencing the student loan industry in England as in the United States).

7. See generally *Colleges and Universities that Award Merit Aid*, N.Y. TIMES (July 16, 2012), http://www.nytimes.com/interactive/2012/07/08/education/edlife/8edlife_chart.html (referencing the availability of merit-based aid, “[i]t’s the fate of being in the middle: a good student but not Ivy caliber, strapped by college costs but not eligible for enough need-based aid.”).

8. See generally Osamudia R. James, *Dogs Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 853 (2010) (discussing the increasing number of students having to rely on loans over scholarships to afford the cost of college).

9. See Kelly Greene, *New Peril for Parents: Their Kids’ Student Loans*, WALL ST. J. (Oct. 26, 2012), <http://online.wsj.com/article/SB10000872396390444024204578044622648516106.html>; Michelle Singletary, *Student Loans Saddle Both Kinds of Seniors: Graduates and Grandparents*, WASH. POST (Apr. 7, 2012), http://www.washingtonpost.com/student-loans-saddle-both-kinds-of-seniors-graduates-and-grandparents/2012/04/06/g1QAYZRi2S_story.html; Peter Coy, *Student Loans: Debt for Life*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2012), <http://www.businessweek.com/articles/2012-09-06/student-loans-debt-for-life> (stating that people age sixty and older owe \$43 billion in student loans); see generally Katy Stech, *Soured Student Loans Bankrupt Parents, Grandparents*, WALL ST. J. (Oct. 29, 2012), <http://blogs.wsj.com/ankruptcy/2012/10/29/soured-student-loans-bankrupt-parents-grandparents/>.

only viable option in making up the deficit between student need and college costs. The pressure to take out high-priced loans,¹⁰ which have dire consequences upon default, has erupted into the Occupy Student Debt movement to prompt reform and demand respect for the millions of college graduates who cannot find employment that pays a living wage.¹¹

The high debt-to-income ratio prevents college graduates from investing in their future.¹² Generally low employment prospects contribute to the anxiety of adulthood for recent college graduates.¹³ A political showdown during the summer of 2012 threatened to encumber student loan borrowers even further when the interest rate for federal student loans was set to double.¹⁴ As Democrats and Republicans battled on the congressional floor,¹⁵ college graduates were at the mercy of bipartisan legislators to prevent a sizeable increase in the percentage of interest due on

10. See generally Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 73 (2011) (discussing the pressure students feel to obtain high-cost loans).

11. See generally Occupy Student Debt Campaign, *A Statement from the Occupy Student Debt Campaign*, <http://www.occupystudentdebtcampaign.org/click-to-read-our-statement-on-student-debt-reform-initiatives/> (last visited Oct. 31, 2012) (mobilizing to raise awareness of the student loan debt crisis); see also Mark Memmott, *Occupy Wall Street: College Students Urged to Walk Out Today*, NPR (Oct. 5, 2011), <http://www.npr.org/blogs/thetwo-way/2011/10/05/141071655/occupy-wall-street-college-students-urged-to-walk-out-today> (linking the Occupy Wall Street protests to the Occupy Student Debt movement); see also Jodi S. Cohen and Vikki Ortiz Healy, *Student Debt Looms Large for a Generation*, CHI. TRIB. (Oct. 30, 2011), http://articles.chicagotribune.com/2011-10-30/news/ct-met-student-loan-debt-20111030_1_student-loan-debt-graduates-borrowers (citing the Occupy Wall Street protests to student loan relief advocacy).

12. See, e.g. *A First Look at "Gainful Employment" Data, by Program and Institution*, CHRON. OF HIGHER EDUC. (June 26, 2012), <http://ezproxy.jmls.edu:2159/article/A-First-Look-at-Gainful/132589/> (analyzing debt-to-earnings ratios among in the context of student loan debt and annual income).

13. See Catherine Rampell, *Many with a New College Degree Find the Job Market Humbling*, N.Y. TIMES (May 18, 2011), <http://www.nytimes.com/2011/05/19/business/economy/19grads.html> (reporting on the job prospects of recent college graduates who may experience difficulty in repaying student loans by taking lower paying jobs in their college major thereby requiring even more education and necessitating more student loan debt).

14. See Tom Cohen, *Political Squabbling over Student Loans Continues*, CNN (June 21, 2012), <http://www.cnn.com/2012/06/21/politics/obama-student-loans/index.html> (chronicling debates between Republicans and Democrats concerning the statutory doubling of federal student loan interest rates).

15. See Jonathan Weisman, *Senate Republicans Block Bill to Avert Rise in Student Loan Rate*, N.Y. TIMES, May 9, 2012, at A16 (chronicling the student loan filibuster); see generally Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 551 (2012) (highlighting how the political climate may affect higher education).

federal aid.¹⁶ The compromise that Congress reluctantly came to, as part of the federal Interest Rate Reduction Act¹⁷ that was set forth within the Transportation Reauthorization Bill,¹⁸ is only temporary.¹⁹ Advocates argue that the time is now for a change in

16. See Cooley, *supra* note 15, at 551 (summarizing partisan debates on how to fund loans to prevent the interest rate increase); see also Allysia Finley, *The Politics of Student Loans*, WALL ST. J. (June 12, 2012), <http://online.wsj.com/article/SB10001424052702303561504577493073429714402.html#articleTabs=article>; Arne Duncan, *Take Politics Out of Student Loan Process*, POLITICO (June 10, 2012), <http://www.politico.com/news/stories/0612/77245.html> (discussing the impact that political squabbles have had on the student loan crisis); Phil Roe, *Student Loans Latest Casualty of Politics*, HILL'S CONG. BLOG (May 8, 2012, 5:48 PM), <http://thehill.com/blogs/congress-blog/education/226197-student-loans-latest-casualty-of-politics> (noting that the proposed increase on subsidized Stafford Loans from 3.4% to 6.8% would result in an increase of about \$1,000 over the life of the loan for the average borrower).

17. H.R. 4628, 112th Cong. (2012); see also H.R. 336, 112th Cong. (2011) (stating that the bill serves “[t]o amend the Truth in Lending Act to protect consumers from usury. . . .”); see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, Statement of Administrative Policy, H.R. 4628 – Interest Rate Reduction Act (2012) (noting that “[s]tudents are increasingly relying on loans to finance postsecondary education, often absorbing tuition hikes stemming from reductions in State funding and institutional support. Graduates should not be burdened with unmanageable college debt as they seek to launch a career or a business, start a family, or buy a house.”).

18. H.R. 4348, 112th Cong. (2012).

19. See Finley, *supra* note 16 (discussing the possibility of continuing below market interest rates for student loans). The article states:

In 2007 Congress reduced interest rates on subsidized Stafford loans to 3.4% from 6.8%. The lower rates, which were phased in over five years, expire at the end of this month. Mr. Obama wants to extend the below-market rates at an annual cost of \$6 billion to taxpayers. Since Republicans don't want to alienate young voters, they've agreed to extend the rates temporarily in return for spending offsets.

Id.; see also Christine Armario, *Brief Relief, Long-Term Questions on Student Loans*, SEATTLE TIMES (June 30, 2012), http://seattletimes.com/html/politics/2018567755_apusstudentloananxiety.html (noting that the deal that Congress came to in preventing the interest rate hike on federal student loans is only good for one year, potentially becoming an issue again next summer); Tom Cohen, *Congress Oks Highway Funds-Student Loan Bill*, CNN (June 29, 2012), <http://www.cnn.com/2012/06/29/politics/congress-highway-bill/index.html> (reporting that Congress voted as part of the transportation bill to forgo an increase in subsidized federal student loans from June 30, 2012 through July 6, 2013, thereby extending cuts issued as part of the transportation bill passed in 2005). The congressional deal also limited the number of years that subsidized federal student loans to undergraduates would be subject to in-school deferment to six years. *Id.*; see also Jonathan Weisman, *Congress Approves a \$127 Billion Transportation and Student Loan Package*, N.Y. TIMES, June 30, 2012, at A14 (noting that the \$127 billion package was approved by the House in a vote 373 to 52, and by the Senate in a vote of 74 to 19).

financial aid.²⁰ The promise of an educated population is at risk if public and private interests do not converge to solve the vexing problem of the student loan load.²¹ The student loan debate was heavily influenced by the presidential election of 2012, and will continue to be a topic of discussion.²² The candidates in presidential and congressional races are set to address the looming student loan debt crisis.²³

This Article defines the student loan problem, presents a series of related legislation for analytical review, and sets forth viable solutions for implementation, supervision, and regulatory oversight. The range of recent legislation addressing the student loan bubble spans the spectrum from bankruptcy to fair lending. The Consumer Financial Protection Bureau created under the Dodd-Frank Act is in place to address issues of financial equity in areas of concern including student loan debt.²⁴ However, the

20. See Jon Healy, *Playing Politics with Student Loan Interest Rates*, L.A. TIMES (Apr. 26, 2012), <http://articles.latimes.com/2012/apr/26/news/la-ol-stafford-student-loan-interest-rate-politics-20120426> (noting that a permanent resolution to yearly speculation on student loan interest rates is necessary to ease borrower anxiety); see also Armario, *supra* note 19 (noting that while interest rates on subsidized federal student loans are set to automatically double from 3.4% to 6.8% next year under a series of congressional rate hikes approved five years ago, “[a]bout \$1.2 billion will be saved by limiting federal subsidies of Stafford loans to six years for students pursuing a bachelor’s degree and three years for those completing an associate’s degree.”).

21. See David Nakamura & Rosalind S. Helderman, *Obama Urges Students, Parents to Pressure Congress on Student Loan Issue*, WASH. POST (June 21, 2012), http://www.washingtonpost.com/politics/obama-and-house-republicans-face-off-over-student-loans-again/2012/06/21/gJQAtJ3osV_story.html (quoting President Obama: “[t]he clock is running out. You know, in today’s economy, higher education can’t be a luxury. It’s an economic necessity. Everybody should be able to afford it.”).

22. See Hauptman, *supra* note 6 (stating that the Higher Education Act will be reviewed following the election); Tracy Jan, *Romney Student Loan Plan Criticized*, BOS. GLOBE (July 9, 2012), http://www.boston.com/news/politics/articles/2012/07/09/romney_moves_to_reintroduce_private_lenders_in_federal_student_loan_market/?page=3 (emphasizing the dichotomy between Republican presidential candidate Mitt Romney’s support of private lenders to issue federal student loans versus Democratic President Barack Obama’s move to eliminate private lenders from the federal student loan program in 2010). Political contributions the 2012 presidential candidates and private lenders such as banks and loan servicers show more support for Romney. *Id.*; see also Michael Stratford, *With Obama’s Win, Colleges Anticipate 4 More Years of Reform*, CHRON. OF HIGHER EDUC. (Nov. 7, 2012), <http://chronicle.com/article/Under-Obama-Colleges/135592/>.

23. See generally Rebecca Berg, *Some Democrats Make Student Loans a Campaign Issue*, N.Y. TIMES BLOG (June 19, 2012, 5:47 PM), <http://thecaucus.blogs.nytimes.com/2012/06/19/some-democrats-make-student-loans-a-campaign-issue/> (emphasizing that both Republicans and Democrats blame one another for obstructing solutions to the student loan crisis).

24. See Rohit Chopra, *Our Student Loan Complaint System Is Open for Business*, CONSUMER FIN. PROT. BUREAU (Mar. 5, 2012), <http://www>

politicized nature of Dodd-Frank and the function of the Bureau leave student loan reform in a state of flux. This Article provides a step-by-step analysis for overcoming such barriers to result in viable student loan relief.

II. THE BURDEN OF STUDENT LOAN DEBT

Poverty rates in this country of wealth are at an all-time high.²⁵ With staggering rates of unemployment and underemployment, even college graduates are affected by the challenges of a tight job market.²⁶ Economic pressures dictate that job applicants obtain advanced degrees or major in specific disciplines in order to earn a livable wage.²⁷ Such educational prerequisites have young adults and seasoned veterans alike

.consumerfinance.gov/blog/our-student-loan-complaint-system-is-open-for-business/ (discussing concerns students have over their loan debt).

25. See *Poverty Facts*, NAT'L POVERTY CTR., <http://www.npc.umich.edu/poverty/> (last visited Oct. 29, 2012) (stating that “[i]n 2010, 15.1 percent of all persons lived in poverty. The poverty rate in 2010 was the highest poverty rate since 1993.”); see generally Carmen DeNavas-Walt et al., *Income, Poverty, and Health Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf> (providing data on income and poverty in the United States in 2010 and concluding that poverty increased from 2009 to 2010).

26. See Paul Davidson, *Unemployment for College Grads Is Highest Since 1970*, USA TODAY (Dec. 5, 2010), http://usatoday30.usatoday.com/money/economy/employment/2010-12-06-collegegrads06_ST_N.htm (reporting that the jobless rate for Americans with at least a bachelor's degree rose to 5.1%, which is the highest percentage since 1970); see also *Employment Status of the Civilian Population 25 Years and Over by Educational Attainment*, U.S. DEP'T. OF LABOR, BUREAU OF LABOR STAT., Table A-4, <http://www.bls.gov/news.release/empsit.t04.html> (last visited Oct. 8, 2012) (analyzing employment data by educational attainment).

27. See Anthony P. Carnevale et al., *Hard Times – College Majors, Unemployment and Earnings: Not All College Degrees Are Created Equal*, GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, 5, <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Unemployment.Final.upd.atel.pdf> (stating:

The unemployment rate for people with graduate degrees is 3 percent compared with a 5 percent unemployment rate for those with a BA (recent college graduates and experienced workers holding a Bachelor's degree). With the exception of majors in the arts and Architecture, unemployment rates for people with graduate degrees range between 1.9 percent and 4.0 percent.)

Id.; see also Beckie Supiano, *Unemployment Varies by Major, Study Finds*, CHRON. OF HIGHER EDUC. (Jan. 4, 2012), <http://chronicle.com/article/Unemployment-Varies-by-College/130212/> (finding that unemployment rate varies by major); see also Peter Whoriskey, *New Study Shows Architecture, Arts Degrees Yield Highest Unemployment*, WASH. POST (Jan. 4, 2012), http://www.washingtonpost.com/business/economy/new-study-shows-architecture-arts-degrees-yield-highest-unemployment/2012/01/03/gIQAwpax_ZP_story.html (finding that certain majors have higher unemployment rates).

enrolling in non-profit and for-profit institutions of higher learning.²⁸ At a time when a college degree may not equal substantially more earning potential than a high school diploma,²⁹ an increasing number of the workforce are shouldering relatively large student loan debt.³⁰

To level the economic playing field, students and parents alike may be compelled to take on the burden of student loan debt.³¹ Student loan debt currently totals in the trillions.³² Student

28. See generally Laura G. Knapp et al., *Postsecondary Institutions and the Price of Attendance in the United States: Fall 2009, Degrees and Other Awards Conferred: 2008-09, and 12-Month Enrollment: 2008-09*, U.S. DEP'T. OF EDUC., NAT'L CTR. FOR EDUC. STAT. (Aug. 2010), <http://nces.ed.gov/pubs2010/2010161.pdf> (finding that 27.4 million people enrolled in some type of higher learning education program in the 2008-09 school year); Doug Lederman, *3 Million and Counting*, INSIDE HIGHER EDUC. (Aug. 26, 2010), <http://www.insidehighered.com/news/2010/08/26/enroll> (stating that for-profit enrollments have increased more than 20% since the 2007-08 school year); see also Daniel L. Bennett et al., *For-Profit Higher Ed.: Growth, Innovation and Regulation*, CTR. FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY, 10 (July 2010), http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/29010.pdf (finding that the for-profit education industry has grown substantially).

29. See *College Student Debt Grows. Is It Worth It?*, NPR (May 16, 2011), <http://www.npr.org/2011/05/16/136214779/college-student-debt-grows-is-it-worth-it> (explaining that college degrees in specific majors such as science and technology provide a higher likelihood that graduates can repay higher student loans as opposed to graduates who major in the arts and humanities who are less likely to be able to repay large educational debt).

30. See Mary Pilon, *What's a Degree Really Worth?*, WALL ST. J. (Feb. 2, 2010), <http://online.wsj.com/article/SB10001424052748703822404575019082819966538.html> (explaining that when one takes student loans into account, a college degree may not increase lifetime earnings as much as projected over those with only high school diplomas); see also Richard Vedder, *Spending Triples; Results Slide, Room for Debate*, N.Y. TIMES (Aug. 31, 2011), <http://www.nytimes.com/roomfordebate/2011/08/23/spending-too-much-time-and-money-on-education/spending-on-k-12-education-triples-and-results-slide> (stating “[m]ore college grads are taking low-skilled jobs previously occupied by those with high school diplomas. . .”).

31. See *Student Debt and the Class of 2010*, PROJECT ON STUDENT DEBT, (Nov. 2011), <http://projectonstudentdebt.org/files/pub/classof2010.pdf> (finding that student loan debt is on the rise); see also Equal Justice Works, *Young Americans Voice Concern over Student Loans*, U.S. NEWS AND WORLD REPORT (Apr. 25, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/04/25/young-americans-voice-concern-over-student-loans> (explaining that two in three college students graduate with an average student loan debt of \$25,000); see also *Trends in Student Aid 2011*, COLLEGE BOARD 8 (2011), http://trends.collegeboard.org/downloads/Student_Aid_2011.pdf (discussing the difficulties that students with more modest means have in paying for college). The article notes that while:

Some students have the financial resources necessary to pay tuition and fees, as well as other costs associated with going to college, without

loans are increasingly on the rise while other consumer debt such as auto loans, credit card balances, and mortgages are steadily decreasing.³³ Student loans increasingly, and more often private student loans, comprise a larger portion of college financial aid packages than scholarships and grants.³⁴ Young college students

serious difficulty. For many others, postsecondary education would be out of the question without generous subsidies. As both college prices and the other expenses associated with college attendance continue to rise more rapidly than income, more students and potential students fall into the second category.

Id.

32. See Josh Mitchell & Maya Jackson-Randall, *Student Loan Debt Tops \$1 Trillion*, WALL ST. J. (Mar. 22, 2012), <http://online.wsj.com/article/SB10001424052702303812904577295930047604846.html> (stating:

Total student debt outstanding appears to have surpassed \$1 trillion . . . [according to] the Consumer Financial Protection Bureau, a federal agency created in the wake of the financial crisis. That would be roughly 16% higher than an estimate earlier this year by the Federal Reserve Bank of New York.).

33. See *Quarterly Report on Household Debt and Credit*, FED. RESERVE BANK OF N.Y., 2 (May 2012), http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q42011.pdf (discussing the rise of student loan balances). The author notes:

Over the one year period ending March 31, 2012, student loan balances rose \$64 billion. Over the same period, all other forms of household debt (mortgages, HELOCs, auto loans and credit card balances) fell a combined \$383 billion. Since the peak in household debt in 2008Q3, student loan debt has increased by \$293 billion, while other forms of debt fell a combined \$1.53 trillion.

Id.; see also Meta Brown et al., *Grading Student Loans*, FED. RESERVE BANK OF N.Y. (Mar. 5, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/03/grading-student-loans.html> (finding “[t]he outstanding student loan balance now stands at about \$870 billion surpassing the total credit card balance (\$693 billion) and the total auto loan balance (\$730 billion).”).

34. See Erin Dillon & Kevin Carey, *Drowning in Debt: The Emerging Student Loan Crisis*, EDUC. SECTOR, 2 (July 9, 2009), <http://www.educationsector.org/publications/drowning-debt-emerging-student-loan-crisis> (finding that “private student loans are exploding. In 1993, such loans barely existed.”); see also Kim Clark, *Cheaper Student Loans but Shortage of College Grants Likely in 2011 and 2012*, U.S. NEWS AND WORLD REPORT (Jan. 31, 2011), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2011/01/31/cheaper-student-loans-but-shortage-of-college-grants-likely-in-2011-and-2012> (explaining that financial aid like the federal Pell Grant and the federal SMART and Academic Competitiveness Grants are less available due to a sizeable increase in college student need as a result of the economic downturn); Jennifer Liberto, *Students Face Squeeze in Pell Grants*, CNNMONEY (Dec. 17, 2011), http://money.cnn.com/2011/12/16/pf/congress_student_loans/index.htm (explaining that deficits in the Pell Grant program prompted the U.S. Congress to cut the budget for higher education financing and reduce the grace period for the repayment of Stafford Student Loans with such changes projected to negatively affect African American and transfer students).

and graduates with relatively no assets or income are ushered into high debt loans with little warning that they may be at serious risk for default.³⁵

Senior citizens are also bearing the brunt of enormous student loan debt by taking out loans on behalf of children and grandchildren, or even paying off their own student loan debt accrued when they were in college decades prior.³⁶ Older Americans age sixty and over now owe an estimated \$36 billion in student loans.³⁷ Unscrupulous lenders and unconscionable loan terms have prompted regulation and reform, but with little consequence to the profitable private student loan industry that perpetuates the problem.³⁸ Instead, students and colleges are prompted to exercise accountability despite lender misconduct in the form of kickbacks and non-disclosure.³⁹ Creditors and

35. See Brown et al., *supra* note 32 (explaining that “some special accounting used for student loans, not applicable to other types of consumer debt, makes it likely that the delinquency rates for student loans are understated.”).

36. See *id.* (explaining that “student loan debt is not just a concern for the young. Parents and the federal government shoulder a substantial part of the postsecondary education bill.”); see generally Mary Pilon, *The \$555,000 Student-Loan Burden*, WALL ST. J. (Feb. 13, 2010), <http://online.wsj.com/article/SB10001424052748703389004575033063806327030.html> (describing a story of a doctor who will be paying her medical school loans until she is seventy years old); see also Brad Tuttle, *60 and Still Not out of Student Loan Debt: Seniors Facing \$36 Billion in College Loans*, TIME (Apr. 3, 2012), <http://moneyland.time.com/2012/04/03/60-and-still-not-out-of-student-loan-debt-seniors-facing-36-billion-in-college-loans/> (explaining that data indicates that Americans over age sixty collectively owe over \$36 billion in loans).

37. See Ylan Q. Mui, *Senior Citizens Continue to Bear Burden of Student Loans*, WASH. POST (Apr. 1, 2012), http://www.washingtonpost.com/business/economy/senior-citizens-continue-to-bear-burden-of-student-loans/2012/04/01/gIQA47lpS_story.html (citing study by the Federal Reserve Bank of New York Consumer Credit Panel).

38. See *Student Loan Default Rates Increase: Borrowers at For-Profit Schools Represent Large and Growing Share of Loan Defaults*, U.S. DEP'T OF EDUC. (Sept. 13, 2010), <http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0> (describing that the “[Proposed regulation] aim[s] to protect students from misleading and overly aggressive recruiting practices; provide consumers with better information about the effectiveness of career college programs; and ensure that only eligible students and programs receive aid.”); see also Diana Jean Schemo, *Cuomo Plans to Broaden Student-Lending Inquiry*, N.Y. TIMES (June 7, 2007), http://www.nytimes.com/2007/06/07/us/07loan.html?_r=0 (stating that “Attorney General Andrew M. Cuomo of New York, whose scrutiny of student loans has exposed ties between universities and lenders, said Wednesday that he was broadening his inquiry to examine the criteria lenders use when making loans, and whether they violate civil rights statutes.”).

39. See Schemo, *supra* note 38 (describing how the former attorney general of New York referred to the private student loan industry as the “wild west” while advocating for a code of conduct for lenders to prohibit secret gifts and unmerited board appointments to loan officers to steer unassuming students

bankruptcy courts have made it virtually impossible to gain relief when it comes to the discharge or forgiveness of student loan debt.⁴⁰

The Great Recession made it difficult for borrowers to live up to their responsibility in paying back loans.⁴¹ Lenders did not always play fair, despite existing regulation that prohibits bad faith and mandates disclosure.⁴² Borrowers may not be afforded an

to unfair loans); *see also* Kyle Stokes, *How Student Loan Defaults End up Hurting Taxpayers*, NPR (Feb. 20, 2012), <http://stateimpact.npr.org/indiana/2012/02/20/how-student-loan-defaults-end-up-hurting-taxpayers/> (describing how students, colleges, and universities are under increased scrutiny to maintain adequate and timely graduation rates in order to qualify for financial aid); *see also* Travis Packer, *College Cost Reduction and Access Act: A Good Step, but Only a Step*, 12 N.C. BANKING INST. 221, 231 (2008) (stating that “[t]he head of financial aid at Columbia University in New York was suspended after receiving one hundred thousand dollars in stock options from a student lender.”).

40. *See Loan Cancellation & Discharge, Collections Guide to Defaulted Student Loans*, U.S. DEPT. OF EDUC., <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation> (last visited Oct. 9, 2012) (explaining that “[e]ffective October 8, 1998, your obligation to repay Title IV, HEA student loan and grant liabilities can no longer be canceled (discharged) due to bankruptcy, unless you can successfully prove that repayment of the debt would cause “undue hardship” as defined by case law in your jurisdiction.”).

41. *See* Jane Glickman, *Student Loan Default Rates Increase: Borrowers at For-Profit Schools Represent Large and Growing Share of Loan Defaults*, DEPT OF EDUC. (Sept. 13, 2010), <http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0>. (discussing difficulty of student loan repayment supported by current default rates). The data “confirms what we already know: that many students are struggling to pay back their student loans during very difficult economic times.” *Id.* (quoting U.S. Secretary of Education, Arne Duncan); *see also* Geraldine Baum, *Student Loans Add to Angst at Occupy Wall Street*, L.A. TIMES (Oct. 25, 2011), <http://articles.latimes.com/2011/oct/25/nation/la-na-occupy-student-loans-20111026> (explaining student frustration leading to increased frustrations); Libby A. Nelson, *Occupy Student Loans*, INSIDE HIGHER EDUC. (Nov. 15, 2011), <http://www.insidehighered.com/news/2011/11/15/occupy-protests-focusing-increasingly-student-debt> (discussing students taking to the “Occupy” movement to express frustration with student loans); *see generally* OCCUPY STUDENT DEBT, <http://occupystudentdebt.com/> (last visited Sept. 19, 2011); (discussing derivatives of the Occupy Wall Street Movement protesting the burdensome increase of student loan debt for the middle-class).

42. *See* Kareem Fahim, *Cuomo Names Developers of a Student Loan Center*, N.Y. TIMES (Dec. 31, 2010), http://www.nytimes.com/2011/01/01/nyregion/01student.html?_r=0. (citing to the resolution of Andrew Cuomo’s campaign to uncover “kickbacks and deceptive marketing practices” among the \$85 billion student loan industry that resulted in \$13 million in settlements paid by student loan lenders such as Sallie Mae and Citibank); *see also* *Cuomo: School Loan Corruption Widespread*, USA TODAY (Apr. 10, 2007), http://www.usatoday.com/money/industries/banking/2007-04-10-cuomo-student-loan-probe_N.htm (portraying corruption through various accounts of school corruption); Packer, *supra* note 39, at 223 (discussing Congress’s involvement in student loans with nonprofit lenders). Congress:

opportunity to engage in an arms-length bargain with lenders.⁴³ Rather, creditors have used questionable tactics to entice debtors to enter into student loan agreements.⁴⁴

There is relief on the horizon.⁴⁵ As the legislature considers statutory amendments to current law and regulation, the examination of the financial aid industry is warranted.⁴⁶ The newly formed Consumer Financial Protection Bureau will enforce the provisions of the Dodd-Frank Act in providing oversight of private student loans.⁴⁷ Also, there are several acts before

[H]ad guaranteed nonprofit lenders a 9.5% rate of return on student loans because of the risk and cost involved with those loans. Congress eliminated this program in 1993, but kept the rates for existing loans. However, private loan companies schemed to retain this return rate by giving false information regarding the number of old loans they continued to service.

Id.

43. See generally Kevin Drawbaugh, *Student Loan Scandal Spreads to Underwriting*, REUTERS (June 6, 2007), <http://www.reuters.com/article/2007/06/06/studentloans-cuomo-idUSN0637732520070606> (discussing underwriting processes of major lenders).

44. See generally Paul Basken, *Cuomo Issues Subpoenas to Student-Loan Companies Suspected of Misleading Marketing Practices*, CHRON. OF HIGHER EDUC. (Oct. 12, 2007), <http://chronicle.com/article/Cuomo-Issues-Subpoenas-to/123265/> (explaining students being victims of student loan marketing); see also Anne Ryman, *Bank Deals for College ID Debit Cards Draw Criticism*, USA TODAY (June 24, 2012), <http://www.usatoday.com/money/industries/banking/story/2012-06-24/colleges-cash-in-on-student-debit-card-bank-deals/55796878/1> (stating that “[f]or many years, some colleges signed agreements with financial institutions to place them on preferred lender lists for student loans in exchange for money.”).

45. See Glickman *supra* note 41 (detailing how the Obama Administration partnered with the higher education industry to implement a strategic plan to restore credibility to federal student loan programs, findings were published on June 16, 2010).

46. See generally *Making College More Affordable*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited Sept. 19, 2012) (discussing the President’s intention to work with legislators on the student loan issue).

47. See *Request for Information Regarding Private Education Loans and Private Education Lenders*, FED. REGISTER (Nov. 17, 2011), <https://www.federalregister.gov/articles/2011/11/17/2011-29737/request-for-information-regarding-private-education-loans-and-private-educational-lenders> (stating:

Section 1077 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) requires the Bureau of Consumer Financial Protection (“Bureau” or “CFPB”) and the Department of Education, in consultation with the Department of Justice and the Federal Trade Commission, to prepare a Report on Private Education Loans and Private Education Lenders).

Id.; see also *Consumer Financial Protection Bureau Releases Financial Aid Comparison Shopper*, CFPB (Apr. 11, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-releases-financial-aid-comparison-shopper> (stating “[u]ntil recently, private student lenders have

Congress to reform the Bankruptcy Code to relieve the financial pressure caused by the student loans of debtors in distress.⁴⁸ Opposition to such reform and regulation by creditors may be unwarranted due to the impending student loan crisis in the United States.⁴⁹ Soaring interest rates and the inequitable dissolution of unsecured debt characterize the student loan market.⁵⁰

been regulated by a patchwork of state and federal authorities); *see also* *Consumer Financial Protection Bureau Aims to Shed Light on the Private Student Loan Industry*, CFPB (Nov. 16, 2011), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-aims-to-shed-light-on-the-private-student-loan-industry> (stating “[t]he CFPB will use the collected input to assist with preparation of a report to Congress on private student lending. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the CFPB and the Department of Education to produce this report by July 21, 2012. The CFPB will also use the information it gathers to prioritize its own regulatory and education work.”).

48. *See* Private Student Loan Bankruptcy Fairness Act of 2011, H.R. 2028.IH, 112th Cong. (2011); *see also* Fairness for Struggling Students Act of 2011, S. 1102, 112th Cong. (2011); The Student Loan Forgiveness Act of 2012, H.R. 4170.IH, 112th Cong. (2012) (showcasing three separate acts to help student loan issues currently before both houses of Congress).

49. *See* Matt Wirz, *What Hedge Funds Can Teach College Students*, WALL ST. J. (Nov. 12, 2011), <http://online.wsj.com/article/SB10001424052970204224604577030562170562088.html> (stating that “[h]istorically, investors have assumed 25% to 30% of student loans bundled into their bonds will default. But today they are baking in between 30% and 40% default rates among the current crop of graduates. . . .”); *see also* *Student Loans in America: Nope, Just Debt – The Next Big Credit Bubble?*, ECONOMIST (Oct. 29, 2011), <http://www.economist.com/node/21534792> (discussing defaults and student loan amounts); *see generally* William D. Henderson and Rachel M. Zahorsky, *The Law School Bubble: Federal Loans Inflate College Budgets, But How Long Will That Last if Law Grads Can't Pay Their Bills?*, ABA J. (Jan. 1, 2012), http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills (discussing stories of students having trouble paying student loans despite law school graduation).

50. *See generally* *Facts for Consumers: Knee Deep in Debt*, FTC FACTS FOR CONSUMERS (Feb. 2011), <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre19.pdf> (discussing tips for dealing with surmounting debt); *see also* Kevin Hollenbeck & Kelly DeRango, *Focus: HOPE: Using Unsecured Student Loans to Self-Finance Job Training for Disadvantaged Workers*, 12 UPJOHN INST. FOR EMP. RES., 56 (2005) (discussing repayment and tuition innovation struggles); Alan Fram, *House Approves Bill Holding Student-Loan Interest Rate at 3.4%*, ASSOC. PRESS (Apr. 28, 2012), http://www.denverpost.com/nationworld/ci_20500256/house-approves-bill-holding-student-loan-interest-rate; David K. Randall, *Choosing Federal or Private Student Loans: The Right Choices Can Save You Thousands of Dollars*, FORBES (Apr. 22, 2009), <http://www.forbes.com/2009/04/22/student-loans-moneybuilder-personal-finance-loans.html>.

III. THE FINANCING OF HIGHER EDUCATION

Student loans account for a large portion of debt among American consumers.⁵¹ Student loans have surpassed historic highs of one trillion dollars in the amount of money disbursed and outstanding.⁵² Higher education has also grown into a lucrative enterprise.⁵³ With the phenomenal increase in student loan debt, default rates are also sharply rising.⁵⁴ Young adults may face the harsh reality of financial insecurity when high student loan payments threaten to leave them with bad credit, debt collectors, and court judgments.⁵⁵ Graduates and their families may be

51. See Vickie Elmer, *Dealing with Student Debt*, N.Y. TIMES (Apr. 26, 2012), http://www.nytimes.com/2012/04/29/realestate/mortgages-dealing-with-student-debt.html?_r=0 (comparing student loan payments to home mortgages and detailing the negative impact that large student loan debt has on the debt-to-income ratio of college graduates as they become first-time home buyers).

52. See generally U.S. DEP'T. OF EDUC., FED. STUDENT AID ANN. REPORT 2011 (2011), available at <http://www2.ed.gov/about/reports/annual/2011report/fsa-report.pdf> (supplying student loan data for the year 2011); see also Rohit Chopra, *Too Big to Fail: Student Debt Hits a Trillion*, CFPB (Mar. 21, 2012), <http://www.consumerfinance.gov/blog/too-big-to-fail-student-debt-hits-a-trillion/> (discussing growth of student loans and efforts of the Consumer Financial Protection Bureau to alleviate some problems); *Student Loan Debt Exceeds One Trillion Dollars*, NPR (Apr. 24, 2012), <http://www.npr.org/2012/04/24/151305380/student-loan-debt-exceeds-one-trillion-dollars> (participating in a discussion of the student loan debt hitting record numbers).

53. See generally BEN WILDAVSKY ET AL., REINVENTING HIGHER EDUCATION: THE PROMISE OF INNOVATION (BEN WILDAVSKY ET AL. EDs., 2011) (featuring articles discussing the current state of education); see also John Hechinger, *Obama Relies on Debt Collectors Profiting From Student Loan Woe*, BLOOMBERG BUSINESSWEEK (Mar. 26, 2012), <http://www.businessweek.com/news/2012-03-26/obama-relies-on-debt-collectors-profiting-from-student-loan-woe#p1> (discussing the Education Department's role in collecting from borrowers). The article states:

With \$67 billion of student loans in default, the Education Department is turning to an army of private debt-collection companies to put the squeeze on borrowers. Working on commissions that totaled about \$1 billion last year, these government contractors face growing complaints that they are violating federal laws by insisting on stiff payments, even when borrowers' incomes make them eligible for leniency.

Id.

54. See Press Release, *Default Rates Rise for Federal Student Loans* (Sept. 12, 2011) (on file with author) (discussing rising default rates along with steps taken by the department to combat the problem); see also Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/education/13loans.html> (stating “[t]he share of federal student loan defaults rose sharply last year, especially at for-profit colleges and universities, where 15 percent of borrowers defaulted in the first two years of repayment, up from 11.6 percent the previous year.”).

55. See generally Saki Knafo, *Occupy Targets Student Debt as National Student Loan Debt Hits \$1 Trillion*, HUFFINGTON POST (Apr. 25, 2012),

surprised to learn that they do not qualify or have reached the maximum period for deferment and forbearance of their student loans.⁵⁶ As the financial strain of obtaining higher education increases, loan initiation and consolidation of private student loans with less favorable terms than federal student loans are on the rise.⁵⁷

Student loans are now a rite of passage for many who pursue a college degree.⁵⁸ With the astronomical amount of tuition charged at colleges and universities across the country, student loans are a fact of life for students and their families.⁵⁹ College

http://www.huffingtonpost.com/2012/04/25/occupy-student-debt-occupy-obama_n_1453993.html (focusing the Occupy Wall Street movement on student loan debt); *see also* OCCUPY STUDENT DEBT CAMPAIGN, <http://www.occupystudentdebtcampaign.org/> (last visited Sept. 26, 2011). (stating:

We are part of a new movement to end the debt financing of higher education. We assert that education is a right and knowledge should not be a source of profit for Wall Street. The time for petitioning our government has passed. We propose a collective strategy of non-violent direct action to take back higher education and end our complicity with a predatory and unjust system. By uniting behind a strategy of direct action, we declare that we will no longer cooperate with Wall Street.)

56. *See generally* Student Loan Protection Act, H.R. 5458, 111th Cong. (2010) (adding additional requirements to the law governing truth in lending for student loans); *see also* Mitch Smith, *Should Debt Outlive a Student?*, INSIDE HIGHER EDUC. (Apr. 27, 2012), <http://www.insidehighered.com/news/2012/04/27/after-online-petition-bank-forgives-dead-students-loans>; *Deferment and Forbearance*, AM. STUDENT ASSISTANCE, <http://www.asa.org/loan-help/defer/default.aspx> (last visited Sept. 26, 2011) (explaining that each type of student loan may have different requirements and procedures for deferment and forbearance); Sheryl Nance-Nash, *The Student Loan Crisis Is Crippling America's Families – Is the Economy Next?*, FORBES (Feb. 7, 2012), <http://www.forbes.com/sites/sherylnancenash/2012/02/07/the-student-loan-crisis-is-crippling-americas-families-is-the-economy-next/>.

57. *See* Jennie H. Woo, *The Expansion of Private Student Loans in Postsecondary Education*, NAT'L CTR. FOR EDUC. STATISTICS, 1 (Oct. 2011), <http://nces.ed.gov/pubs2012/2012184.pdf> (introducing descriptive data presented by National Center for Education Statistics on the increasing percentages of undergraduate students obtaining private loans); *see also* Press Release, *New Data Show Big Increases in Private Student Loan Borrowing*, PROJECT ON STUDENT DEBT (Apr. 21, 2009), http://projectonstudentdebt.org/files/pub/Private_loan_data_NR.pdf (citing the National Postsecondary Student Aid Study conducted by the National Center for Education Statistics). The study indicates an increase in private loan borrowing with highly unfavorable terms, such as higher variable interest rates and fewer repayment options. *Id.*

58. *See* Theo Keith, David Earl & Blake Hanson, *Student Loan Crisis Threatens Financial Futures*, MSNBC, http://www.msnbc.msn.com/id/43584744/ns/business-personal_finance/t/student-loan-crisis-threatens-financial-futures (last modified July 1, 2011, 8:19 AM) (stating that “U.S. student loan debt has reached \$900 billion, more than what Americans owe on credit cards.”).

59. *See* James Surowiecki, *Debt by Degrees*, THE NEW YORKER (Nov. 21,

tuition has outpaced the rate of inflation and students are struggling to maintain this pace.⁶⁰ As scholarships and grant programs decrease, students are left little option but to take out student loans.⁶¹ College graduates are experiencing stagnant hiring practices and flat wages as their student loans enter repayment.⁶² Generally, regardless of the employment prospects, new graduates are only afforded a short grace period before they are required to make regular payments on their student loans.⁶³

2011), http://www.newyorker.com/talk/financial/2011/11/21/111121ta_talk_surowiecki (indicating that over the past decade Americans owe over \$600 billion in debt, while more than two million graduates are unemployed and millions are underemployed); *see also* Mindy Fetterman & Barbara Hansen, *Young People Struggle to Deal with Kiss of Debt*, USA TODAY, Nov. 22, 2006, at 1A (indicating that overall debt has risen among young people, including the sixteen percent increase in student loan balances).

60. John Hechinger & Janet Lorin, *Tuition Jumps 8.3% Doubling Inflation as Obama Plans Debt Relief*, BLOOMBERG BUSINESSWEEK (Nov. 4, 2011), <http://www.bloomberg.com/news/2011-10-26/tuition-jumps-8-3-doubling-inflation-as-obama-plans-debt-relief.html> (examining the impact of student loans on young people given that an average price of college tuition has grown much faster than the rate of inflation); *see also* Editorial, *Reining in College Tuition*, N.Y. TIMES, Feb. 4, 2012, at A20 (discussing President Obama's proposed reform plan to establish a \$1 billion dollar fund to provide grants to states that improve graduation rates, reduce costs, and expand campus-based aid).

61. *See* HOWARD R. GREENE & MATTHEW W. GREENE, PAYING FOR COLLEGE: THE GREENE'S GUIDE TO FINANCING HIGHER EDUCATION 181 (2004) (stating, "These days, most [college] students take out loans . . .").

62. *See* Mandi Woodruff, *Student Protest Forces Sallie Mae to Alter \$50 Fee Against Unemployed Borrowers*, BUS. INSIDER (Feb. 3, 2012), http://articles.businessinsider.com/2012-02-03/news/31020010_1_sallie-mae-sallie-mae-student-borrowers (explaining the debate about the imposition of Sallie Mae's penalty fee onto the struggling young graduates who are unable to find employment and pay off their debts); *see also* Matthew Shaer, *Law Schools Sued for Lying About Lawyering*, N.Y. MAG.: DAILY INTEL (Feb. 1, 2012), <http://nymag.com/daily/intel/2012/02/law-schools-sued-for-lying-about-lawyering.html> (discussing an imbalance between the shortage of the available job openings and the alarming amount of debt for recent law school graduates); *see also* Katherine Mangan, *Judge Dismisses Lawsuit Accusing Law School of Inflating Job and Salary Data*, CHRON. OF HIGHER EDUC. (Mar. 21, 2012), <http://chronicle.com/article/Judge-Dismisses-Lawsuit/131266> (stating recent law graduates' inability to find jobs upon graduation, yet having to pay steep debts); *see generally* *Sallie Mae Unemployment Penalty Leads College Grads to Join Campaign in Protest*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/01/27/sallie-mae-student-loans-_n_1236788.html (last updated Jan. 27, 2012, 2:07 PM) [hereinafter *Sallie Mae*] (discussing a recent unemployment penalty and the reaction from the graduates who are hit with the penalty because they are unable to make payments on their private loans).

63. *See* *Direct Loans: While You're in Repayment*, U.S. DEP'T OF EDUC., <http://www.ed.gov/offices/OSFAP/DirectLoan/inrepayment.html> (last updated Mar. 3, 2011) (noting that generally, students have between ten and twenty-five years to repay their loans); *see also* *Sallie Mae*, *supra* note 62 (indicating

Federal student loans no longer cover the basic necessities of college enrollment.⁶⁴ Rather, students face the challenge of filling the gap after federal aid is exhausted.⁶⁵ Private student loans are increasing in number and size as students and parents bridge the gap to make ends meet between the exorbitant cost of college attendance and inadequate college savings.⁶⁶ Students may have no other choice than to take out student loans with unfavorable terms to finance their desire to obtain a college education.⁶⁷ Long-term debt in exchange for short-term college success is a reality for some students who take out large loans without graduating.⁶⁸ College attendees may even face personal and financial ruin due to the rising student loan debt in a declining economy.⁶⁹

that normally there is a six month grace period after college graduation before repayment on federal student loans begins); *see generally* Poynter v. United States, No. 10-56751, 2012 U.S. App. LEXIS 6168 (9th Cir. Mar. 26, 2012) (discussing the duration of the grace period for students in the context of the bankruptcy proceeding).

64. *See Student Loan Debt History*, FED. RESERVE BANK OF N.Y., <http://www.newyorkfed.org/studentloandebt/> (last visited Nov. 1, 2012) (noting that “delinquency rates for student loans are likely to understate actual delinquency rates because almost half of these loans are currently in deferment or in grace periods and therefore temporarily not in the repayment cycle. Among loans in the repayment cycle, delinquency rates are roughly twice as high.”).

65. *See generally* David A. Longanecker, Cheryl D. Blanco & Bridget Terry Long, *The Impact of Federal Financial Aid Policies on the Funding, Design, Operation, and Marketing of State and Institutional Financial Aid Policies and Practices: A Review of the Literature*, W. INTERSTATE COMM’N FOR HIGHER EDUC. & HARV. GRADUATE SCH. OF EDUC. (July 2004), http://174.133.199.34/pdf/research-studies/ReseachReport_Longanecker.pdf (noting “[v]arious gift-aid, loan, and week-study programs help college students fill the gap between educational costs and their financial resources).

66. *See Filling the Gap*, SMARTBORROWING, <http://www.smartborrowing.org/smartborrower/fillingthegap.html> (last visited Sept. 24, 2012) (stating that federal loans generally offer more favorable rates).

67. *See* Thomas Harnisch, *The Public Realities of Private Student Loans*, AM. ASS’N. OF ST. COLLS. & UNIVS. (Apr. 2008), <http://congressweb.com/aascu/docfiles/pmapril08.pdf> (indicating that for some students private loans become the only possible outlet due to the rising costs and caps on federal borrowing).

68. *See Letter from Lauren Asher, Vice President*, Inst. for Coll. Access & Success, to Consumer Financial Protection Bureau in Response to Request for Info. (Jan. 17, 2011), http://ticas.org/files/pub/CFPB_PL_Comments_01-17-12.pdf; *see also Private Student Loans: Facts and Trends*, PROJECT ON STUDENT DEBT (July 2011), http://projectonstudentdebt.org/files/pub/private_loan_facts_trends.pdf (stating that about two-thirds of the private loan borrowers did not utilize the readily available, more advantageous, and more affordable federal loans).

69. *See* Kathy Kristof, *Crushed by College*, FORBES, Feb. 2, 2009, at 60 (divorcing couple cited their mounting law school educational debt as a major stress on their marriage).

IV. THE COLOR AND CLASS OF STUDENT LOAN FINANCING

In pursuit of the American Dream, education is a tool of access and opportunity.⁷⁰ In the “land of opportunity” there were academically gifted Americans who were purposely precluded from obtaining a college degree prior to school desegregation.⁷¹ Despite the historically oppressive measures to keep African Americans out of the mainstream collegiate ranks, education prevailed as the means to attain upward mobility as articulated during the Civil Rights Movement.⁷² The economic playing field in narrowing the race wealth gap in this country may be leveled by higher education attainment.⁷³

Strides have been made in building a middle class among people of color through higher education, but colleges that train students to enter into wealth-building careers are experiencing a decrease in minority enrollment.⁷⁴ Higher education continues to

70. See generally Cameron Brenchley, *In America, Education Is Still the Great Equalizer*, OFFICIAL BLOG OF THE U.S. DEP’T. OF EDUC. (Dec. 12, 2011), <http://www.ed.gov/blog/2011/12/in-america-education-is-still-the-great-equalizer> (quoting Secretary Duncan’s statement about the importance of education both in the long-run and in today’s economy); see generally Press Release, Nat’l. Educ. Ass’n., *Education Is the Great Equalizer: NEA President Responds to National Urban League’s Annual Report* (Mar. 26, 2010), available at <http://www.nea.org/home/38697.htm> (responding to annual report of the National Urban League and emphasizing the importance of education in the society).

71. See generally Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, CIVIL RIGHTS PROJECT, 2 (Jan. 2009), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf> (explaining the importance of the development of diversity and inclusion in the United States’ educational system).

72. See Cally L. Waite, *The Segregation of Black Students at Oberlin College After Reconstruction*, 41 HIST. OF EDUC. Q. 344, 347 (2001); see generally HIGHER EDUCATION AND THE CIVIL RIGHTS MOVEMENT: WHITE SUPREMACY, BLACK SOUTHERNERS, AND COLLEGE CAMPUSES (Peter Wallenstein ed., 2d ed. 2008) (explaining desegregation movement and its impact on the American educational system).

73. See Ryan D. Hahn & Derek Price, *Promise Lost: College-Qualified Students Who Don’t Enroll in College*, INST. FOR HIGHER EDUC. POL’Y 1, 16 (Nov. 2008), <http://www.ihep.org/assets/files/publications/m-r/promise-lost-colleg-equalrpt.pdf> (noting that “[m]ost low-income and Hispanic non-college-goers see college as a path to economic mobility . . .”).

74. See generally Sharon M. Collins, *The Making of the Black Middle Class*, 30 SOC. PROBLEMS 369 (1983) (describing efforts in creating black middle-class job opportunities); see also ACHIEVEMENT GAP INITIATIVE AT HARVARD UNIV. (Sept. 5, 2012), <http://www.agi.harvard.edu/> (illustrating efforts by colleges to increase minority access to higher education); see also F. Cadelle Hemphill et al., *Achievement Gaps, Statistical Analysis Report*, NAT’L CTR. FOR EDUC. STAT. (2011), <http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf> (providing detailed information on the size of the achievement gaps between Hispanic and white public school students at the national and state levels);

perpetuate a color caste system in dividing the haves and have-nots.⁷⁵ Predatory lending based on race has led to a subprime student loan market that preys on low-income minorities.⁷⁶

The dismantling of affirmative action programs has a dwindling effect on diversity as an increasing number of minorities are denied admission.⁷⁷ African Americans and Latinos lag behind

Alan Vanneman et al., *Achievement Gaps, Statistical Analysis Report*, NAT'L CTR. FOR EDUC. STAT. (2009), <http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf> (summarizing state-level achievement gaps between black and white students grades four through eight in the main NAEP assessments in mathematics and reading); Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES (Jan. 6, 2010), http://www.nytimes.com/2010/01/07/education/07law.html?_r=0 (stating from 1993 to 2008 both the percentage and number of black and Mexican-American law student declined).

75. See generally James W. Henson & Alexander W. Astin, *The Minority Pipeline: Minorities at Different Educational Transition Points*, 23 NEW DIRECTIONS FOR HIGHER EDUC. (2000) (discussing how increasing the participation of minority groups at lower educational levels appears to have an effect on increasing the lacking representation of minorities in graduate and professional schools than do changes in higher education admissions procedures); Ronald Roach, *Minority Graduate Students Urged to Address Pipeline Issues*, DIVERSE ISSUES IN HIGHER EDUC. (Oct. 26, 2009), <http://diverseeducation.com/article/13152/> (describing data showing that minority men have failed to keep pace with minority women in enrolling as well as completing undergraduate, graduate and professional degree programs over the past three decades); See generally Beheruz N. Sethna, *Minorities in Higher Education: A Pipeline Problem?*, RES. IN HIGHER EDUC. J. (Oct. 2011), <http://www.aabri.com/manuscripts/11913.pdf> (proposing that there are low numbers of ethnic group inputs at various stages of the academic pipeline).

76. See Mamie Lynch et al., *Subprime Opportunity: The Unfulfilled Promise of For-Profit Colleges and Universities*, EDUC. TRUST, 1 (2010) (discussing student loan debt and its impact on the American Dream). The author notes that:

The developing showdown between for-profit colleges and the government is another example of how the aspirations of the underserved and the unfulfilled promise of the American dream combine with lax regulation to make the rich, richer and the poor, poorer. Low-income and minority students are doing their part to advance America's goal to become the best educated country in the world: Some 86 percent of African-American and 80 percent of Hispanic high school seniors plan to attend college

Id.

77. See generally Peter Hinrichs, *The Effect of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 93 REV. ECON. & STAT. (2010) (stating that affirmative action bans decrease underrepresented minority enrollment and increase white enrollment at selective colleges); see also *Challenging Race Sensitive Admissions: A Summary of Important Rulings*, PBS (Sept. 5, 2012), <http://www.pbs.org/wgbh/pages/frontline/shows/sats/race/summary.html> (giving a synopsis of various court case where affirmative actions were banned and the resulting detrimental impact it had minority admissions); See generally Joseph O. Jewell, *An Unfinished Mission: Affirmative Action, Minority Admissions, and the Politics of Mission at the University of*

Whites in college admission and retention.⁷⁸ Graduation rates among African American and Latino students are drastically lower than that of White students.⁷⁹ College students of color who do not graduate leave college with increased student loan debt without the benefit of a degree.⁸⁰ Whites comprise the overwhelming majority of students who obtain admission to attend professional schools nationwide, even at schools that are located in diverse communities with a sizeable pool of minority applicants.⁸¹ Enrollment statistics at non-profit higher education institutions may highlight the need for continued reform in higher education to break the color barrier in serving a more diverse population.⁸²

California, 1868-1997, 69 J. OF NEGRO EDUC. 38 (2000) (arguing that the University of California's Berkley campus's recent retreat from affirmative action signals a departure from its earlier emphasis on providing Californians with greater access to higher education generally and increasing the representation of minorities); see generally Peter Arcidiacono et al., *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, DUKE UNIV. (2011), <http://public.econ.duke.edu/~psarcidi/prop209.pdf> (discussing the effect of Propostion 209 and how it diminished minority enrollment); see also *California Minorities Ask Court to Restore Affirmative Action in College Admissions*, FOX NEWS LATINO (Feb. 14, 2012), <http://latino.foxnews.com/latino/news/2012/02/14/california-affirmative-action-supporters-ask-court-to-overturn-ban-on/> (discussing challenges brought minority plaintiffs against California's ban on using affirmative action to determine admission to public colleges); See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (stating that admissions decisions between 1989 and 2004 impacted enrollment, resulting in fewer minority students).

78. See Mary Beth Marklein, *Minority Enrollment in College Still Lagging*, USA TODAY (Oct. 30, 2006), http://usatoday30.usatoday.com/news/education/2006-10-29-minority-enrollment_x.htm (discussing that despite increased minority enrollment throughout the nation's colleges, the rate at which black and Hispanic students continues to trail white students); see generally Thomas Espenshade & Chang Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293 (June 2005) (indicating that eliminating affirmative action in American higher education institutions would reduce acceptance rates for African-American and Hispanic applicants by as much as one-half).

79. See *Education Trust Reports Divulge Minority College-Graduation Rate Gaps, Diverse Issues in Higher Ed.*, DIVERSE ISSUES IN HIGHER EDUC. (Aug. 10, 2010), <http://diverseeducation.com/article/14027/> (noting that “[n]ationally, 60 percent of whites but only 49 percent of Latinos and 40 percent of African-Americans who start college earn bachelor degrees six years later, according to the data.”).

80. See Kristof, *supra* note 69 (stating that “[h]alf of students entering college never earn a degree. Six in ten African-Americans depart without one.”).

81. See *Diversity in Law School*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/jd/diversity/minorities-in-legal-education.asp> (last visited Sept. 6, 2012) (stating that minorities do not make up the majority of law school applicants).

82. See Peter Applebome, *College Segregation Persists, Study Says*, N.Y. TIMES (May 18, 1995), <http://www.nytimes.com/1995/05/18/us/college->

A barrier that is cited by minority applicants and students is the high cost of obtaining a college degree.⁸³ Minorities are less likely to have access to credit and personal resources to pay for college.⁸⁴ Increased financial obligations may also impede potential applicants from enrolling in college.⁸⁵ The demands of living paycheck to paycheck may outweigh the long-term goal of obtaining a better quality of life through higher education.⁸⁶ Race

segregation-persists-study-says.html?pagewanted=all&src=pm (citing study conducted on the 41st anniversary of *Brown v. Board of Education*); Peter Hinrichs, *An Empirical Analysis of Racial Segregation in Higher Education*, GEORGETOWN PUB. POL'Y INST. (2012), http://www9.georgetown.edu/faculty/plh24/Hinrichs_segregation_092012.pdf (concluding that policies and events that coincide with declining segregation, including falling enrollment at HBCUs and affirmative action bans, may come along with other costs or benefits).

83. See Associated Press, *Cost Keeps College out of Reach for Many Minority Students*, DIVERSE ISSUES IN HIGHER EDUC., 1 (July 2, 2007), <http://diverseeducation.com/article/7945/> (stating that “[c]ost is one of the top barriers cited as a reason South Carolina’s largest colleges and universities have trouble increasing their percentages of Black Student”); see generally *College Access*, EDUC. WEEK (Aug. 3, 2004), <http://www.edweek.org/ew/issues/college-access/> (proposing that the rising cost of tuition is one of the factors contributing to under-representation of minorities on university and college campuses).

84. See generally William Elliott III, *Examining Minority and Poor Youth’s College Aspirations and Expectations: The Potential Role of College Savings*, Working Paper No. 07 – 07, CTR. FOR SOC. DEV. AT WASH. U. IN ST. LOUIS (2007) (stating that savings increase access to education and minorities tend to have less savings when compared with non-minority groups).

85. See generally Amaury Nora, *How Minority Students Finance Their Education*, EDUC., http://www.education.com/reference/article/Ref_How_Minority/ (last visited Sept. 13, 2012) (illustrating that having sufficient funds for college increases their chance of success and going to college); see also Jeffrey S. Lehman, *Social Irresponsibility, Actuarial Assumptions, and Wealth Redistribution: Lessons About Public Policy from a Prepaid Tuition Program*, 88 MICH. L. REV. 1036, 1141 (1990) (discussing how intergenerational obligations even those outside the family context may burden minorities trying to pay for college).

86. See *Trends in Student Aid 2011*, *supra* note 31, at 7 (discussing the growing need for student aid in difficult economic times). The article states:

In an era of persistently high unemployment, family incomes that fail to keep up with inflation, savings that have been eroded by declining stock market values, and rising college prices, student financial aid is more important than ever. Despite prevalent questions about whether and for whom college is really “worth it,” most people agree that their lives and their children’s lives will be much easier if they successfully complete postsecondary credentials. Without a strong and well-designed system of subsidies for students, these opportunities are out of reach for many who could benefit from them. Moreover, it is increasingly evident that the complexities of existing financial aid policies and programs make it difficult for many of those who most need the help to understand and navigate the system.

Id.

and ethnicity may also play a role in a cultural aversion to taking out student loan debt.⁸⁷

Years of education and student loan debt in exchange for a prospective increase in income may be too tenuous of a proposition for families of color.⁸⁸ Faced with predatory lending and the deterioration of household wealth due to a recession that hit harder in communities of color,⁸⁹ minority students are left with few choices when deciding whether to attend college.⁹⁰

Promising minority students may be forced to drop out of school to survive financially.⁹¹ The decision to forgo a college

87. See Ryan D. Hahn & Derek Price, *Promise Lost: College-Qualified Students Who Don't Enroll in College*, INST. FOR HIGHER EDUC. POL'Y, 13-14 (Nov. 2008), <http://www.ihep.org/assets/files/publications/m-r/promise-lost-colleg-equalrpt.pdf> (stating that “[g]iven that minority students, . . . fall disproportionately in the population of non-college-goers, identifying the factors important to them is a step toward improving college access.”).

88. See *id.* at 4-5, 13 (discussing the overwhelming costs of college and its impact on attending).

89. See James, *supra* note 8, at 872-74 (suggesting disparate impact on minorities).

90. See *Promise Lost: College-Qualified Students Who Don't Enroll in College*, *supra* note 87, at 5 (noting that “while efforts to streamline the financial aid application process are laudable, more effort needs to be made to create greater transparency overall about the amount and types of financial aid available.”); see also Erin Dillon & Kevin Carey, *Drowning in Debt: The Emerging Student Loan Crisis*, EDUC. SECTOR (July 9, 2009), <http://www.educationsector.org/publications/drowning-debt-emerging-student-loan-crisis> (discussing the risks that students are taking when making a decision to take on more student debt). The text notes:

Students are taking on more of the riskiest debt: unregulated private student loans. Here, students have the least protection and pay the highest rates. For-profit colleges are leading the way in this trend, and minority college students appear to be borrowing a disproportionate share. If this continues, the consequences will be severe: reduced access to higher education, diminished life choices, and increasing rates of catastrophic loan default. There are many culprits to this emerging student loan crisis: out-of-control tuition increases, lack of commitment to need-based financial aid, and states and universities increasingly spending scarce financial aid dollars on wealthy students.

Id.; see generally Jeanette Bradley & Peter Skillern, *Predatory Lending: Subprime Lenders Trick Homeowners into Expensive Loans*, 109 NAT'L HOUS. INST. (2000) (stating that minorities are among the worst impacted by predatory lending); Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership* (2007), available at <http://kirwaninstitute.turnstile-systems.com/FileServer/Organization/Media/77667553-da6c-491a-8ebe-2e8c8a3ae415/3ddec33a-7957-47a0-84d8-2c3b76cb46db/Patricia%20A%20McCoy%20and%20KATHLEEN%20C%20ENGEL.pdf> (discussing how abusive lenders exploit inequalities resulting from past discrimination to target people of color with predatory loans).

91. See Brenda Bautsch & Ronald Williams, *College Completion Agenda State Policy Guide*, COLLEGE BD. (2010), http://completionagenda.collegeboard.org/sites/default/files/reports_pdf/Policy_Guide.pdf (highlighting

degree may be less of a decision and more of a necessity for African American and Latino families, as the racial wealth gap expands.⁹² African Americans are the most likely group to graduate college with higher student loans.⁹³ Further, African American and Latino college graduates disproportionately shoulder the burden of student loan debt.⁹⁴

The recent economic downturn has resulted in a tightening of the credit market to the detriment of college-bound students.⁹⁵ Low-income college students in need of financial aid may find that it is harder to secure a low-interest loan.⁹⁶ Students in need with lower credit scores are now more likely to need a co-signer for private educational loans.⁹⁷ Private lenders are implementing tougher underwriting standards that will reject a larger percentage of low-income students.⁹⁸ These heightened standards for obtaining student loans will disproportionately affect community colleges⁹⁹ and for-profit colleges that

the cuts states have made to higher education programs and its likely impact on students who struggle financially); see also James L. Morrison, *Why the Disadvantaged Drop Out: The Administrator's View*, 7 C. STUDENT J. 4, 54-56 (1973), available at <http://horizon.unc.edu/bios/Morrisson/papers/3.html> (explaining socioeconomic reasons for student dropout rates); Ryan D. Hahn & Derek Price, *Promise Lost: College-Qualified Students Who Don't Enroll in College*, INST. FOR HIGHER EDUC. POL'Y 5, 15 (Nov. 2008), available at <http://www.ihep.org/assets/files/publications/m-r/PromiseLostCollegeQualrpt.pdf>. (discussing the costs of attending college).

92. See Julianne Malveaux, *What's at Stake: The Social and Economic Benefits of Higher Education*, COLLEGE BD. (Jan. 2003), http://www.collegeboard.com/prod_downloads/about/news_info/natdial/RR2_social_econ.pdf (discussing the switch from student aid in the form of grants to loans).

93. See Tracey King & Ellynn Bannon, *The Burden of Borrowing: A Report on the Rising Rates of Student Loan Debt*, PIRG'S HIGHER EDUC. PROJECT, 3 (Mar. 2002) (stating that in "In 1999-2000 . . . 55% of African-American student borrowers graduated with unmanageable debt.").

94. See *id.* at 1 (discussing debt impact on Hispanic graduates, noting that "58% of Hispanic student borrowers graduated with unmanageable debt.").

95. See Rajeev R. Bhaskar & Yadav K. Gopalan, *The Rising Cost of College: Student Loans Harder to Find in Tight Credit Market*, FED. RES. BANK OF ST. LOUIS, 6 (Spring 2009), http://www.stlouisfed.org/publications/pub_assets/pdf/br/2009/br_sp_09.pdf (noting that "[u]nfortunately, the cost of education keeps rising and the availability of credit, especially in this current economic environment, keeps dwindling.").

96. See *Impact of the Subprime Mortgage Credit Crisis on Student Loan Cost and Availability*, FINAID, <http://www.finaid.org/loans/creditchris.phtml> (last visited Sept. 14, 2012) (explaining the impact of subprime mortgage crisis and College Cost Reduction and Access Act of 2007 will have on both federal and private student loans).

97. See *id.* (explaining that borrowers with a FICO credit score under 650 are generally considered by lenders to be subprime).

98. See *id.* (noting that "[m]ore borrowers will need to apply for private student loans with a cosigner").

99. See James, *supra* note 8, at 66 (stating "[i]n terms of spending, the Obama administration has proposed billions of dollars in aid to the nation's

disproportionately serve low-income and minority students.¹⁰⁰ For-profit schools of higher education are also subject to heightened criticism due to allegations of depleting equity from the minority community.¹⁰¹ Female college graduates may also disproportionately encounter a student loan debt burden once in repayment status due to the gender wage gap.¹⁰²

Student loan Cohort Default Rates are a factor in determining the availability and interest rates of federal student loans.¹⁰³ The Cohort Default Rate takes into account the percentage of defaulted student loans at each institution receiving federal funds within the fiscal year.¹⁰⁴ The calculated Cohort Default Rate is then used to determine the credit risk of student borrowers who attend the

community colleges to enable the institutions to produce five million more graduates by the year 2020.”).

100. See *Impact of the Subprime Mortgage Credit Crisis on Student Loan Cost and Availability*, *supra* note 96 (stating that “[t]he student loan credit crunch will mainly affect subprime borrowers, who disproportionately attend community colleges and for-profit colleges.”); see also Dara Sharif, *Student Lending: Wall Street’s Next Bubble*, ROOT (Aug. 17, 2011), <http://theroot.com/views/student-lending-wall-streets-next-bubble> (expressing “special concern about students at for-profit proprietary schools, which include many trade and online universities, and where graduation rates are typically lower than those of traditional colleges and the loan-default rate is higher. Minorities make up a majority . . . of students enrolled at these schools.”).

101. See Karin Kapsidelis, *Class-Action Suit Alleges Fraud at Area Health School*, RICHMOND TIMES-DISPATCH (June 14, 2011), <http://www2.timesdispatch.com/news/2011/jun/14/tdmain01-class-action-suit-alleges-fraud-at-henrid-ar-1106494/> (quoting plaintiffs’ attorney John P. Relman who cites predatory lending by a for-profit school that targets low-income and minority students with false advertisement to unfair profiting from student aid); see also Mamie Lynch et al., *Subprime Opportunity: The Unfulfilled Promise of For-Profit Colleges and Universities*, EDUC. TRUST, 1 (Nov. 2010), http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf (reporting that “for-profit colleges provide high-cost degree programs that have little chance of leading to high-paying careers, and saddle the most vulnerable students with heavy debt.”).

102. See Danielle Kurtzleben, *Women May Have Tougher Time Paying Student Loan Debt Due to Gender Pay Gap*, U.S. NEWS AND WORLD REPORT (Apr. 16, 2012), <http://www.usnews.com/news/articles/2012/04/26/women-have-tougher-time-paying-student-loan-debt-due-to-gender-pay-gap> (asserting that men and women may have the same monthly student loan payment, but that payment will have a more severe effect on the budget of a woman who earns less money than a man for the same work); see also *The Simple Truth About the Gender Pay Gap*, AM. ASSOC. OF UNIV. WOMEN, 3 (2012), <http://www.aauw.org/learn/research/upload/simpletruthaboutpaygap1.pdf> (explaining that on average, American women earn seventy-seven cents for every dollar that a man earns which amounts to a twenty-three percent gap).

103. See *Official Cohort Default Rates for Schools*, U.S. DEP’T. OF EDUC., <http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> (last visited Sept. 22, 2012).

104. *Id.*

institution.¹⁰⁵ Cohort Default Rates tend to be higher at institutions that serve low-income and minority students including community colleges and HBCUs resulting in higher interest student loans and increased fees by virtue of attending a college with a high Cohort Default Rate.¹⁰⁶

V. FAIR LENDING AND THE EQUAL CREDIT OPPORTUNITY ACT

Fair lending initiatives have increased in priority as a result of the housing foreclosure crisis in the United States.¹⁰⁷ In response to heightened governmental concern regarding fair lending,¹⁰⁸ the United States Department of Justice formed the Fair Lending Unit within the Civil Rights Division in 2010.¹⁰⁹ The Fair Lending Unit has authority to unilaterally enforce the ECOA, or it may act upon agency referral.¹¹⁰ The Fair Lending Unit also has authority to challenge discriminatory practices including reverse redlining and abuse encompassed within student loan products.¹¹¹ The fair lending suits filed by the Department of Justice resulted in settlements totaling more than \$350 million in

105. *Id.*

106. *See generally* Rodriguez v. SLM Corp., No. 3:07CV1866, 2010 WL 1286989 (D. Conn. Mar. 26, 2010) (claiming extraneous fees attached to student loans issued to borrowers at schools with a higher cohort default rate include a prepaid finance charge, disbursement fee, repayment fee, insurance premium, or supplemental fee).

107. *See generally* U.S. DEP'T. OF JUSTICE, ATTORNEY GENERAL'S 2011 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 (Mar. 2012), available at <http://www.justice.gov/crt/about/hce/documents/ecoareport2011.pdf> (highlighting DOJ efforts to combat illegal unfair lending practices).

108. *See Financial Fraud Enforcement Task Force*, STOPFRAUD.GOV, <http://www.stopfraud.gov/about.html> (last visited Sept. 15, 2012) (noting that "[t]he most common claim in fair lending enforcement actions brought during 2010 involved pricing discrimination, which is charging borrowers more because of their race or national origin than similarly qualified white applicants.") Financial institution data regarding the Community Reinvestment Act (CRA) was cited as crucial information in the enforcement of fair lending. *Id.* at 4.49; *but see Fair Lending: Federal Oversight and Enforcement Improved but Some Challenges Remain*, U.S. GEN. ACCT. OFF., n.1 (Aug. 1996), <http://www.gao.gov/assets/160/155529.pdf> (stating that "[t]he Community Reinvestment Act (CRA) is often included in discussions of the fair lending laws. However, CRA is distinct from the antidiscrimination laws.") (citation omitted).

109. ATTORNEY GENERAL'S 2011 ANNUAL REPORT, *supra* note 107, at 1.

110. *See id.* at 23 (stating that "[t]he Division has authority . . . to challenge a pattern or practice of discriminatory conduct, and the Division's Fair Lending Unit focuses on the range of abuses seen in the market, from traditional access to credit issues such as redlining, to emerging issues involving pricing discrimination, steering, reverse redlining, and mortgage insurance discrimination.").

111. *Id.* at 2-3.

2011.¹¹² In pursuit of economic justice, the United States Department of Justice collaborates with a number of state and federal partners including the Consumer Financial Protection Bureau.¹¹³

The Civil Division of the United States Department of Justice also acts in accordance with the Financial Fraud Enforcement Task Force¹¹⁴ and its Non-Discrimination Working Group¹¹⁵ that includes federal agencies, state attorneys general, and local law enforcement officials.¹¹⁶ The Civil Division also serves within the Federal Interagency Fair Lending Task Force¹¹⁷ in the coordination of fair lending efforts.¹¹⁸ Efforts by the Civil Division and financial task forces should be directed toward the student loan industry, particularly private student loans that have been described as the “wild west” of student loan products.¹¹⁹

The Equal Credit Opportunity Act¹²⁰ was enacted in part to

112. *Id.* at 2.

113. *Id.* at 11.

114. *See generally* *Financial Fraud Enforcement Task Force*, *supra* note 108 (discussing the goals and purposes of the task force).

115. *See id.* (explaining “practices—which can include charging minorities higher prices for credit, providing less favorable financial services to minority neighborhoods and steering minorities to more expensive loan products—create an unlevel playing field and have no place in our country.”).

116. *See* ATTORNEY GENERAL’S 2011 ANNUAL REPORT, *supra* note 107, at 11-12 (explaining that the task force, “was designed to wage an aggressive, coordinated, and proactive effort to investigate and prosecute illegal financial activity. The Task Force includes representatives from the highest levels at the Department, federal law enforcement agencies, regulatory authorities, inspectors general, state attorneys general, and local law enforcement . . .”).

117. *See generally* *Interagency Fair Lending Examination Procedures*, CFPB, <http://www.consumerfinance.gov/guidance/supervision/manual/interagency-fair-lending-examination-procedures/> (last visited Sept. 18, 2012) (including Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision, National Credit Union Administration).

118. ATTORNEY GENERAL’S 2011 ANNUAL REPORT, *supra* note 107, at 12.

119. *See Press Release: Cuomo Testifies on Deceptive Practices in Student Loan Industry Before U.S. Senate Banking Committee*, N.Y. ST. OFF. OF THE ATTY. GEN. (June 6, 2007), <http://www.ag.ny.gov/press-release/cuomo-testifies-deceptive-practices-student-loan-industry-us-senate-banking-committee> (discussing Cuomo’s statements on private alternatives to student loans). The article states that “[c]alling the private/alternative loan sector the ‘Wild West of the college loan business,’ Cuomo urged the Senate Banking Committee to ask the private lenders to disclose their interest rates. Private lenders currently control 20% of the student loan marketplace and continue to grow exponentially.” *See also* Schemo, *supra* note 38 (explaining how New York Attorney General Andrew Cuomo is pushing Congress to “clean up the private loan industry.”); *see also* Greg Robb, *Obama Set to Unveil Student-Loan Plan*, WALL ST. J. (Oct. 25, 2011), http://articles.marketwatch.com/2011-10-25/economy/30738236_1_student-loan-plan-institute-for-college-access-student-loans (noting that private student loans form the wild west of lending).

120. Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* (1974); *see also*

regulate the impact that credit products such as student loans have on minorities.¹²¹ The prohibition of redlining practices in private student loan underwriting to effectively discriminate against minority applicants based on the institutional cohort default rate,¹²² geographic location of the borrower's school of attendance, or undisclosed in-house credit scoring standards, should be enforced by the regulatory agency of the ECOA, the Consumer Financial Protection Bureau.¹²³

Student Loan Sunshine Act, H.R. 890, S. 486, 110th Cong. (2007) (establishing requirements for lenders to protect student borrowers receiving educational loans); Preventing Student Loan Discrimination Act, S. 3141, H.R. 6698, 110th Cong. (2008) (preventing FFELP lenders from discriminating against students applying for federal Stafford loans based on a number of factors including the institution they choose to attend); Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1970) (forming the base of consumer credit rights).

121. See *Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA) and Regulation*, CFPB, <http://www.consumerfinance.gov/guidance/supervision/manual/ecoa-narrative/> (last visited Sept. 18, 2012) (explaining “disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a protected class unless it meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”); see also *Anti-Discrimination Rules for Education Lenders*, FINAID, <http://www.finaid.org/loans/discrimination.phtml> (last visited Sept. 19, 2012) (explaining how the ECOA applies to both federal and private student loans, including consolidation loans); see generally *United States v. Am. Future Sys., Inc.*, 571 F. Supp. 551, 560 (Pa. 1982) (stating: “The purpose of the ECOA is to promote equal credit opportunity through elimination of specified non-objective factors such as race, sex, and marital status. The ECOA also recognizes that because of economic disadvantages and special social needs, certain classes of persons cannot realistically participate in the credit market when customary lending standards are applied.”).

122. See *Cohort Default Rate Resources*, PROJECT ON STUDENT DEBT, http://projectonstudentdebt.org/CDR_resources.vp.html (last visited Nov. 27, 2012) (stating that “[c]olleges’ ‘cohort default rates’ (CDRs) measure the share of their federal student loan borrowers who default within a specified period of time after entering repayment. Colleges with high CDRs may lose future eligibility for federal grants and loans.”); *Default Prevention*, TEX. GUARANTEED STUDENT LOAN CORP., <http://www.tgslc.org/default-prevention/cdr.cfm> (noting that an institution’s cohort default rate is calculated by dividing the number of borrowers who defaulted on their loans within a specified set of fiscal years by the number of borrowers who entered repayment within a specified set of fiscal years multiplied by one hundred).

123. See *Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA) and Regulation*, *supra* note 121 (explaining that the Federal Reserve was the initial regulating agency of the ECOA, but the Consumer Financial Protection Bureau was later charged with this duty pursuant to the Dodd-Frank Act); see also *Facts for Consumers, Equal Credit Opportunity: Understanding Your Rights Under the Law*, FTC, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm> (last visited Sept. 18, 2012) (noting that “[t]he Federal Trade Commission (FTC), the nation’s consumer protection agency, enforces the Equal Credit Opportunity Act (ECOA), which prohibits credit discrimination on the basis of race, color, religion, national

Financial institutions that are involved in originating or underwriting student loans are subject to the ECOA.¹²⁴ In compliance with the ECOA that is implemented by Regulation B, financial institutions may not consider race, color, national origin, or sex in granting credit.¹²⁵ Creditor consideration of the racial composition of a neighborhood in deciding whether to approve home loans is also prohibited.¹²⁶ Student loan lenders that may develop an in-house credit scoring system¹²⁷ also subject to supervision under Regulation B pursuant to the ECOA.¹²⁸ According to Regulation B, credit scoring systems must be an “empirically derived, demonstrably and statistically sound, credit

origin, sex, marital status, age, or because you get public assistance.”) *but see generally* United States v. Landmark Fin. Servs., Inc., 612 F. Supp. 623, 625 (D. Md. 1985) (stating that section 704, 15 U.S.C. § 1691c regarding administrative enforcement of the ECOA provides enforcement authority to twelve federal agencies); 12 C.F.R. § 202.1(b) (the twelve regulatory agencies that may provide administrative enforcement of the ECOA include “the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, (acting directly or through the Federal Savings and Loan Insurance Corporation), Administrator of the National Credit Union Administration, Interstate Commerce Commission, Civil Aeronautics Board, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration and the Federal Trade Commission.”).

124. *See Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA) and Regulation*, *supra* note 121 (explaining that the ECOA as implemented by Regulation B applies to every creditor and the regulation covers creditor activities during each phase in the extension of credit).

125. *Id.*

126. *See id.* (discussing temporary procedures of the CFPB). The text notes:

For fair lending scoping and examination procedures, the CFPB is temporarily adopting the FFIEC Interagency Fair Lending Examination Procedures that are referenced in the examination program. However, in applying those procedures the CFPB takes into account that the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, unlike ECOA, is not a “Federal consumer financial law” as defined by the Dodd-Frank Act for which the CFPB has supervisory authority.

Id.

127. *See Class Action Complaint* ¶ 24, *Rodriguez v. SLM Corp.*, 2010 WL 1286989, at 9 (D. Conn. Mar. 26, 2010) (No. 3:07CV1866) (explaining Sallie Mae’s underwriting process). The complaint notes:

Sallie Mae’s automated underwriting process involves the use of a credit score produced by formulas created by Sallie Mae. Sallie Mae conceals from applicants the actuarial basis for its automated underwriting process. In addition, Sallie Mae keeps secret its credit scoring formulas, including the credit factors which impact the resulting score. As a result, the amount a borrower pays for a loan is dependent upon a hidden automated underwriting process allegedly justified by actuarial information not given to borrowers.

Id.

128. *See* 12 C.F.R. § 202.2(p) (2012) (describing how to develop or purchase a qualified empirically derived credit scoring system).

scoring system” to be in compliance.¹²⁹ Noncompliance with this requirement will render a credit scoring system to be automatically classified as a “judgmental” evaluation system.¹³⁰

The prohibition on redlining tactics in the housing credit market could be formally extended and similarly applied to student loans. The permissible school cohort default rate-underwriting factor used by creditors in granting student loans may be viewed as a proxy for race in the student loan context.¹³¹ Increased funding for more effective enforcement of the existing regulatory measures may inhibit the supervisory oversight that applicable legislation purports to require. An individual assessment of creditworthiness should govern student loan terms within a regulatory structure that adequately balances risk with equitable access to resources for education. Cohort statistics used to the detriment of vulnerable communities may be considered unfair and do not serve the purpose of the Higher Education Act.¹³²

VI. FAIR LENDING AND THE CONSUMER FINANCIAL PROTECTION BUREAU

The Consumer Financial Protection Bureau (CFPB) was generally transferred authority to regulate and enforce the ECOA

129. *See id.* (describing how a credit scoring system qualifies as empirically derived, demonstrably and statistically sound).

130. *See Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA) and Regulation*, *supra* note 121 (explaining that Regulation B neither requires nor endorses any particular method of credit analysis but if a credit analysis does not meet the standards to qualify as empirically derived, demonstrably and statistically sound, credit system, it is automatically classified as a judgmental system).

131. *See generally Anti-Discrimination Rules for Education Lenders*, FINAID, <http://www.finaid.org/loans/discrimination.phtml> (last visited Sept. 18, 2012) (noting that “lenders can discriminate on the basis of income and attendance at an eligible educational institution, among the other omissions in section 421(a)(2) of the Higher Education Act.”).

132. *See* 20 U.S.C.A. § 1071(a)(2) (banning discrimination); *see also Anti-Discrimination Rules for Education Lenders*, *supra* note 131 (explaining that section 438(c) of the Higher Education act requires creditors to charge equal fees, unless the student is a low-income borrower); *see generally Higher Education Act-Forty Years of Opportunity Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, TG RES. AND ANALYTICAL SERVS., 17 (Nov. 2005), http://www.tgslc.org/pdf/hea_history.pdf (describing the goals of the Higher Education Act); *but see Anti-Discrimination Rules for Educating Lenders*, *supra* note 131 (noting:

Compared with the other anti-discrimination rules, this language [in HEA section 421(a)(2)] adds marital status but does not include color, income, attendance at an eligible educational institution, length of the borrower’s education program, or the borrower’s academic year in school. . . . (The use of the word “student”, however, allows lenders to discriminate in the waiver of fees on parent PLUS loans.).

as of July 21, 2011, pursuant to the Dodd-Frank Act.¹³³ Prior to the formation of the CFPB in accordance with the Dodd-Frank Act, the Federal Reserve Board held authority of the ECOA.¹³⁴ Generally, the CFPB has regulatory authority to enforce the ECOA among depository institutions, credit unions, and nonbank entities.¹³⁵ The Dodd-Frank Act instituted substantive amendments to the ECOA prompting an amendment to Regulation B.¹³⁶ The relevant Dodd-Frank amendments to the ECOA include an increase in the statute of limitations from two to five years.¹³⁷ The interim final rule issued by the CFPB did not implement any substantive changes to Regulation B, but the CFPB contemplated the eventual extension of recordkeeping requirements due to the increase in the statute of limitations under Dodd-Frank.¹³⁸

The CFPB works in conjunction with several federal and state agencies, including the Department of Justice and the Federal Trade Commission, in providing regulatory oversight, supervision, rule implementation, and enforcement of the ECOA.¹³⁹ The Dodd-

133. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (describing the consumer financial protection functions that were transferred to the Bureau). The act further explains that the Bureau will have the authority to carry out the purposes of Act. *Id.*

134. See 76 Fed. Reg. 79442-01, 79442 (Dec. 21, 2011) (summarizing the transfer of rulemaking authority for a number of consumer financial protection laws pursuant to the Dodd-Frank Act); see also *Federal Fair Lending Regulations and Statutes: Equal Credit Opportunity (Regulation B)*, FEDERAL RESERVE CONSUMER COMPLIANCE HANDBOOK, 1 (Jan. 2006), http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_reg_b.pdf (showing that prior to the Dodd-Frank Act and states that under the ECOA, the Federal Reserve Board was responsible for drafting and interpreting the implementing regulation).

135. See generally 124 Stat. 1376 (explaining that banks, credit unions, their affiliates and financial institutions with total assets more than \$10 billion are subject to CFPB enforcement of the ECOA, but the FTC retains its prior ECOA authority under 15 U.S.C. § 1691c(e)).

136. See *Federal Fair Lending Regulations and Statutes: Equal Credit Opportunity (Regulation B)*, supra note 134 (showing that former Regulation B appeared at 12 C.F.R. part 202, and amended Regulation B appears at 12 C.F.R. Part 1002).

137. See *id.* (explaining that further Dodd-Frank amendments to the ECOA include additional small business loan data collection and changes pursuant to a consumer's right to an appraisal).

138. See *id.* (showing that the CFPB issuance of the interim final rule "substantially duplicates" former Regulation B under the Federal Reserve Board with limited non-substantive amendments to Regulation B to conform to technical amendments such as font, the elimination of footnotes, and the updating of cross-references).

139. See Patrice Ficklin, *Addressing Credit Discrimination*, CFPB (Dec. 14, 2011), <http://www.consumerfinance.gov/blog/addressing-credit-discrimination/> (showing that the CFPB has many tools that it can use to protect consumers

Frank Act also established the Office of Fair Lending and Equal Opportunity within the CFPB to specifically focus on equal access to credit.¹⁴⁰ The CFPB is in a position to set forth unprecedented change toward enhanced fair lending standards and procedure in the private student loan industry.¹⁴¹

The CFPB recognizes the pervasive problem of unequal access to credit in reaffirming the principles of Regulation B of the ECOA. Specifically, the CFPB reiterates, “[a]s the legislative history of the ECOA emphasizes, ‘[t]he availability of credit often determines an individual’s effective range of social choice and influences such basic life matters as selection of occupation and housing.’”¹⁴²

from credit discrimination and promote fair access to credit including working in conjunction with several other agencies); *see also* CFPB Bulletin 2012-04 (Fair Lending) Lending Discrimination, CFPB, 1 (Apr. 18, 2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf (stating, “[t]he Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act” or “Act”) granted CFPB authority to supervise and enforce compliance with the ECOA for entities within CFPB’s jurisdiction and to issue regulations and guidance to interpret the ECOA.”) (citation omitted); *see also* ATTORNEY GENERAL’S 2011 ANNUAL REPORT, *supra* note 107, at 11 (discussing the role of the CFPB). The report notes:

The CFPB is a critical partner [to the DOJ], which has supervisory and enforcement authority under ECOA over all banking institutions with assets of more than \$10 billion, as well as certain non-bank lenders. In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 granted rulemaking authority under ECOA to the CFPB.

Id.

140. *See* Federal Fair Lending Regulations and Statutes: Equal Credit Opportunity (Regulation B), *supra* note 136 (explaining that with regard to nonbank creditors the Dodd-Frank Act created the Office of Fair Lending and Equal Opportunity within the Bureau to focus on fair, equitable, and nondiscriminatory access to credit).

141. *See* Pauline Abernathy, *Cordray Appointment to Lead Consumer Financial Protection Bureau Is a Big Win for Students and Families*, THE INST. FOR C. ACCESS AND SUCCESS (Jan. 4, 2012), http://ticas.org/files/pub/CFPB_Director_NR.pdf (urging the Bureau to move quickly to protect students and their families’). The statement read:

We urge the Bureau to move swiftly on behalf of students and their families by taking steps such as curbing the flagrantly predatory private lending to students at some for-profit colleges; developing and enforcing sound underwriting and loan modification standards; and requiring school “certification” of all private loans to ensure that students can make informed borrowing choices. . . . Private student loans typically have uncapped variable interest rates that are highest for those who can least afford them. They currently lack the consumer protections and flexible repayment options that come with federal student loans, and private student loans are non-dischargeable in bankruptcy. Nevertheless, a majority of private student loan borrowers could have borrowed more in safer federal loans.

Id.

142. CFPB Bulletin 2012-04 (Fair Lending) Lending Discrimination, *supra*

The CFPB also reconfirms a disparate impact analysis in compliance with Regulation B that implements the ECOA.¹⁴³ The CFPB explicitly upholds the legal doctrines of disparate impact and disparate treatment to prove discrimination in lending.¹⁴⁴ The disparate impact doctrine that the CFPB will use in determining compliance with the ECOA and Regulation B is also referred to as the “effects test,” drawing a similar correlation to the same doctrine in the employment law context.¹⁴⁵

The CFPB finds that evidence of disparate impact is in accordance with a finding of lending discrimination consistent

note 139 (citing to House Report that accompanied H.R. 6516, No. 94-210, p. 3); *see also Consumer's Guide Credit Cards Credit Protection Laws*, BD. OF GOVERNORS OF THE FED. RES. SYS., <http://www.federalreserve.gov/creditcard/regs.html> (last updated on June 15, 2010) (noting that the “Consumer Credit Protection Act (1969) is an umbrella consumer protection law that includes the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, and the Truth in Lending Act.”).

143. *See id.* (noting “[T]he CFPB reaffirms that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B.”).

144. *See id.* (referring to the 1994 policy statement of the Interagency Task Force on Fair Lending); *see also Policy Statement on Discrimination in Lending*, 59 FED. REG. 18, 266 (Apr. 15, 1994) (identifying the three methods of proof of lending discrimination employed by the courts as overt evidence of discrimination, evidence of disparate treatment, and evidence of disparate impact).

145. *See CFPB Bulletin 2012-04 (Fair Lending) Lending Discrimination*, *supra* note 139 (citing employment law U.S. Supreme Court cases *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)); *see generally* 12 C.F.R. § 202 (stating: “Generally, credit scoring systems treat all applicants objectively and thus avoid problems of disparate treatment. In cases where a credit scoring system is used in conjunction with individual discretion, disparate treatment could conceivably occur in the evaluation process. In addition, neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test”); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980) (validating the use of a disparate impact analysis in the ECOA context); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 3:15 (“Drawing from precedents in the employment area, courts use a three-step procedure for the effects test under the ECOA:

- (1) the plaintiff must demonstrate that the use of a certain factor has a disproportionately negative impact on a protected group;
- (2) if that threshold burden is met, the creditor must show that the criterion makes the credit evaluation system “more predictive than it would be otherwise” or that it is justified by a “legitimate business need”; and
- (3) the plaintiff would then have the opportunity to show that the creditor's legitimate business needs could be met by a less discriminatory alternative.”)

(citations omitted).

with the relevant commentary to Regulation B pursuant to the ECOA that states in part:

The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.¹⁴⁶

Racial discriminatory practices persist, even in a “post-racial” era.¹⁴⁷ The CFPB recognizes that certain demographic groups, such as racial minorities and women, may still be subject to unfair lending practices and procedures.¹⁴⁸ The CFPB has a wide array of tools and a variety of mechanisms to enforce standards of fair lending, including a formal review of policies and procedures that are discriminatory in nature.¹⁴⁹ Accordingly, the CFPB has a

146. See *CFPB Bulletin 2012-04 (Fair Lending) Lending Discrimination*, *supra* note 139 (citing Equal Credit Opportunity Act (Regulation B)); see also Meg Handley, *Cordray, Consumer Bureau Target Discriminatory Lending*, U.S. NEWS AND WORLD REPORT (Apr. 18, 2012), <http://www.usnews.com/news/articles/2012/04/18/cordray-consumer-bureau-target-discriminatory-lending> (discussing unintentional but harmful loan discrimination). The report stated:

Consumer Financial Protection Bureau Director Richard Cordray said in a speech Wednesday, underscoring that discrimination in lending doesn't have to be intentional to be harmful The CFPB cited the discretion loan officers have to set borrowers' lending fees as an example of a practice that can result in certain demographics—for instance, African-Americans or women—paying more than a similarly situated white or male borrower.

Id.

147. See Handley, *supra* note 146 (quoting CFPB director, Richard Cordray, stating that “[t]his subtle but powerful form of discrimination creates damages that are no less direct than the kind of overt and blatant discrimination that, we hope and assume, is increasingly a relic of a bygone era.”); See generally THE OBAMAS AND A (POST) RACIAL AMERICA? (Gregory S. Parks & Matthew W. Hughey eds., 2011) (describing post-racialism as the concept of racial equality upon the election of President Barack Obama); Randall Kennedy, *Under Obama, Is America “Post-Racial?”: The Black Quota*, N.Y. TIMES (Sept. 22, 2011), <http://www.nytimes.com/roomfordebate/2011/09/21/under-obama-is-america-post-racial/the-black-quota> (arguing that “[t]he era of race consciousness is not over in either law or politics”); see also Michelle Adams, *Under Obama Is America “Post-Racial?”: In Sync with the Supreme Court*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/roomfordebate/2011/09/21/under-obama-is-america-post-racial/in-sync-with-the-supreme-court> (articulating the U.S. Supreme Court's view).

148. See Handley, *supra* note 146 (noting that the pursuit of discriminatory lending is a priority for the Consumer Financial Protection Bureau to protect vulnerable populations).

149. See Ficklin, *supra* note 139 (listing tools the Office of Fair Lending &

critical role to play in the narrowing of the race wealth gap.¹⁵⁰ The accumulation and preservation of wealth in minority communities may be realized with proper federal supervision and enforcement of the credit sector.

VII. THE CONSUMER FINANCIAL PROTECTION BUREAU AND SUBPRIME PRIVATE STUDENT LOANS

Due to relaxed or non-existent underwriting standards, private lenders issued private student loans to students without taking precautionary measures regarding the likelihood of repayment.¹⁵¹ As a result, a higher degree of private student loans have defaulted and such delinquency is on the rise. Private student loan borrowers increasingly entered into subprime student loans despite the potential to qualify for more favorable federal student loans, thereby contributing to debt overload problem.

The CFPB is now in the position to regulate the private student loan industry to require tighter underwriting standards to prevent unqualified borrowers from entering the default danger zone in the first place. Students in need are now directed first to federal aid and grant programs prior to considering private student loans. The CFPB prompts borrowers to exhaust all of their federal aid options before relying on private loans that tend to have more costly and less flexible terms. The CFPB supervises responsible lending to the benefit of higher education consumers. Such oversight is necessary to prevent another student loan bubble caused by exorbitant debt and a stagnant economy.

VIII. PREDATORY PRIVATE STUDENT LOAN LITIGATION

The class-action federal lawsuit, *Rodriguez v. SLM Corp.*,¹⁵² highlights the complexity of student loan underwriting practices based on race. The named plaintiffs, Sasha Rodriguez and Cathelyn Gregoire, alleged that Sallie Mae applied “systemic discriminatory practices” in the origination, underwriting, and

Equal Opportunity uses to protect consumers and promote fair access to credit).

150. See Handley, *supra* note 146 (citing that African Americans as a group experienced a more than a fifty percent drop in median wealth and Hispanic median wealth fell by sixty-six percent from 2005 through 2009 as a result of the financial crisis fueled by predatory lending in the housing credit market).

151. See Jordan Weissmann, *A \$150 Billion Burden: What to Do About Subprime Student Loans*, THE ATLANTIC (July 20, 2012), <http://www.theatlantic.com/business/archive/2012/07/a-150-billion-burden-what-to-do-about-subprime-student-loans/260131/> (attributing \$150 billion of student loan debt to “grossly loose lending standard during the last decade”).

152. See generally *Rodriguez*, 2010 WL 1286989 (highlighting the complexity of the student loan process).

servicing of private student loans.¹⁵³ The basis of the plaintiffs' complaint in *Rodriguez* was the violation of the ECOA and TILA in Sallie Mae's "company-wide discriminatory policy" in originating or underwriting private student loans to African American and Hispanic college students resulting in disproportionately higher interest rates and fees. The "disparate impact"¹⁵⁴ of Sallie Mae's actions also allegedly constituted a violation of civil rights.¹⁵⁵

The causes of action in *Rodriguez* included racial discrimination pursuant to Title 18 of the United States Code sections 1981¹⁵⁶ and 1982,¹⁵⁷ violation of the Equal Credit Opportunity Act pursuant to Title 15 of the United States Code sections 1691 *et seq.*, and the Truth in Lending Act pursuant to Title 15 of the United States Code sections 1601 *et seq.*¹⁵⁸ A jury trial was demanded in *Rodriguez* in addition to reasonable attorneys' fees and costs, equitable relief, and damages.¹⁵⁹ The *Rodriguez* case was filed on December 18, 2007, in the United States District Court in the District of Connecticut.¹⁶⁰

The *Rodriguez* complaint alleged that Sallie Mae covertly targeted minority students and schools with high minority enrollment to exploit the relationship for corporate financial gain by steering students of color into subprime private student loan

153. *See generally id.* (discussing the plaintiffs' claim).

154. 15 U.S.C.A. § 1691e; *see also Consumer Laws and Regulations, supra* note 121 (showing that the two theories of liability under the Equal Credit Opportunity Act are disparate treatment and disparate liability). The text states:

Disparate treatment occurs when a creditor treats an applicant differently based on a prohibited basis such as race or national origin. Disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a protected class unless it meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.

Id.; *see generally* Int'l. Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (stating that it is easy to understand that disparate treatment is a form of discrimination).

155. *See* Complaint ¶¶ 25-26, *Rodriguez*, 2010 WL 1286989 (2010) [hereinafter *Rodriguez* Complaint] (alleging racial discrimination in violation of 42 U.S.C. § 1981); *see generally* Mays v. Buckeye Rural Elec. Co-op., Inc., 277 F.3d 873 (6th Cir. 2002) (explaining the similarities between the ECOA concerning credit discrimination and Title VII legislation concerning employment discrimination in utilizing a burden-allocation framework to establish a prima facie case of discrimination).

156. *See Rodriguez* Complaint, *supra* note 155, ¶¶ 25-26; *see also* 18 U.S.C. § 1981.

157. *See Rodriguez* Complaint, *supra* note 155, ¶ 27; *see also* 18 U.S.C. § 1982.

158. *Rodriguez* Complaint, *supra* note 155, ¶ 28.

159. *Id.* ¶ 32.

160. *Id.* ¶ 1.

products.¹⁶¹ Predatory private student loan products in *Rodriguez* were claimed to be fraudulent, unfair, and deceptive without proper disclosure.¹⁶² The *Rodriguez* complaint also cited a violation of Regulation Z¹⁶³ promulgated by the Board of Governors of the Federal Reserve System to implement the Truth in Lending Act (TILA)¹⁶⁴ due to Sallie Mae's failure to make sufficient and timely disclosure of private student loan terms.¹⁶⁵ Exclusive deals and improper arrangements with colleges to steer students into Sallie Mae private student loan products were allegedly not revealed to student applicants within the loan documentation resulting in a request for punitive damages in the *Rodriguez* lawsuit.¹⁶⁶

A settlement agreement was entered in the *Rodriguez* case on May 23, 2011, and approved by the United States District Court for the District of Connecticut on June 21, 2011.¹⁶⁷ The class in *Rodriguez* was defined as “[a]ll African American, Hispanic or Native American individuals for whom Sallie Mae, Inc. or any other affiliate or subsidiary of SLM Corporation underwrote or originated a private student loan between September 15, 2003 and June 20, 2011.”¹⁶⁸

The settlement terms in *Rodriguez* included monetary consideration in the form of a cy-près¹⁶⁹ contribution made by

161. See *id.* ¶ 6-10 (discussing the plaintiff's allegations).

162. See *id.* (discussing the plaintiff's claims).

163. See 12 C.F.R. § 226.1(a) (Regulation Z implements the Truth in Lending Act within Title I of the Consumer Credit Protection Act); see also 12 C.F.R. §§ 226.46-48 (subpart F provides special rules for private student loans and Appendix A to Part 226 states the effect of such regulations on state laws).

164. See 15 U.S.C. § 1601 *et seq.*

165. See *Rodriguez* Complaint, *supra* note 155, ¶¶ 11-12 (discussing violations under Regulation Z and TILA).

166. Equitable relief was also requested pursuant to an injunction and/or specific performance. *Id.* ¶ 31.

167. See generally Order Certifying Provisional Settlement Class, Preliminary Approving Class Action Settlement and Providing for Notice to the Class, *Rodriguez*, 2010 WL 1286989 (2010) [hereinafter *Rodriguez* Settlement Agreement] (discussing the court order).

168. *Id.* at 2. The order further provides that notice of the settlement shall be published once in *Ebony* Magazine, *People Magazine* Spanish Language Edition, and *Native American Times*. *Id.* at 4.

169. *Id.* at 6; see generally *Cy Pres*, JACKSONVILLE AREA LEGAL AID, <http://www.jaxlegalaid.org/cypres.html> (last visited Oct. 10, 2012) (discussing the cy-près award). The definition states:

In class action lawsuits, if there is to be a payment of damages to class members, a fund is created. After class members' claims are paid, there is often an amount remaining. Under the doctrine of *Cy Pres*, judges and class counsel can recommend that residual fund be distributed to the “next best” use. The *Cy Pres* remedy can also be used for the entirety of a statutory damage award when the amount of damages to each class member is too small to warrant distribution.

Id.

Sallie Mae to the United Negro College Fund and the Hispanic College Fund for scholarships and credit education, attorneys' fees and expenses, an incentive award to the named plaintiffs.¹⁷⁰ The *Rodriguez* settlement also included a statement of compliance for Sallie Mae to provide disclosure and information on factors of origination, the underwriting process, the setting of interest rates and fees for private student loans, the effect of school choice and cohort default rates on the cost of student loans, and default consequences.¹⁷¹

Another class-action lawsuit involving a for-profit college, *Morgan v. Richmond School of Health and Technology, Inc.*,¹⁷² was filed in the United States District Court for the District of Columbia in 2011 alleging reverse redlining¹⁷³ in the targeting of -African Americans and low-income neighborhoods for predatory student loan abuse and fraudulent practices.¹⁷⁴ False representations of occupational certification and licensure compliance, inaccurate statements regarding professional prerequisites, and inflated employment prospects were alleged in the *Morgan* complaint.¹⁷⁵

The defendant in *Morgan* allegedly targeted "unsophisticated"

170. See *Rodriguez* Settlement Agreement, *supra* note 167, at 6 (agreeing that the cy-près contribution would be \$500,000 to be evenly distributed between the United Negro College Fund and the Hispanic College Fund, attorneys' fees and costs would be awarded for approximately \$1,800,000, and plaintiffs Rodriguez and Gregiore would receive incentive awards in the amount of \$3,000 each).

171. See *id.* at 7-8 (outlining the information and disclosures that Sallie Mae must include on its website for potential borrowers); see generally *Consumer Laws and Regulations*, *supra* note 121 (providing that electronic disclosures that comply with the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. §§ 7001-7031 are permissible under the ECOA).

172. See generally *Morgan v. Richmond Sch. of Health and Tech., Inc.*, 857 F. Supp. 2d 104 (D.D.C. 2012) (transferring case to the U.S. District Court for the Eastern District of Virginia in granting Defendant's Motion to Dismiss or Transfer; case currently pending before the Richmond Division); see also *id.* at 1 (noting that "[o]n June 8, 2011, Plaintiffs filed their first Complaint [Dkt. No. 3]. On August 3, 2011, Plaintiffs filed an Amended Complaint [Dkt. No. 3]. On December 7, 2011, the Court granted leave for Plaintiffs to file their Second Amended Complaint [Dkt. No. 21].").

173. First Amend. Class Action Complaint ¶ 4, *Morgan*, 857 F. Supp. 2d 104 [hereinafter *Morgan* Complaint] (noting that "[t]argeting African Americans to take out loans on the basis of deceptive and otherwise unfair practices constitutes 'reverse redlining.' Reverse redlining has repeatedly been held to violate federal anti-discrimination laws, including the Equal Credit Opportunity Act."); see also ATTORNEY GENERAL'S 2011 ANNUAL REPORT, *supra* note 107, at 5, 7 (distinguishing reverse redlining as the targeting of minorities for predatory loans as opposed to redlining in general that excludes minority communities from the offering of loans).

174. See *Morgan* Complaint, *supra* note 173.

175. *Id.* ¶¶ 3, 5, 12, 13, 23, 28, 33, 34, 44, 82, 84, 117.

African Americans¹⁷⁶ eligible for federal financial aid¹⁷⁷ for the school to obtain more than \$5 million annually from the federal government.¹⁷⁸ Low-income students were allegedly of particular interest to the for-profit defendant in *Morgan* due to their increased need that would result in larger financial aid awards.¹⁷⁹ A disparate impact pursuant to the ECOA was alleged due to the harmful effect of poor credit ratings after student loan default on African Americans.¹⁸⁰ The targeting of African Americans resulted in a disproportionately high rate of minority enrollment at the for-profit institution at issue in *Morgan*.¹⁸¹

The counts of the *Morgan* complaint included violation of the ECOA,¹⁸² violation of Title VI of the Civil Rights Act of 1964,¹⁸³ violation of the Virginia Consumer Protection Act,¹⁸⁴ breach of contract,¹⁸⁵ and fraudulent inducement to contract.¹⁸⁶ Compensatory and punitive damages were sought in *Morgan*, in addition to injunctive relief and reasonable attorneys' fees and costs.¹⁸⁷

Fair underwriting standards are necessary to comply with standards of fairness and decency. Without regulatory oversight and supervision, lenders are left to their own devices to arbitrarily deny students of an opportunity to become upwardly mobile in our society. The use of college cohort default rates should be limited to develop sound financial practices of colleges and universities instead of imposing an unjust tax on the racially oppressed and

176. *Id.* ¶ 67.

177. *See id.* ¶ 17 (noting that federal financial aid is provided for under Title IV of the Higher Education Act of 1965 to include Pell Grants, Direct Loans, and Stafford Loans).

178. *See id.* ¶¶ 2-3 (stating that federal financial aid accounted for over eighty-six percent of school revenue, and the school allegedly advertised on African American media outlets and on mass transit to lure unsuspecting minorities to enroll in "a school for African Americans").

179. *See id.* ¶¶ 6-8 (stating that defendant allegedly asked potential students if they were on food stamps to ascertain whether they were desirable candidates for enrollment).

180. *Id.* ¶ 69 (noting that African Americans are traditionally denied equal access to credit).

181. *Id.* ¶ 67 (stating that the student body is seventy-five percent African American as compared to a lower percentage of African Americans in the local community).

182. *Id.* ¶ 73.

183. *Id.* ¶ 74.

184. *Id.* ¶¶ 74-75.

185. *Id.* ¶ 75 (alleging the violation of the implied covenants of good faith and fair dealing implicit in the Enrollment Agreement as a written contract).

186. *Id.* ¶¶ 75-76 (alleging that the defendant intentionally made false statements regarding the quality and content of the educational programs offered).

187. *Id.* ¶ 76 (treble damages were also requested by the plaintiffs for defendant's willful violation of Virginia consumer law).

economically distressed. Economic justice in student loan underwriting is an important factor in narrowing the race wealth gap in the United States.

IX. HISTORIC STUDENT LOAN LEGISLATION

The National Defense Education Act of 1958 placed a college education within reach to thousands of Americans by providing for federal financial aid through Direct Loans financed by funds from the United States Treasury.¹⁸⁸ To remain competitive in a global economy and continue our dominance as a world superpower, higher education was recognized as a ladder to success.¹⁸⁹ The Higher Education Act of 1965 guaranteed federal financial backing of educational loans.¹⁹⁰ The Middle-Income Student Assistance Act of 1978 followed the tradition of funding college degrees as a mutually beneficial contribution to society.¹⁹¹

These longstanding bodies of legislation are subject to amendment and revision as there is a tightening of the budgetary spending attributed to education.¹⁹² As the credit market contracts, more Americans are left to finance their college education with student loans.¹⁹³ The reform to the Bankruptcy

188. See generally National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 101 (declaring the act's intention to "provide substantial assistance in various forms to individuals."); see also *Federal Student Loan Programs – History*, FED. EDUC. BUDGET PROJECT (Mar. 28, 2012), <http://febp.newamerica.net/background-analysis/federal-student-loan-programs-history> (explaining that "[t]he first federal student loans . . . were direct loans capitalized with U.S. Treasury funds.").

189. See *Federal Role in Education*, U.S. DEPT OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last visited Sept. 8, 2012) (describing the U.S. Department of Education mission: "to promote student achievement and preparation for global competitiveness by fostering education excellence and ensuring equal access.").

190. Higher Education Act of 1965, 20 U.S.C. § 1070 (2008).

191. Middle Income Student Assistance Act, 20 U.S.C. § 1087 (2008).

192. See Affordable Student Loans Act of 2001, H.R. 1622, 107th Cong. § 2 (1st Sess. 2001) (reducing cost of student loans to families); see also Private Student Loan Disclosure Enhancement Act of 2007, S. 1831, 110th Cong. § 3 (1st Sess. 2007) (amending to improve student loan disclosures); Ensuring Continued Access to Student Loans Act of 2008, Pub. L. 110-227, 122 Stat. 740 (requiring "a study to evaluate the impact of increase in Federal loan limits"); Higher Education Opportunity Act of 2008, Pub. L. 110-315, 122 Stat. 3078 (enacted) (requiring yearly reporting of program outcomes "that voluntary flexible agreements have had with respect to [] program integrity[,] [] cost efficiencies, delinquency prevention, and default aversion."; and Student Loan Simplification and Opportunity Act of 2011, H.R. 2732, 112th Cong. § 2 (1st Sess. 2011) [hereinafter *Loan Simplification Act*] (authorizing temporary student loan debt conversion).

193. See Bhaskar & Gopalan, *supra* note 95, at 6 (noting that "borrowing by students and parents is close to 40 percent of the overall college costs, which is significant.").

Code in 2005 amounted to an almost insurmountable standard in overcoming the burden of student loan debt, even in the case of insolvency.¹⁹⁴

The current economic conditions have brought about a chance of relief as Congress considers a number of bills in balancing interests in accountability for both the lenders and borrowers, including the Student Loan Simplification and Opportunity Act of 2011.¹⁹⁵ The proposed legislation includes the Fairness for Struggling Students Act of 2011,¹⁹⁶ the Student Loan Forgiveness Act of 2012,¹⁹⁷ the Private Student Loan Bankruptcy Fairness Act

194. Bankruptcy Code, 11 U.S.C. § 523(8)(b) (2005); See *Brunner v. N.Y. St. Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (adopting the Brunner Test). The test articulates a standard for “undue hardship”:

- (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

Id.; see also *The Student Loan “Debt Bomb”: America’s Next Mortgage-Style Economic Crisis?*, NAT’L ASSOC. OF CONSUMER BANKR. ATTYS., 5 (Feb. 7, 2012), <http://nacba.org/Portals/0/Documents/Student%20Loan%20Debt/020712%20NACBA%20student%20loan%20debt%20report.pdf> (reiterating that “[t]here is no discharge in bankruptcy for federal loans except in extremely limited circumstances”); but see Adam Liptak, *Bankruptcy Ruling in Student Loan Case*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/us/24scotus.html?_r=0 (U.S. Supreme Court ruling provides narrow exception to student loan discharge).

195. See Tim Bishop, *Bishop Proposal to Reduce Burden of Student Loans Taken Up by White House*, CONGRESSMAN TIM BISHOP (Oct. 26, 2011), <http://timbishop.house.gov/latest-news/bishop-proposal-to-reduce-burden-of-student-loans-taken-up-by-white-house/> (noting:

The Student Loan Simplification and Opportunity Act of 2011 bill would allow students with loans under the Federal Family Educational Loan program to convert them to lower-interest federal Direct loans without penalty, and, in fact, to receive a reduction in outstanding principal as an incentive for making the switch. The program could benefit up to 1.6 million borrowers and reduce payments by as much as a couple hundred dollars a month . . .).

196. Fairness for Struggling Students Act 2011 S. 3291, 112th Cong. (1st Sess. 2011); see Becky Yerak, *Student Loan Debt a Growing Threat to the Economy*, CHI. TRIB. (Apr. 12, 2012), http://articles.chicagotribune.com/2012-04-12/business/ct-biz-0413-student-debt-20120416_1_private-student-student-loan-deanne-loonin (noting that the act “would allow students who borrowed from private lenders for their education to wipe out that debt in bankruptcy proceedings, just as credit card borrowers and many other unsecured debtors may do. In 2005, Congress changed bankruptcy laws and made private student loan debts nondischargeable in bankruptcy, with few exceptions.”).

197. Student Loan Forgiveness Act of 2012 H.R. 4170, 112th Cong. (2d Sess. 2012) (introducing the “10-10 standard” that would allow a borrower to qualify for loan forgiveness after making payments for ten years of student loan payments equal to ten percent of the borrower’s discretionary income).

of 2011,¹⁹⁸ and the Know Before You Owe Private Student Loan Act of 2012.¹⁹⁹ These borrower-friendly provisions may stem from the economic downturn of the economy.²⁰⁰ The steep decline of income and the diminution of wealth have affected a generation of Americans that are strapped with a backpack of large student loans.²⁰¹

The movement to reform borrower-lender relations is led by

198. Private Student Loan Bankruptcy Fairness Act of 2011, H.R. 2028, 112th Cong. (1st Sess. 2011); see Dick Durbin, *Durbin, Cohen and Others Introduce Legislation to Restore Fairness in Student Lending: Bill Will Make Private Student Loans Dischargeable in Bankruptcy*, U.S. SENATE (May 26, 2011), <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=f7c84e6c-f2a2c-4ee5-b466-f461b0f0de8a> (noting:

Before changes were made to the bankruptcy code in 2005, only government issued or guaranteed student loans were protected during bankruptcy. This protection had been in place since 1978 and was intended to safeguard federal investments in higher education. Today's bill would restore the bankruptcy law, as it pertains to private student loans, to the language that was in place before 2005, so that privately issued student loans will once again be dischargeable in bankruptcy.)

199. Know Before You Owe Private Student Loan Act of 2012, S. 2280, 112th Cong. (2d Sess. 2012); see Equal Justice Works, *Private Student Loans Examined in New Senate Legislation*, U.S. NEWS AND WORLD REPORT (Apr. 4, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/04/04/private-student-loans-examined-in-new-senate-legislation> (discussing the impact of the act). The article notes:

The act would require institutions of higher education to inform students about their federal financial aid availability and eligibility; their ability to select a private lender of their choice; the impact of a private loan on their eligibility for other forms of financial aid; and their right to accept, reject, or cancel a private loan as allowed under current law. It would also require schools to inform students about the terms and conditions of federal and private student loans. Private lenders would be required to certify with the borrower's school that the student is enrolled, as well as the amount the student is eligible to borrow before issuing a private loan. The private lenders would also have to provide the borrower with quarterly updates on their loans, including accrued but unpaid interest and capitalized interest. In addition, private lenders would have to report information to the Consumer Financial Protection Bureau about the student loans they issue.

Id.

200. See Equal Justice Works, *Is Student Debt Prolonging the Recession?*, U.S. NEWS AND WORLD REPORT (Mar. 7, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/03/07/is-student-debt-prolonging-the-recession> (reporting on the proposal to forgive student loan debt in order to boost the economy).

201. *Id.* (reporting that young adults are forgoing homeownership due to unstable employment and student loan debt); see also Becky Yerak, *Massive Student Loan Debt Weighs Heavily on Young Couple*, CHI. TRIB. (Apr. 16, 2012), http://articles.chicagotribune.com/2012-04-16/business/ct-biz-0413-student-side-20120416_1_private-student-loans-federal-loans-interest-rates (reporting that a 2007 graduate "with a bachelor's degree in interior design . . . still hasn't found a job in her field.").

the Consumer Financial Protection Bureau²⁰² as empowered by the Dodd-Frank Act²⁰³ to field complaints and resolve issues of regulatory compliance for private student loans.²⁰⁴ The federal government provides federal student loans under the United States Department of Education.²⁰⁵ The financial aid industry is also under scrutiny by state attorneys general in protecting consumers from unfair and deceptive practices.²⁰⁶

202. See *Learn About the Bureau*, CFPB, <http://www.consumerfinance.gov/the-bureau/> (finding that the CFPB was established under Article X of the Dodd-Frank) (last visited Sept. 8, 2012); see also *Student Debt Repayment Assistant*, CFPB, <http://www.consumerfinance.gov/students/repay/> (last visited Sept. 8, 2012); *Know Before You Owe: Student Loans*, CFPB, <http://www.consumerfinance.gov/students/knowbeforeyouowe/> (last visited Sept. 8, 2012) (pushing for reform in the student loan arena).

203. Dodd-Frank Act, Stat. at 1376-2223 (2010).

204. See 124 Stat. 1376, §§ 1035, 1077 (designating a Private Education Loan Ombudsman to review and resolve borrower complaints and requiring a report that examines consumer protections available and necessary).

205. See U.S. DEP'T OF EDUC., YOUR FEDERAL STUDENT LOANS: LEARN THE BASICS AND MANAGE YOUR DEBT 1 (2010), available at <http://www.studentaid.ed.gov/sites/default/files/your-federal-student-loans.pdf> (stating that “[t]he U.S. Department of Education provides more than \$150 billion in federal student aid (grants, work-study, and loans) each year to students seeking a postsecondary education (a degree after high school).”). The report also notes that “[a]bout 14 million students currently receive federal student aid with a majority receiving federal student loans.”); see also *About the Office of Federal Student Aid*, U.S. DEP'T OF EDUC., <http://federalstudentaid.ed.gov/about/index.html> (last visited Oct. 11, 2012) (explaining that “[t]he federal student aid programs are authorized under Title IV of the Higher Education Act (HEA) of 1965, as amended[,]” including federal grants, loans and work-study programs.”).

206. See Paul Basken, *Attorneys General and Senate Panel Cite More Evidence of Lender Corruption*, 53 CHRON. OF HIGHER EDUC., A18 (2007) (stating that a group of thirty-two state attorneys, led by former New York Attorney General, Andrew Cuomo, met with the United States Senate to discuss actions for student loan transparency that were proposed to be considered for the reauthorization of the Higher Education Act); see also H.R. 890 (seeking to establish standards for lenders and institutions of higher education that protect student borrowers who receive educational loans); Maya P. Hill & Thomas A. Hill, *“Let the Sun Shine In”: The Student Loan Sunshine Act and Recent Developments in Student Lending Law*, 23 OKLA. CITY U. L. REV. 47 (2008) (stating that New York Attorney General, Andrew Cuomo, testified before the U.S. House of Representatives Committee on Education and Labor that revenue sharing, preferred lender lists, improper relationships between lenders and financial aid administrators, denial of choice of lender, undisclosed sales of loans to another lender, and quid pro quo opportunity loans encourage unfair and deceptive practices); see generally *Student Loans: Avoiding Deceptive Offers*, FTC FACTS FOR CONSUMERS 1, 2 (May 2012), <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre43.pdf> (advising students not to allow “promotions or incentives like gift cards, credit cards, and sweepstakes prizes” to distract them “from assessing whether the key terms of the loan are reasonable” and to “[b]e cautious about consolidating

X. STUDENT LOAN REFORM

The complex nature of the variety of financial products available in the multi-billion-dollar student loan industry does little to open the doors of opportunity to first generation college students who may be unsophisticated in negotiating terms.²⁰⁷ Students with poor credit or with thin credit files may have limited viable alternatives to finance their college degree other than private student loans.²⁰⁸

The public interest in assisting others in obtaining increased education has waned to a degree over time.²⁰⁹ Taxpayers are no longer willing to finance college degrees at a high cost with little benefit to the economy.²¹⁰ For-profit schools are under scrutiny and outcome assessment measures are becoming commonplace as schools seek to justify and quantify their existence.²¹¹ Historically

federal loans and private loans into one private loan” because “consolidating all loans into one non-federal private loan means that [they] lose all the benefits and protections provided in the federal loan programs.”).

207. See generally Northwest Education Loan Association, *First Generation College Students*, NELA, <http://www.nela.net/Centers/Pages/firstgeneration.aspx> (last visited Oct. 11, 2012) (discussing difficulties that first generation college students face when considering student loans).

208. See NELA CENTER FOR STUDENT SUCCESS, PAYING FOR COLLEGE 2012 1, 16 (2012), available at <http://www.nela.net/SiteCollectionDocuments/Downloads%20Order%20Forms/PayingforCollege.pdf> (informing students that “[p]rivate education loan programs may run a credit check to examine your ability to repay the loan. Generally, these programs require your parent or another creditworthy individual to borrow or co-sign the loan on your behalf.”) The pamphlet also tells students that “[u]nsubsidized Stafford Loans and PLUS loans are more widely available, but because the government does not subsidize the interest, they cost you slightly more in interest payments over time. . . . consider private education loans only as a last resort.” *Id.*

209. See U.S. DEP’T OF EDUC., ENSURING CONTINUED ACCESS TO STUDENT LOANS ACT (ECASLA), ANNUAL REPORT TO CONGRESS 1, 2 (July 2011), available at <http://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/July2011ECASLAREport.pdf> (indicating that “[n]early all default risk and interest rate risk is borne by taxpayers”); Scott Cohn, *The College Debt Crisis: Student Loan Defaults Could Cost Taxpayers Dearly*, CNBC (Dec. 21, 2010), http://www.cnbc.com/id/40492487/Student_Loan_Defaults_Could_Cost_Taxpayers_Dearly (stating that the dramatic rise in student loan defaults could leave American taxpayers on the hook for hundreds of billions of dollars).

210. See Thomas K. Lindsay, *Fool for Higher Education*, INSIDE HIGHER EDUC. (May 17, 2012), <http://www.insidehigered.com/views/2012/05/17/us-should-curtail-student-loans-help-taxpayers-and-students-essay> (stating that “[t]he increased dollars required to foot this [student loan] bill can come only through raising taxes, or cutting funding for other programs, or government borrowing”).

211. See Karina Frayter, *For-Profit Schools Under Fire, Stocks Down Nearly*

Black Colleges and Universities (HBCUs) are disproportionately pressured to fiscally perform in light of economic pressures to produce graduates who do not default on their student loans.²¹² Students who attend HBCUs include economically disadvantaged youth who are more susceptible to predatory lending in the form of high-interest-rate private student loans.²¹³ High student loan default rates have threatened the closure of several HBCUs.²¹⁴

30 Percent, CNBC (Dec. 17, 2010), www.cnbc.com/id/40494522/For_Profit_Schools_Under_Fire_Stocks_Down_Nearly_30_Percent (explaining that “[f]or-profit schools are private businesses, but finance their operations primarily with public dollars coming by way of federal student aid[.]” and “[w]hile these schools enroll roughly 10 percent of all higher education students, they receive 24 percent of public funds.”); *see also* RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 121 (Univ. of Chi. Press 2011) (indicating that “[g]rowing numbers of students are sent to college at increasingly higher costs, but for a large proportion of them the gains in critical thinking, complex reasoning and written communication are either exceedingly small or empirically nonexistent.”); INSTITUTE FOR RESEARCH & STUDY OF ACCREDITATION & QUALITY ASSURANCE, *COUNCIL FOR HIGHER EDUCATION ACCREDITATION, ACCREDITATION AND ACCOUNTABILITY: LOOKING BACK AND LOOKING AHEAD* 19 (2011) (asserting that “[a]ccreditation is highly valued in the academic community[.]” and even greater advocacy is necessary to sustain its respect and credibility).

212. *See* ADAM RUST, N.C. INST. FOR MIN. ECON. DEV., *YOUNG MINDS, BIG DEBTS: STUDENT LOANS AT NORTH CAROLINA’S HBCUS* 2 (2009) (stating that “[m]ore students at HBCUs (76.8 percent compared to 70.3 percent) receive financial aid than do students as a whole nationwide[.] [m]ore HBCU students receive a student loan (51.4 percent, compared to 40.1 percent)[.] and [a]verage student loan amounts are greater at HBCUs, for each category of school”); *see also* ERIN DILLON & ROBIN V. SMILES, *EDUCATION SECTOR, LOWERING STUDENT LOAN DEFAULT RATES: WHAT ONE CONSORTIUM OF HISTORICALLY BLACK INSTITUTIONS DID TO SUCCEED* 1 (2010) (quoting Erin Dillon and Robin V. Smiles:

The problem . . . starts with a number called the “cohort default rate,” which is calculated annually by the U.S. Department of Education for every college and university in the country that participates in the federal student aid program. The rate is the percentage of student borrowers who default (defined by the department as not making loan payments for 270 days) within two years of leaving school. The federal government uses the cohort default rate to sanction colleges where too many students don’t pay back their loans. Any college with a rate higher than 25 percent for three consecutive years or above 40 percent in any one year risks losing eligibility for federal student aid. Without access to federal grant and loan funds to help students pay tuition, a school’s very survival is at risk.)

213. *See* RUST, *supra* note 212 (quoting Rust: “African-American students at HBCUs are more likely to come from a low-income household than are African-American students at a ‘primarily white institution’ (PWI).”); *see also* DILLON & SMILES, *supra* note 212 (indicating that “[m]ost at risk are those schools that serve large numbers of first-generation and low-income students.”).

214. *See* DILLON & SMILES, *supra* note 212, at 2 (stating that “the average

Overall, recent college graduates are more likely to default on their student loans due to dismal job prospects.²¹⁵ Defaulting on student loans comes at a high cost with immediate consequences that extend far into the borrower's economic future.²¹⁶ The Higher Education Opportunity Act places even more accountability on colleges for their student loan default rates.²¹⁷

Student loans now comprise the vast majority of financial aid packages, but this was not always the case.²¹⁸ The federal grants and programs used to pave the way for a number of Americans to obtain middle-class status.²¹⁹ These programs have since decreased in size and the amount of student aid has diminished in value.²²⁰ While federal and state governments still invest in higher

endowment per student [at HBCUs located in the state of Texas for example] is \$8,600, well below the median endowment of \$16,000 per student among private four-year institutions[.]" and the loss of federal student aid money would be disastrous for both individual schools and their peer).

215. See *id.* at 1 (indicating that "[t]he latest cohort default rates, which track students who left school in 2007, showed the largest increase since 1989 . . . and that [t]he classes of 2008 and 2009 face bleak job prospects, putting more students at risk of defaulting . . .").

216. See *Default Consequences*, AM. STUDENT ASSISTANCE, <http://www.asa.org/in-default/consequences/default.aspx> (last visited Oct. 11, 2012) (noting that default consequences include wage garnishment, loan acceleration, interest capitalization, forfeiture of federal government payments including Social Security and disability income, and future student loan ineligibility); see also *Is Student Debt Prolonging the Recession?*, *supra* note 200 (noting that it would be a mistake to "forget the increasing number of people who face the severe consequences of delinquency and default—which include harassment by third party collection agencies, garnishment of wages, seizing of tax refunds or Social Security, and denial of eligibility for new education grants or loans . . .").

217. See DILLON & SMILES, *supra* note 212 (explaining that in 2008, the United States Congress revised the federal Higher Education Opportunity Act (HEOA) to require colleges to account for student loan defaults within the first three years, as opposed to two years, after leaving school).

218. See *Trends in Student Aid 2011*, *supra* note 31, at 3 (indicating that "state grant aid, grants from employers and other private sources, and federal campus-based aid all provided fewer inflation-adjusted dollars per student in 2010-11 than they had three years earlier . . .").

219. See Kim Clark, *Cheaper Student Loans, But Shortage of College Grants Likely in 2011 and 2012*, U.S. NEWS & WORLD REPORT (Jan. 31, 2011), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2011/01/31/cheaper-student-loans-but-shortage-of-college-grants-likely-in-2011-and-2012> (explaining that college is becoming less affordable for lower and middle class families as federal grants and student loans fall behind rising tuition costs).

220. See LESLEY J. TURNER, THE INCIDENCE OF STUDENT FINANCIAL AID: EVIDENCE FROM THE PELL GRANT PROGRAM 4 (Columbia Univ. 2012) (discussing the Pell Grant Program). The text notes that the program was:

Established to promote access to postsecondary education, the Pell Grant Program is the largest source of need-based student aid in the United States. In 2011, the program provided 9.5 million low-income

education to a degree, these programs have limited budgets despite the annual increase in cost to attend college.²²¹

The early student loan programs of access and opportunity have slowly morphed into a trap of red tape and bureaucracy for millions of college students and their families who put their trust in the education system.²²² Prior to an amendment to the Higher Education Act of 1965²²³ by the Higher Education Opportunity Act

students with subsidies totaling \$35 billion. The maximum Pell Grant award has grown in generosity from \$452 during the 1973-1974 school year to \$5,550 in 2011, a 62 percent increase in real terms. However, over this period the purchasing power of the maximum Pell Grant award declined. In 2010, the maximum Pell Grant represented 42 percent of average tuition and fees at public institutions and only 17 percent at private schools.

Id.

221. See *State Higher Education Finance FY 2011*, SHEEO 1, 7 (2012), http://www.sheeo.org/finance/shef/SHEF_FY11.pdf (stating that “[a] recession beginning in 2008 dramatically reduced state revenue and ended the growth in state and local support achieved between 2004 and 2008.”); see also Nicholas Johnson et al., *An Update on State Budget Cuts*, CTR. ON BUDGET AND POL’Y PRIORITIES 1, 4 (Feb. 9, 2011), <http://www.cbpp.org/files/3-13-08sfp.pdf> (stating that “At least 43 states have cut assistance to public colleges and universities, resulting in reductions in faculty and staff in addition to tuition increases.”); Coburn Palmer, *Higher Education Vanishing Before Our Eyes*, USA TODAY COLLEGE (Mar. 26, 2012), <http://www.usatoday.com/staging/index.php/ccp/higher-education-vanishing-before-our-eyes> (stating that “[e]ven with top grades and extracurricular activities, students may find it difficult to gain acceptance to or graduate from a four-year university after recent cuts to higher education budgets.”).

222. See THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS, AFTER THE FAFSA: HOW RED TAPE CAN PREVENT ELIGIBLE STUDENTS FROM RECEIVING FINANCIAL AID 2 (2010), available at <http://ticas.org/files/pub/AfterFAFSA.pdf> (arguing that low-income financial aid applicants are more likely to be subject to document verification procedures prior to receiving federal aid such as the Pell Grant); Daniel Luzer, *Federal Student Aid, Changes Sort Of*, WASH. MONTHLY (Dec. 21, 2009), http://www.washingtonmonthly.com/college_guide/blog/federal_student_aid_changes_so_1.php (discussing the increasing length of the loan applications). The form has 120 questions and is more than six pages long. *Id.*; Jane Bennett Clark, *Financial-Aid Form Gets a Facelift*, KIPLINGER’S PERSONAL FIN. (Jan. 2010), <http://www.kiplinger.com/magazine/archives/financialaid-form-gets-a-facelift.html> (discussing the changes in the FAFSA form for 2010-11).

223. 20 U.S.C. §§ 1001-1099e (2006); see also *Higher Education Act Legislation*, TEX. GUARANTEED STUDENT LOAN CORP., <http://www.tgslc.org/hea/> (last visited Sept. 30, 2012) (explaining that the Higher Education Act is generally reauthorized by Congress every five years to take into account the current impact of the Act); see also *Reauthorization of the Higher Education Act of 1965*, FINAID, <http://www.finaid.org/educators/reauthorization.phtml> (last visited Sept. 30, 2012) (indicating that the next reauthorization of the Higher Education Act of 1965 is scheduled to take place in 2013 to address changes and improvements to introduce new financial aid programs and streamline existing ones).

of 2008,²²⁴ the extensive Free Application for Federal Student Aid was an impediment to low-income college students in need.²²⁵ The Truth-in-Lending Act (TILA)²²⁶ has fallen short in providing protection from bad actors in the financial aid industry.²²⁷ With the amendments to Regulation Z in 2009, TILA now requires more disclosure to borrowers of financial products offered to college students.²²⁸ Although there are enhanced disclosure requirements under TILA, these amendments do not adequately protect

224. See generally 122 Stat. 3078 (outlining the goals of the act); see also *Higher Education Opportunity Act – 2008*, U.S. DEPT OF EDUC., <http://www2.ed.gov/policy/highered/leg/hea08/index.html> (last visited Sept. 30, 2012) (explaining that the Higher Education Opportunity Act of 2008 reauthorizes the Higher Education Act of 1965 through new or revised regulations, including the simplification of the FAFSA form).

225. See *Report to Congress on Efforts to Simplify the Free Application for Financial Student Aid (FAFSA)*, U.S. DEPT OF EDUC. 4 (Jan. 16, 2009), <http://www2.ed.gov/policy/highered/leg/hea08/fafsa-report.pdf> (explaining that the FAFSA's complex nature as well as the involved process of collecting a great deal of family financial information is especially difficult for students from low-income families).

226. Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (1998); see also THOMAS A. DURKIN & GREGORY ELLIEHAUSEN, *TRUTH IN LENDING: THEORY, HISTORY, AND A WAY FORWARD 2* (Oxford Univ. Press 2011) (explaining that the Truth in Lending Act was initially enacted as part of the Consumer Credit Protection Act of 1968 to require meaningful disclosure by lenders in consumer credit transactions including the annual percentage rate to determine finance charges).

227. See generally DURKIN & ELLIEHAUSEN, *supra* note 226, at xv. (stating that “[o]ver the next twenty years [from the 1968 enactment of TILA], the market was dramatically deregulated, and creditors were free to introduce almost any kind of consumer financial product, at any price, so long as it was disclosed according to regulatory specifications.”); see also *Financial Aid Regulation*, ASSOC. OF AM. MED. COLLS., https://www.aamc.org/advocacy/meded/79124/fin_aid_regs.html (last visited Sept. 30, 2012) (discussing the aims of TILA). The article states:

TILA [Truth in Lending Act] is designed to protect consumers in credit transactions by requiring clear disclosure of key terms, lending arrangements, and total costs associated with lending transactions. The revisions under Title X of HEOA [Higher Education Opportunity Act of 2008] were designed to improve and increase transparency of private education loans. . . . HEOA provides for regulation and oversight of the financial aid community similar to the Student Loan Sunshine Act (H.R. 890) passed by the House on May 9, 2007.

Id.

228. See C.F.R. §§ 226.46-48; FED. RESERVE, *REGULATION Z: TRUTH IN LENDING, CONSUMER COMPLIANCE HANDBOOK 1-2* (2012), available at <http://www.federalreserve.gov/boarddocs/supmanual/cch/til.pdf> (explaining that Regulation Z was amended in 2009 following the enactment of the Higher Education Opportunity Act of 2008 to include disclosure requirements for private student loans). The Consumer Financial Protection Bureau was granted rulemaking authority pursuant to TILA in 2010 to supervise covered entities. Such disclosures also include credit card agreements offered to school affiliates. *Id.*

unassuming borrowers and do not assess proper oversight and supervision of financial institutions who offer financial aid products.²²⁹ For the most part, federal student loans are exempt from regular consumer financial protection disclosures including TILA disclosures, bankruptcy discharge, statute of limitations, and state usury laws regarding interest rates.²³⁰

Enforcement of the regulations already in place to protect consumer financial transactions prior to the Dodd-Frank Act were overlooked as banking interests began to capitalize on the captive market of student loans.²³¹ The most vulnerable members of our society, the young and disenfranchised, are falling prey to their detriment to the pressurized and deceptive tactics of loan officers and providers.²³² Without government intervention to eliminate

229. See *Globalization and the Student Loan Crisis*, GLOBALIZATION 101: A PROJECT OF THE SUNY LEVIN INST. (May 4, 2012), <http://www.globalization101.org/globalization-and-the-student-loan-crisis/> (discussing the Higher Education Act). The article states that the:

Higher Education Act was revised numerous times to give further support to student loan companies, taking away additional consumer protections, such as statutes of limitation, refinancing rights, and truth in lending requirements. Some of these protections were recently instituted for federal loans. Still though, the government can take the borrower's wages, tax returns, social security and disability income, and terminate public employment.

Id.

230. See Peter J. Riley & Alan Collinge, *Time to Occupy the Department of Education?*, FORBES (Apr. 23, 2012), <http://www.forbes.com/sites/peterjreilly/2012/04/23/time-to-occupy-department-of-education/> (stating that federal student loans for years were exempt from protections such as "standard bankruptcy protections, statutes of limitations, truth in lending laws, state usury laws, and many others.").

231. See Press Release, Project on Student Debt, Sallie Mae's Private Loans Exempt from Fin. Reform Bill? (May 3, 2010) (on file with projectonstudentdebt.org) (stating that "[p]rivate student loans typically have uncapped, variable interest rates that are highest for those who can least afford them. They lack the consumer protections and flexible repayment options of federal student loans, and are nearly impossible to discharge in bankruptcy.").

232. See *Know Before You Owe: Student Loans*, *supra* note 202 (stating that college students may be confused by financial aid offers that may not clearly indicate loan terms); see, e.g., U.S. DEP'T OF EDUC., FINAL PROGRAM REVIEW DETERMINATION - IOWA STUDENT LOAN LIQUIDITY CORPORATION 5-9 (Sept. 28, 2009) (sanctioning the Iowa Student Loan Liquidity Corporation over \$15 million in monetary fines citing to section 435(d)(5) of the Higher Education Opportunity Act of 2008 that prohibits lenders from offering kickbacks to school financial aid officers in exchange for obtaining student loans with certain lenders); see also Linda Doell, *For-Profit College Misconduct Complaints Under Investigation*, DAILY FIN. (Nov. 29, 2011), <http://www.dailyfinance.com/2010/11/29/for-profit-college-misconduct-complaints-under-investigation/> (detailing investigations by the Florida Attorney General regarding "questionable tactics" and "deceptive statements" regarding admissions and financial aid requirements at a number of for-profit

bribes and other unfair practices like redlining that may negatively impact students seeking financial aid at historically black colleges and universities,²³³ unregulated and unsupervised financial institutions threaten to further widen the wealth gap in our country.²³⁴

XI. RECENT STUDENT LOAN LEGISLATION

Federal legislative action such as the Private Student Loan Disclosure Enhancement Act of 2007,²³⁵ Private Student Loan Transparency and Improvement Act of 2008,²³⁶ Ensuring

institutions including the University of Phoenix).

233. See George M. Walsh, *Cuomo: Lenders "Redlining" Student Loans*, ASSOCIATED PRESS (June 19, 2007), http://www.boston.com/news/education/higher/articles/2007/06/19/cuomo_lenders_redlining_student_loans/?page=full (stating that "[s]ome student loan providers have been setting rates based on the schools borrowers attend, a practice New York Attorney General Andrew Cuomo likens to "redlining" in the home mortgage market."); *but see* Andy Guess, *"Redlining" or Reasonable Criterion?*, INSIDE HIGHER EDUC. (July 5, 2007), <http://www.insidehighered.com/news/2007/07/05/loans>. The article notes that:

[T]aking a specific college, or type of college, into account as a factor in determining a credit score could theoretically mean that loans to students at, say, Harvard could be seen by lenders as less risky and therefore more desirable than those made to students at community colleges, for-profit institutions and historically black colleges.

Id.; *see also Student Loan Redlining*, CONSUMER WARNING NETWORK 1-5, <http://www.consumerwarningnetwork.com/wp-content/uploads/docs/redlining-cwn-nm0424.pdf> (last visited Sept. 30, 2012) (reporting on the problem and solutions to redlining in the student loan industry in making state comparisons between the student loan default rate at "traditional" schools and historically black colleges and universities).

234. See Josh Keller, *Senator Kennedy Accuses Sallie Mae and Nelnet of Abusive Treatment of Borrowers*, CHRON. OF HIGHER EDUC. (Apr. 26, 2007), <http://chronicle.com/article/Senator-Kennedy-Accuses-Sallie/38728> (reporting that Sallie Mae and Nelnet "may have broken federal law by using 'harsh and inappropriate tactics' with borrowers whose payments were overdue."); *see also* Jeannette Neumann et al., *Some Nonprofit Student Lenders Accused of Misconduct*, HUFFINGTON POST (Mar. 18, 2010), http://www.huffingtonpost.com/2010/01/07/some-nonprofit-student-le_n_415049.html (highlighting the investigation of several state financial aid lenders for such questionable practices). As a result, non-profit financial aid lenders in at least ten states including Alabama, Arkansas, Indiana, Iowa, Louisiana, New Hampshire, Pennsylvania, and Texas have been ordered by the education department to reimburse the federal government. *Id.*

235. See generally 122 Stat. 3078 (providing enhanced required disclosures for the issuance of private student loans that include disclosures on the fees charged, the range of available interest rates, and an example of the total amount of private student loan over the life of the loan).

236. Private Student Loan Transparency and Improvement Act of 2008, S. 2849, 110th Cong. § 1 (2008) (including Title I - Preventing Unfair and Deceptive Private Educational Lending Practices and Eliminating Conflicts of Interest); Preventing Unfair and Deceptive Private Educational Lending

Continued Access to Student Loans Act of 2008,²³⁷ Higher Education Opportunity Act of 2008,²³⁸ Student Aid and Fiscal Responsibility Act of 2009,²³⁹ Christopher Bryski Student Loan Protection Act,²⁴⁰ Student Loan Simplification and Opportunity

Practices and Eliminating Conflicts of Interest, S. 2849, 110th Cong. § 101 (2008) (amending Chapter 2 of the Truth in Lending Act prohibiting gifts from lenders to educational institutions and advisory board members for any advantage or consideration); *see also* Community Reinvestment Act Credit for Low-Cost Loans, S. 2894, 110th Cong. § 301 (2008) (amending section 804 of the Community Reinvestment Act of 1977 to take into account a financial institution's issuance of low-cost educational loans in assessing compliance with the Community Reinvestment Act).

237. Ensuring Continued Access to Student Loans Act of 2008, Pub. L. 110-227, 122 Stat. 740 (increasing federal Stafford Loan limits); *see also* Letter from Vincent Sampson, Deputy Assistant Sec'y to the Office of Postsecondary Educ. of the U.S. Dep't. of Educ., to Colleague (June 19, 2008), *available at* <http://ifap.ed.gov/dpccletters/061908GEN0808.html> (discussing the legislation).

The letter notes:

[T]he legislation provides the Department of Education with new authority to address concerns about the availability of FFEL Program loans for the upcoming academic year. The ECASLA also increases annual and aggregate loan amounts in the FFEL and Direct Loan programs and provides relief for certain PLUS Loan borrowers whose adverse credit history is related to payments on home mortgages or medical bills. Finally, the ECASLA made important changes to the Academic Competitiveness Grant (ACG) and National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) Programs.

Id.; *Ensuring Continued Access to Student Loans Act of 2008 (ECASLA)*, NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, <http://www.nacacnet.org/issues-advocacy/LegislativeNews/Pages/ECASLA.aspx> (last visited Sept. 26, 2012) (discussing the reasons behind enacting the law).

238. Pub. L. No. 110-315, 122 Stat. 3708 (2008).

239. H.R. 3221, 111th Cong. (1st Sess. 2009); *see also* Doug Lederman, *House Passes Student Aid Bill*, INSIDE HIGHER EDUC. (Sept. 18, 2009) (finding that "[t]his bill will . . . strengthen Pell Grants and Perkins Loans that make college more affordable.") President Obama also noted that "[t]his bill also follows through on our plan to shore up our community college system, simplifies the complicated financial aid forms to make it easier for students to apply for and get the help they need . . ." *Id.*

240. Christopher Bryski Student Loan Protection Act H.R. 3240, 112th Cong. (1st Sess. 2011) (discussing the aim of the law, the Act states its purpose "[t]o amend the Truth in Lending Act and the Higher Education Act of 1965 to require additional disclosures and protections for students and cosigners with respect to student loans, and for other purposes."); *see also* Loren Berlin, *KeyBank Agrees to Forgive Student Loans of Christopher Bryski, Dead Rutgers Student*, HUFFINGTON POST (Apr. 25, 2012), http://www.huffingtonpost.com/2012/04/25/christopher-bryski-student-loan-forgiveness-_n_1452996.html (indicating that the bill, also known as Christopher's Law, was drafted in response to the death of Rutgers University undergraduate student, Christopher Bryski). Mr. Bryski's father, as co-signer, was charged with his son's outstanding student loans of approximately \$50,000. *Id.* Bryski's federal student loan debt was cancelled while KeyBank, a private loan lender, still demanded payment of the remaining debt prompting advocates to petition

Act of 2011,²⁴¹ and Stop the Student Loan Interest Hike Act,²⁴² have instituted regulation, supervision, oversight and expansion of student loan programs. Before the passage of the Dodd-Frank Act, private student loans were subject to relatively minimal regulation despite increased abuse by lenders.²⁴³

XII. STUDENT LOAN REPAYMENT OPTIONS

Limited deferment, forbearance, and loan consolidation are the primary mechanisms used to assist at-risk borrowers.²⁴⁴

KeyBank to forgive the loan. *Id.* Under pressure, KeyBank eventually decided to discharge the loan. *Id.*

241. Student Loan Simplification and Opportunity Act of 2011, H.R. 2732, 112th Cong. (1st Sess. 2011) (stating its purpose “[t]o amend the Higher Education Act of 1965 to provide for temporary student loan debt conversion authority.”); S. 1068, 112th Cong. (1st Sess. 2011); Press Release, Sen. Sherrod Brown, With Two-Thirds of Ohio Students Graduating with Student Debt Sen. Brown Announces Bill to Simplify Student Loan Repayment Process, Save Graduates Money, and Bolster Federal Pell Grant Program (May 25, 2011), available at <http://www.brown.senate.gov/newsroom/press/release/with-two-thirds-of-ohio-students-graduating-with-student-debt-brown-announces-bill-to-simplify-student-loan-repayment-process-save-graduates-money-and-bolster-federal-pell-grant-program> (Brown introduced this legislation to abate financial penalties for missed student loan payments and increase the federal Pell Grant program stating that “[s]tudents shouldn’t have to sign away their financial futures when they sign up for college . . .”).

242. Stop the Student Loan Interest Hike Act, S. 2343, 112th Cong. (2d Sess. 2012); see also Associated Press, *House Passes Student Loans, Highway Jobs Bill*, USA TODAY (June 29, 2012), <http://www.usatoday.com/news/washington/story/2012-06-29/highway-jobs-student-loans/55920654/1> (outlining the House’s decision to stay an interest rate increase in student loans scheduled to be reset).

243. See *Consumer Finance Protection Bureau Now Taking Private Student Loan Complaints*, CFPB (Mar. 5, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-now-taking-private-student-loan-complaints/> (noting the lack of regulation of private student lenders); see also Angela Peoples, *Your Thoughts on Private Student Loans*, CFPB (Feb. 9, 2012), <http://www.consumerfinance.gov/blog/your-thoughts-on-private-student-loans/> (revealing that the assessment of the private student loan market is still evolving); Libby A. Nelson, *An Earful on Private Loans*, INSIDER HIGHER EDUC. (June 14, 2012), <http://www.insidehighered.com/news/2012/06/14/consumer-financial-protection-bureau-publishes-2000-comments-private-student-loans> (indicating that the Consumer Financial Protection Bureau received over two thousand comments regarding borrower experience with private student loans complaining about a range of topics including high debt repayment and confusion between federal and private loans).

244. See *Deferment and Forbearance*, U.S. DEP’T OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/difficulty.jsp> (last visited Sept. 26, 2012) (noting that terms and reasons for deferment and forbearance differ and apply for defined periods of time as interest may continue to accrue during this time period); see also *Deferment/Forbearance*, U.S. DEP’T OF EDUC., http://www.nsls.ed.gov/nsls_SA/SaEcTour.do?page=SaEcMp1 (last visited Sept. 26, 2012) (informing borrowers that they must apply and obtain

Economic hardship deferments and excess debt burden forbearances are generally only available for three years over the life of the student loan.²⁴⁵ Repayment options are even more limited for private student loans.²⁴⁶ Underemployed graduates may find the inflexible ten year standard repayment schedule for federal student loans to be unreasonable.²⁴⁷ Accessible loan forgiveness and repayment programs are necessary in order to deflate the growing student loan bubble.

The College Cost Reduction and Access Act (CCRAA)²⁴⁸ instituted two programs including a loan forgiveness program, the Public Service Loan Forgiveness Program, and a repayment program, the Income-Based Repayment Program.²⁴⁹ Income-Based

approval for each deferral or forbearance); *Forbearance*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/repayment/postponing-repayment/forbearances/> (last visited Sept. 26, 2012) (indicating that private student loans may have fees associated with a forbearance); *but see* Tamar Lewin, *Online Campaign Prompts Sallie Mae to Change Fee Policy for Loan Suspensions*, N.Y. TIMES, Feb. 2, 2012, at A13 (outlining details of a Sallie Mae policy change to no longer require unemployed borrowers to pay a fifty dollar forbearance fee every three months as a “good faith deposit”).

245. *See Parent Loans*, FINAID, <http://www.finaid.org/loans/parentloan.phtml> (last visited Sept. 26, 2012) (indicating that certain excess debt forbearances and hardship deferments are limited to a three-year renewal period).

246. *See Solutions for Borrowers Who Are Having Trouble Repaying Educational Loans*, FINAID, <http://www.finaid.org/loans/troublerepayingdebt.phtml> (last visited Sept. 26, 2012) (warning borrowers that private student loans are more limited than federal student loans); *see also* Sonya Stinson, *Four Tips to Navigate Private Student Loans*, BANKRATE (May 19, 2011), <http://www.bankrate.com/finance/college-finance/4-tips-to-navigate-private-student-loans-2.aspx> (noting that there is no cap on the repayment amount for private student loans as there is for federal student loans).

247. *See Repayment Plans*, U.S. DEP’T OF EDUC., <http://www.direct.ed.gov/RepayCalc/dlindex2.html> (last updated Mar. 3, 2011) (describing the standard plan as a higher fixed monthly payment over a ten year period for the life of the student loan); *see also* Liz Weston, *Wipe Out Your Student Loan Debt*, MSN MONEY (Jan. 16, 2012), <http://money.msn.com/college-savings/wipe-out-your-student-loan-debt-weston.aspx?ucsort=1> (explaining that borrowers may extend the standard ten-year repayment plan to up to twenty or thirty years, but more interest will ultimately be paid over the course of time due to the extension).

248. College Cost Reduction and Access Act, Pub. L. No. 110-84, 110th Cong. 121 Stat. 784 (2007).

249. *See* EDFUND, OVERVIEW OF THE COLLEGE COST REDUCTION AND ACCESS ACT – PUBLIC LAW 110-84, 1, 2 (Feb. 13, 2011), *available at* http://www.edfund.org/pdfs/CCRAA_Overview.pdf (reviewing the CCRAA enacted improvements to federal student loan programs including an increase to the Pell Grant program and the temporary lowering of interest rates for subsidized Stafford Loans); *see also* *College Cost Reduction and Access Act*, CORP. FOR NAT’L & CMTY. SERV., http://www.nationalservice.gov/for_organizations/highered/ccraa.asp (last visited Sept. 26, 2012) (identifying two

Repayment (IBR) sets forth a more equitable approach to student loan monthly payments by allowing lower payments over a shorter period of time.²⁵⁰ The IBR program requires qualification for “partial financial hardship” status.²⁵¹

Income Contingent Repayment (ICR)²⁵² was a precursor to IBR that was available to borrowers in good standing prior to the passage of the CCRAA.²⁵³ The ICR program is only available for Direct Loans, as opposed to the IBR program that is available for both Direct Loans and Federal Family Education Loan (FFEL) loans.²⁵⁴ The ICR program also does not require a finding of partial financial hardship.²⁵⁵ However, Direct Loan repayment

CCRAA-created programs including the Public Service Loan Forgiveness Program and the Income-Based Repayment Program.

250. See *Income-Based Repayment Plan*, U.S. DEPT. OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRPlan.jsp> (last visited Sept. 26, 2012) (demonstrating that only federal student loans are eligible and borrowers must opt in to participate in the program through the U.S. Department of Education); see also *Proposed Pay-As-You-Earn Repayment Option*, U.S. DEPT. OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/PayAsYouEarn.jsp> (last visited Sept. 26, 2012) (noting that “the Obama Administration proposed a Pay-As-You-Earn plan that would cap certain student loan borrowers’ loan payments at 10% of their discretionary income. Under this proposal, borrowers paying under the Pay-As-You-Earn plan would also be eligible to have their remaining loan balance forgiven after making 20 years of payments.”); Press Release, Office of the Press Secretary, White House, Fact Sheet: “Help Americans Manage Student Loan Debt” (Oct. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt> (citing the American Opportunity Tax Credit for student loan debt and proposing the pay as you earn plan to expedite the income sensitive repayment plan to start in the year 2012); see generally D. Bruce Johnstone, *The Economics and Politics of Cost Sharing in Higher Education: Comparative Perspectives*, 23 ECON. OF EDUC. REV. 403 (2004) (highlighting the global movement toward a cost-sharing model toward student financing of higher education to include repayment considerations).

251. See Equal Justice Works, *Income-Based vs. Income-Contingent Loan Repayment*, U.S. NEWS AND WORLD REPORT (Mar. 23, 2011), <http://www.usnews.com/education/blogs/student-loan-ranger/2011/03/23/income-based-vs-income-contingent-loan-repayment> (noting that the IBR program requires annual eligibility; partial financial hardship is determined by a calculating the borrower’s adjusted gross income to the poverty line).

252. See generally BRUCE CHAPMAN, GOVERNMENT MANAGING RISK: INCOME CONTINGENT LOANS FOR SOCIAL AND ECONOMIC IMPACT xv (2006) (detailing the Higher Education Contribution Scheme (HECS) as “public sector financing” described as “a risk-sharing income contingent loan.”).

253. See *id.* (explaining that the ICR program was implemented in 1994 by the federal government, prior to passage of the CCRAA).

254. See *Frequently Asked Questions*, IBRINFO, <http://www.ibrinfo.org/faq.vp.html> (last visited Sept. 22, 2012) (clarifying the difference between ICR and IBR Programs).

255. See *id.* (discussing the benefits of the ICR Program as opposed to the IBR Program).

under the IBR program²⁵⁶ is generally more affordable than repayment under the ICR program.²⁵⁷ The Income Sensitive Repayment (ISR) Program provides an alternative to ICR for borrowers under the FFEL program.²⁵⁸

The IBR Program is only effective for federal Direct or FFEL loans that are not in default.²⁵⁹ In addition, parent PLUS Loans,²⁶⁰ a product that is part of the largest student loan program,²⁶¹ are ineligible for the IBR program, even if consolidated into another

256. See *Income-Based vs. Income-Contingent Loan Repayment*, *supra* note 251 (revealing that both FFEL and Direct Loan programs are eligible under the IBR Program).

257. See *Frequently Asked Questions*, *supra* note 254 (highlighting the financial advantages of the IBR Program versus the ICR Program).

258. See *Income Sensitive Repayment*, FINAID, <http://www.finaid.org/loans/isr.phtml> (last visited Sept. 23, 2012) (discussing the method for determining the monthly loan payment). In determining the payment:

The monthly loan payment is pegged to a fixed percentage of gross monthly income, between 4% and 25%. The percentage is determined by the borrower and the resulting monthly payment must be greater than or equal to the interest that accrues. Some lenders set a minimum threshold on the percentage of income based on your [borrower] debt-to-income ratio.

Id.

259. See Megan Slack, *Income Based Repayment: Everything You Need to Know*, WHITE HOUSE BLOG (June 7, 2012, 10:59 AM), <http://www.ed.gov/blog/2012/06/income-based-repayment-everything-you-need-to-know/> (stating that “[a]ll Stafford, Grad PLUS, and Consolidation Loans made under either the Direct Loan or Federal Family Education Loan programs are eligible to be included in the program. Non-federal loans, loans currently in default, and Parent PLUS Loans are not eligible for the income-based repayment plan.”).

260. See *Income Sensitive Repayment*, *supra* note 258 (discussing various aspects of the PLUS loan program); see also *Plus Loans*, U.S. DEP’T OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp> (last visited Sept. 23, 2012) (explaining that the eligibility requirements to receive a Direct PLUS Loan require parents to apply on behalf of a biological child, adoptive child, or stepchild in some cases); see generally *Parents*, U.S. DEP’T OF EDUC., <http://www.direct.ed.gov/parent.html> (last visited Sept. 23, 2012) (noting that “[p]arent PLUS loan borrowers cannot have an adverse credit history (a credit check will be done). In addition, “parents and their dependent child must be U.S. citizens or eligible noncitizens, must not be in default on any federal education loans or owe an overpayment on a federal education grant, and must meet other general eligibility requirements for the Federal Student Aid programs.” *Id.*

261. See *About Direct Loans*, U.S. DEP’T. OF EDUC., <http://www.direct.ed.gov/about.html> (last visited Sept. 23, 2012) (discussing that “[t]he FSA Programs are the largest source of college financial assistance, each year providing billions of dollars in funding. . . .”); but see Mark Kantrowitz, *Parent PLUS Loan Denial Rates in the FFEL and Direct Loan Programs*, STUDENT AID POLY ANALYSIS, 1 (Aug. 31, 2009), <http://www.finaid.org/educators/20090831parentplusdenial.pdf> (finding that “[i]n 2007-08, Parent PLUS loan denial rates were 42% in the FFEL program and 21% in the DL [Direct Loan] program.”).

type loan.²⁶² Parent PLUS Loans or consolidated loans that were used to pay off parent PLUS loans are also ineligible for the federal ICR Program.²⁶³ Grad PLUS loans²⁶⁴ and Parent PLUS Loans that are included as part of a Federal Direct Consolidation Loan may be eligible for the ICR Program.²⁶⁵ Parents are also susceptible to economic hardship due to student loans, and yet they are generally precluded from relief by federal repayment programs.²⁶⁶

262. Peter J. Reilly, *Is Income Based Repayment a Solution to Crushing Student Debt?*, FORBES (Oct. 11, 2011), <http://www.forbes.com/sites/peterjreilly/2011/10/11/is-income-based-repayment-a-solution-to-crushing-student-debt/>; see also *Income-Based Repayment*, FINAID, <http://www.finaid.org/loans/ibr.phtml> (last visited Sept. 24, 2012) (asserting that PLUS loans are ineligible for the IBR Program even if consolidated); Direct Loans, *Repayment Plan Selection*, FEDERAL STUDENT AID 2, loanconsolidation.ed.gov/forms/rps.pdf (last visited Sept. 24, 2012) (detailing that Direct PLUS Loans, Federal PLUS Loans, Direct PLUS Consolidation Loans, Federal Perkins Loans, HEAL Loans or other health education loans, private education loans are not eligible for the IBR plan); but see *Basic Federal Options*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/repayment/repayment-plans/> (last visited Sept. 24, 2012) (indicating that grad PLUS loans, or loans made under the PLUS program for graduate programs in which students repay themselves, are eligible under the IBR program).

263. See *Repayment Plans*, U.S. DEP'T. OF EDUC., <http://www.direct.ed.gov/RepayCalc/dlindex2.html> (last visited Sept. 24, 2012) (discussing Direct Loan obligations).

264. See *Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/publicservice.phtml> (last visited Oct. 11, 2010) (noting the limited grounds for Grad Plus loan forgiveness); see also *PLUS Loans*, U.S. DEP'T. OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/PlusLoansGradProfstudents.jsp> (last visited Sept. 24, 2012) (providing a brief overview of information regarding Direct PLUS Loans); see also Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007) (describing IBR and a loan forgiveness program for public service through the CCRAA).

265. See *Public Service Loan Forgiveness*, *supra* note 264 (discussing the limited grounds under which PLUS loans are eligible for forgiveness).

266. See Kim Clark, *Gov't Oks College Loans to Struggling Parents*, U.S. NEWS AND WORLD REPORT (Sept. 27, 2010), <http://www.usnews.com/education/best-colleges/paying-for-college/student-loan/articles/2010/09/27/government-oks-college-loans-to-struggling-parents> (discussing loans to parents). The article notes:

[S]tudents whose parents get rejected for PLUS loans can get up to \$5,000 in extra Stafford student loans. Many families prefer to take out larger student loans because parent PLUS loans charge a higher fixed annual percentage rate of up to 8.3 percent. Student Stafford loans charge a maximum of 6.9 percent (including fees), and offer many more affordable repayment and forgiveness options While taking on additional debt is a bad idea for anyone facing financial difficulties, federal parent loans are especially onerous. Parents who take out PLUS loans may not realize that most bankruptcy judges won't discharge

Inclusion of the excluded student loans in the IBR and ICR programs is a crucial revision that the federal government should consider to provide economic relief to the millions of student loan recipients. Private lenders, such as banks and other regulated financial institutions, should also be compelled to offer more equitable repayment plans to distressed borrowers.²⁶⁷ Exclusion of certain types of student loans from the IBR and ICR programs despite economic hardship may actually serve to expand the number of delinquent loans as borrowers may not consolidate these loans with other eligible loans if they want to be considered for the IBR or ICR programs.²⁶⁸ Rather, the IBR and ICR programs should be adequately restructured to encourage enrollment in a variety of repayment programs to avoid default and ensure broader reach to borrowers experiencing financial hardship.²⁶⁹

Repeal of the loan exclusion requirements of the IBR and ICR programs may sustain the federal student aid program amid increasing loan defaults while encouraging borrower fiscal responsibility by making graduated payments. Reasonable lender incentives should be awarded to financial institutions that assist borrowers in obtaining low-cost student loans with a full range of repayment options.²⁷⁰

PLUS loans. Federal parent loans can only be forgiven in extreme cases—such as death, permanent disability, or permanent financial collapse.

Id.

267. See *Frequently Asked Questions About Income-Based Repayment and Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/ibrfaq.phtml> (last visited Sept. 24, 2012) (noting the private student loans offered by banks and other lenders are governed by their own terms and do not include income-based repayment); see also *Impact of the Subprime Mortgage Credit Crisis*, *supra* note 96 (noting that “[c]olleges that disproportionately serve low income students, who tend to be subprime borrowers, will find that lenders are less willing to make loans to their students.”).

268. See generally Douglas Albrecht & Adrian Ziderman, *Student Loans: An Effective Instrument for Cost Recovery in Higher Education?*, 8 WORLD BANK RESEARCH OBSERVER 71 (stating that traditional student loan repayment options are generally ineffective in terms of cost recovery).

269. See generally *id.* (describing how student loan programs may be just as expensive as simply issuing grants while detailing student loan reform to include a graduate tax assessment for repayment depending in part on a pattern projected earnings); Thomas A. Flint, *Predicting Student Loan Defaults*, 68 J. OF HIGHER EDUC. 322 (1997) (finding that loan counseling does not reduce the likelihood of student loan default).

270. Competitive Loan Auction Pilot Program, H.R. 4137, 110th Cong. § 499(2)(c)(2) (2008); see generally Packer, *supra* note 39 (describing how subsidies to private lenders were reduced as a result of the CCRAA). The article suggests that “[t]he reduction in benefits to private student loan lenders may reduce the number of lenders and the amounts that existing

A recession-sensitive cap on interest rates during times of economic downturn for federal and private loans may also be considered to help manage debt.²⁷¹ Such actions may prompt potential students to consider a college education in fulfillment of the goal to have an educated and competitive American workforce to compete in a global economy.²⁷²

Prior to the income sensitive method of repayment, the available federal student loan repayment schemes basically fit into one-size-fits-all model.²⁷³ With a repayment schedule that reflects current economic conditions and recognizes individual financial circumstances,²⁷⁴ borrowers may be less likely to default on their

lenders are willing to extend to students. . . .” *Id.* at 236.

271. *But see Impact of the Subprime Mortgage Credit Crisis*, *supra* note 96 (observing the effects on the market:

Decreases in the profitability of federal and private education loans will likely lead to decreases in the availability of private student loans to subprime borrowers, increased minimum balance requirements for loan consolidation, cuts in loan discounts (especially on consolidation loans) and increases in interest rates and fees on private student loans as lenders adjust their products to compensate for the increased cost of capital. . . . The College Cost Reduction and Access Act of 2007 cut lender interest income, increased risk sharing and increased lender-paid origination fees on federal education loans. The combination of the credit crisis and the lender subsidy cuts lead to significant compression of lender spread, making federal and private education loans less profitable for lenders.)

272. *See* Packer, *supra* note 39, at 221 (noting that approximately 400,000 graduating high school students decide to postpone college enrollment due to cost); *see also Education*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education> (last visited Oct. 11, 2012) (discussing the Obama administration’s desire to increase college graduation rates in the United States: “President Obama is committed to ensuring that America will regain its lost ground and have the highest proportion of students graduating from college in the world by 2020.”).

273. *See* Press Release, White House Office of the Press Secretary, White House Fact Sheet: “Help Americans Manage Student Loan Debt” (Oct. 25, 2011), *available at* www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt (explaining that the current IBR program permits borrowers to cap monthly payments to fifteen percent of their discretionary income, and starting on July 1, 2014, the cap will be lowered to ten percent of borrower discretionary income:

For example: . . . A teacher who is earning \$30,000 a year and has \$25,000 in Federal student loans. Under the standard repayment plan, this borrower’s monthly repayment amount is \$287. The currently available IBR plan would reduce this borrower’s payment by \$116, to \$171. Under the improved “Pay As You Earn” plan, his monthly payment amount would be even more manageable at only \$114. And, if this borrower remained a teacher or was employed in another public service occupation, he would be eligible for forgiveness under the Public Service Loan Forgiveness Program after 10 years of payments.)

274. *See Education*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited Oct. 12, 2012) (citing the Obama Administration’s proposal: “Pay As You Earn’ will allow about 1.6 million

student loans,²⁷⁵ thereby not depleting the federal government of available financial resources to continue the administration the student aid program. Also, federal debt relief programs should be inclusive of other low-paying, but socially beneficial career paths that do not fit under the requirements of the Public Service Loan Forgiveness Program.²⁷⁶

The elimination or lowering of barriers to enrollment in the debt relief and management programs may also be considered to provide more effective relief to those who need it most.²⁷⁷ Debt management and forgiveness program enrollment that does not preclude borrowers with a history of default may serve to rehabilitate delinquent borrowers as part of a government-

borrowers the ability to cap their monthly payments at 10 percent of their discretionary income starting in 2012. The plan will also forgive the balance of borrowers' debt after 20 years of payments.”).

275. See generally Luigi Zingales, *The College Graduate as Collateral*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/2012/06/14/opinion/the-college-graduate-as-collateral.html> (citing a former Yale University income-based student loan repayment program implemented in 1972 that failed since the institutional plan was based on collective repayment resulting in a number of defaults).

276. See *Federal Student Aid, Loan Forgiveness for Public Service Employees*, U.S. DEP'T OF EDUC. (Feb. 2009), <http://www.studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (noting that the Public Service Loan Forgiveness Program was established under the College Cost Reduction and Access Act of 2007). Furthermore:

Qualifying employment is any employment with a federal, state, or local government agency, entity, or organization or a non-profit organization that has been designated as tax-exempt by the Internal Revenue Service (IRS) under Section 501(c)(3) of the Internal Revenue Code (IRC). . . . A private non-profit employer that is not a tax-exempt organization under Section 501(c)(3) of the IRC may be a qualifying public service organization if it provides certain specified public services. These services include emergency management, military service, public safety, or law enforcement services; public health services; public education or public library services; school library and other school-based services; public interest law services; early childhood education; public service for individuals with disabilities and the elderly.

Id.; see also *Public Service Loan Forgiveness*, *supra* note 264 (explaining the criteria of borrower eligibility to the program including 120 payments under the Direct Loan program and full-time employment in a public service job to receive a discharge benefit of any remaining debt after ten years of employment). Perkins Loans are issued as need-based financial aid, but are generally excluded from inclusion in the Public Service Loan Forgiveness Program; parent PLUS loans are minimally eligible for loan forgiveness under this program. *Id.*

277. See Deanne Loonin, *Too Small to Help: The Plight of Financially Distressed Private Student Loan Borrowers*, STUDENT LOAN BORROWER ASSISTANCE, 11-12 (Apr. 2009), <http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/TooSmalltoHelp.pdf> (explaining the benefits of flexibility in loan repayments for vulnerable borrowers).

mandated or federally regulated credit repair program. An opt-out instead of an opt-in student loan debt relief and management program may also be beneficial to improve borrower financial stability.²⁷⁸

Best practices to proactively deflate the expanding student loan bubble include enforcement of the existing regulatory laws regarding consumer credit and lending, enhancement of a code of conduct to eliminate redlining in the disbursement of student loans, collection and publication of demographic statistics of student loan borrowers to ensure regulatory compliance, and implementation of effective rules through the Consumer Financial Protection Bureau that adequately supervise the private student loan industry. The pursuit of additional relief through a student loan settlement fund²⁷⁹ and the inclusion of an enhanced financial literacy program during the entrance and exit interviews of college graduates with federal and private student loan debt may also be considered.²⁸⁰ The establishment of a fiduciary duty that protects students from over-reaching by financial aid officers and other university officials in applying for student aid may ultimately serve the best interest of students.²⁸¹

Monthly student loan payments may generally account for a large share of income for recent graduates.²⁸² The amount of

278. See generally Megan Slack, *Income Based Repayment: Everything You Need to Know*, WHITE HOUSE BLOG (June 7, 2012, 10:59 AM), <http://www.whitehouse.gov/blog/2012/06/07/income-based-repayment-everything-you-need-know> (describing how to opt in to the IBR program).

279. See generally Robert Tomsho, *Student-Loan Firms Settle with Cuomo*, WALL ST. J. (Sept. 10, 2008), <http://online.wsj.com/article/SB122097590568015129.html> (announcing a settlement reached with student loan lenders including Nelnet Inc., Campus Door Inc., GMAC Bank, NextStudent Inc., Xanthus Financial Services Inc., EduCap Inc., and Graduate Loan Associates LLC); Alfonso Serrano, *Student Loan Settlement Announced*, CBS (Feb. 11, 2009), http://www.cbsnews.com/2100-500690_162-2640251.html.

280. See Jon Marcus, *Lack of Safeguards Driving Student Debt*, HECHINGER REPORT (Oct. 22, 2012), http://hechingerreport.org/content/colleges-starting-to-teach-students-how-much-their-degree-might-cost_9999/; see also Ron Lieber, *Counseling on Student Loans Now May Ease Pain Later*, N.Y. TIMES (Sept. 5, 2008), <http://www.nytimes.com/2008/09/06/business/yourmoney/06money.html> (urging that students take the federally mandated loan counseling session seriously and that the curriculum should include more than the government requires).

281. See, e.g., *Special Report: Student Loan Scandal*, NEW AM. FOUND., http://education.newamerica.net/special_report_student_loan_scandal (last visited Nov. 27, 2012) (detailing wrongdoing by collegiate financial aid employees and a U.S. Department of Education official in accepting bribes and kickbacks from financial institutions to steer students to certain loan products).

282. See Vickie Elmer, *Dealing with Student Debt*, N.Y. TIMES, Apr. 26, 2012, at RE6 (addressing the difficulty people have obtaining and paying

student loan payments without consolidation may make it difficult to meet living expenses.²⁸³ Borrowers who demonstrate financial responsibility in making regular, on-time payments may be rewarded with student loan forgiveness in less amount of time than previous loan forgiveness programs.²⁸⁴ Similar programs could be implemented for the repayment of private student loans to reduce the burden of debt. Families in need that do not necessarily fall within a financial standard set by the government as required for an economic hardship deferment stand to benefit from such programs.²⁸⁵ A comparable and equitable statute of limitations should also be enacted to protect borrowers from student loan collections in perpetuity.²⁸⁶

Another approach to reduce the increasing number of student loan accounts that are delinquent or in default is to permit loan modifications and refinancing, especially of private student loans.²⁸⁷ The refinancing of private student loans into consolidated

mortgages when they are also paying back substantial student loans).

283. See Tracey King & Ellynn Bannon, *The Burden of Borrowing: A Report on the Rising Rates of Student Loan Debt*, STATE PIRGS' HIGHER EDUCATION PROJECT 3 (Mar. 2002), available at http://www.pirg.org/highered/atwhatcost4_16_02.pdf (noting the difficulty students have to pay debts and living expenses, stating that “[b]ased on this figure, an estimated 39% of all student borrowers graduate with unmanageable student loan debt; meaning, these students pay more than 8% of their monthly income on student loan payments.”).

284. See *Ensuring that Student Loans Are Affordable*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education/ensuring-that-student-loans-are-affordable> (last visited Oct. 12, 2012) (describing how a borrower’s remainder of student loan debt may now be forgiven after twenty years of payments, or after ten years for those in public service, down from twenty-five years due to the Health Care and Education Reconciliation Act); See Huma Kahn, *Obama Speed Up Aid for College Students: How Will It Help You?*, ABCNEWS.COM (Oct. 26, 2011), <http://abcnews.go.com/blogs/politics/2011/10/obama-speeds-up-aid-for-college-students-how-will-it-help-you/> (describing the proposed repayment systems).

285. See generally 34 C.F.R. §§ 682.210(s)(6), 674.34(e).

286. See Higher Education Resources and Student Assistance Act § 484A(a), 20 U.S.C.A. § 1091a(2) (West 2012) (imposing no statute of limitations for the collection of federal student loan debt); see also Deanne Loonin, *No Way Out: Student Loans, Financial Distress, and the Need for Policy Reform*, NAT’L CONSUMER LAW CTR. 4 (June 2006), <http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/nowayout.pdf> (noting that the statute of limitations for student loan collections was repealed in 1991); see, e.g., *N.Y. State Higher Educ. Servs. Corp. v. Fabrizio*, 900 N.Y.2d 159, 161 (N.Y. 2010) (holding there is no statute of limitations for student loans).

287. See *Student Loan Crisis Calls for Mortgage-Style Flexibility*, NEWS TRIB. (Mar. 25, 2012), <http://www.thenewstribune.com/2012/03/25/2081364/student-loan-crisis-calls-for.html> (comparing the benefits of flexibility in struggling mortgages and struggling student-debts).

federal student loans may provide room for improvement of financial circumstances to allow the debtor to maintain good standing with creditors.²⁸⁸

Creditors should recognize that debtors may encounter intervening life circumstances that may preclude even the most creditworthy borrowers to fall short of repayment expectations. A fair and equitable cost-benefit analysis could offer credit counseling and repair as part of the student loan repayment process instead of the typical exit interview that briefly warns graduating students of their looming student loan debt. The concentration of initiatives in financial literacy at Historically Black Colleges and Universities is federally mandated as a charge of the federal Financial Literacy and Education Commission established under the Financial Literacy and Education Improvement Act.²⁸⁹

A more proactive approach would be to promote a system where borrowers may willingly come forward to circumvent financial trouble exacerbated by layers of student loans prior to default in exchange for redemption from the invasive debt collection process used to intimidate borrowers into repayment. Accordingly, by establishing a sustainable student loan amnesty program, borrowers may be less likely to default on their student loans.²⁹⁰ By simplifying the student loan repayment schedules,

288. See generally *Private Student Loan Consolidation*, FINAID, <http://www.finaid.org/loans/privateconsolidation.phtml> (last visited Nov. 27, 2012) (stating the general rule that private student loans cannot be consolidated with federal student loans while noting that the interest rates on consolidated private student loans are set by the lender as opposed to the government).

289. See Financial Literacy and Education Improvement Act, 20 U.S.C. § 9709(a) (West 2012) (citing the language of the act:

The Secretary of the Treasury . . . in coordination with the Secretary of Education, the Secretary of Agriculture (with respect to land grant colleges and universities), and any other appropriate agency that is a member of the Financial Literacy and Education Commission established under the Financial Literacy and Education Improvement Act (20 U.S.C. 9701 et seq.), shall seek to enhance financial literacy among students at covered educational institutions [including historically black colleges and universities] through: (1) the development of initiatives, programs, and curricula that improve student awareness of the short- and long-term costs associated with education loans and other debt assumed while in college, their repayment obligations, and their rights as borrowers; and (2) assisting such students in navigating the financial aid process.).

290. See generally Charles J. Reid, Jr., *A Year of Jubilee for Student-Loan Debt*, HUFFINGTON POST BLOG (June 28, 2012, 5:36 PM), http://www.huffingtonpost.com/charles-j-reid-jr/a-year-of-jubilee-for-student-loan-debt_b_1632294.html; Alison Griswold, *Student Loan Forgiveness Programs Short on Funds*, FORBES (July 16, 2012), <http://www.forbes.com/sites/alisongriswold/2012/07/16/student-loan->

and providing debt counseling services during and after college enrollment, lenders may help to establish favorable borrower and lender relations for the life of the loans.²⁹¹

The almost complete prohibition on the discharge of student loans in bankruptcy proceedings does little to reduce the number of delinquent student loan accounts.²⁹² An expansion of student loan forgiveness program for borrowers that enter underserved fields may also lighten the load of student loan debt. Further streamlining of the application process for the FAFSA, along with expedited deferment, forbearance, and loan forgiveness periods may provide the necessary relief.

Flexible student loan repayment options may be more favorable than a rigid approach and may even promote borrower savings and investment to enhance the likelihood of repayment.²⁹³ The offering of various loan products may provide a practical way for lenders to utilize sound underwriting practices while taking into account individual circumstances that may optimize the likelihood of repayment. Private student loans issued by not-for-

forgiveness-programs-short-on-funds/.

291. See *Repay Your Loans*, U.S. DEPT OF EDUC., <http://studentaid.ed.gov/repay-loans> (last visited Nov. 27, 2012) (“Understanding the repayment process for your federal student loans can go a long way toward building a solid financial foundation.”).

292. See generally 11 U.S.C. § 523(a)(8) (barring the discharge of student loans without a finding of undue hardship); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (describing the test used by courts to determine undue hardship to discharge student loans in bankruptcy); John O’Connor, *How Can I Tell If My Student Loan Debt Is Dischargeable in Bankruptcy?*, NAT’L BANKRUPTCY FORUM, <http://www.nationalbankruptcyforum.com/bankruptcy-myths/how-can-i-tell-if-my-student-loan-debt-is-dischargeable-in-bankruptcy/> (last visited Nov. 27, 2012) (explaining that the *Brunner* test for undue hardship is a high standard to overcome).

293. See *Extended Repayment Plan: Benefits and Costs for the Borrower*, ACCESS GROUP INC. 3 (2008), http://www.casfaa.org/assets/documents/ExtendedRepaymentPlan_BenefitsAndCostsForTheBorrower.pdf (noting the benefits of flexible repayment plans:

Borrowers may benefit financially from extending repayment even in cases when they feel they can afford the monthly payment required under the Standard 10-year fixed payment plan if they invest the added cash flow from a reduced monthly loan payment. This investment might be the purchase of a home or investing in a tax-deferred retirement account. With the purchase of a home (assuming the borrower could not otherwise afford this purchase without the added cash flow created by extending repayment), the borrower likely could reduce his or her federal income tax liability because the mortgage interest could be itemized as a tax deduction. The home also represents an asset that hopefully would gain in value over time. In the case of investing for retirement, the borrower would be better off financially as long as the rate of return on the retirement account was greater than the interest rate of the loans being repaid more slowly using extended repayment.).

profit credit unions with no origination fees, interest rate reduction, cosigner release, a return policy, and even using academic grades in the underwriting process are examples of workable programs in narrowing the wealth gap to finance higher education.²⁹⁴

XIII. CONCLUSION

Enhanced credit counseling and compulsory disclosures may make for a more informed student loan borrower, but financial illiteracy may impede the effect of such measures. Responsible lending, including school certification of private student loans, may reduce the number of at-risk students who engage in risky student loan transactions.

The lasting effect of entering into an unfavorable student loan may affect generations, as parents may still be making payments on their own student loans while trying to save for the college funds of their children. The general lack of safe and moderate terms in student loan agreements may preclude borrowers from pursuing home ownership and employment opportunities. Susceptible students may enter into promissory notes for student loans without realizing that these promises are not made to be broken.

With minimal financial oversight, lenders have little incentive to self-regulate their products to create more equitable student loan products.²⁹⁵ The incentive to offer manageable student loans may come in the form of regulatory compliance. Responsible lending coupled with equal access to the financial sector for vulnerable communities may serve in narrowing the widening race wealth gap. Modernization of the student loan industry holds the promise of increasing college accessibility while decreasing the administrative cost of higher education.²⁹⁶ Such

294. See generally *Giving Students the Credit They Deserve*, WRIGHT-PATT CREDIT UNION, INC. (June 2010), http://www.wpcu.coop/Files/pdf/brochures/getaloan/student_loans.pdf (describing a private credit union's student loan options); see also Sonya Stinson, *4 Tips to Navigate Private Student Loans*, BANKRATE (May 19, 2011), <http://www.bankrate.com/finance/college-finance/4-tips-to-navigate-private-student-loans-1.aspx> (identifying options for private loan repayments:

For borrowers who sign up to have their principal and interest repayments deducted from their bank accounts automatically, many banks will lower the interest rate by a nominal amount such as 0.25 percent. . . . Many banks offer to release co-signers from their obligation once the borrower has made a certain number of consecutive monthly, on-time payments.).

295. See *Student Loan Practices Code of Conduct*, FLA. INT'L UNIV., <http://finaid.fiu.edu/index.php?id=1344> (last visited Oct. 12, 2012) (providing university regulations regarding lending to its students).

296. See *Obama Administration Announces Streamlined College Aid*

savings may in fact save the student loan industry from collapse while containing the student loan bubble. More proactive measures must be taken to avoid such occurrence. This Article identifies the main issues with financial aid to propose ways to position future generations with less student loan debt, thereby making the case for reform without the need for rebellion.

Application, U.S. DEPT OF EDUC. (June 24, 2009), <http://www2.ed.gov/finaid/info/apply/simplification.html> (outlining the Obama-Biden Agenda for College Affordability to include setting higher goals for college enrollment, increasing Pell Grants under the Recovery Act and increasing college tax credits pursuant to the American Opportunity Tax Credit, building upon the Perkins Loans Program with increased funding and the maintenance of a low interest rate, establishing a \$2.5 Billion fund for college access and completion, and investigating ways to improve 529 college savings plans pursuant to the presidential Middle Class Task Force in conjunction with the Department of the Treasury).

