Law School, Debt, and Discrimination

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I. Introduction

Law school is more than a professional training ground.[1] Our graduates play a special and privileged role in the nation's politics and culture. They know—or should know—the language of the law, the vehicle broadly capable of moving society from where it is to where it aspires to be, and ideally aimed at achieving justice in the case of individuals wronged by the state, a neighbor, or simple bad luck. This special role for lawyers adds significance to questions of who goes to law school and what law students do after they graduate. Law graduates' career decisions have practical effects on access to justice; for example, new lawyers may choose to serve, or not to serve, poor, historically subordinated communities.

Decisions about careers also link access to justice to student financing of law school. The more law students must borrow to pay for their education, the more pressure they are under to pursue higher-paying jobs to manage repayment. While empirical evidence of the impact of indebtedness on decision-making is scarce, the data we do have suggests that more borrowing for law school correlates with a lower likelihood of seeking a career devoted to the public interest.[2] The correlation makes sense, because public interest

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1. *See, e.g.*, Susan Sturm, *Reaction: Law Schools, Leadership, and Change*, 127 Harv. L. Rev. F. 49 (2013) (describing the special role that law schools, through the lawyers they train, play in society); Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (observing that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders").

2. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 Am. Econ. J.: Applied Econ. 1, 15 (2009) (finding that law students are more likely to pursue public interest jobs after receiving grant aid than after receiving an economically equivalent combination of debt and loan forgiveness).

careers tend to pay less.[3] The more students must pay for law school, the more likely it is that they will seek more lucrative careers.

Lenders have incentives, too. All else equal, a loan to a law student on track to land a well-paid job at an elite law firm is a lower risk than one to a student who finds work elsewhere. If possible, rational lenders would charge different interest rates to borrowers depending on how risky they are—or at least how risky they appear. Varying terms of credit would reinforce incentives facing student borrowers, encouraging those with greater debt to pursue better-compensated jobs. Preventing such added pressure is one reason that federal loan programs charge students a fixed rate regardless of borrower characteristics.[4] In contrast, consumer lenders historically have more closely tied the cost of funds to the riskiness of borrowers. They have also engaged in prohibited discrimination, systematically charging higher rates to borrowers who are African American, for example.[5] Greater involvement of commercial lenders in higher education finance thus raises the risk that student borrowers will face traditional forms of discrimination, as well as more sophisticated forms using borrower characteristics that correlate with attributes rendered off-limits by law.

Two potential policy shifts in higher education finance, both of which may make law school more costly for students and more profitable for lenders, make the issue of lender discrimination more pressing. First, opponents of federal subsidization of access to higher education have laid the rhetorical foundation for arguments that the government's role should be limited, reduced, or eliminated.[6] For example, Congress could impose a limit on the total amount that students may borrow from the federal government, forcing students to rely on consumer loans for additional amounts. Congress could mandate a return to the guaranteed loan program that existed before the financial crisis that began in 2008, in which the government both paid commercial lenders to extend loans to students and at the same time guaranteed those loans, protecting lenders in the event of student default. And Congress could end federal lending programs entirely, although the political costs of such a move would likely be catastrophically high. The common effect of these policy moves is to push borrowers to commercial lenders, who generally offer less

3. Field, *supra* note 2, at 2 (noting increasing divergence between public service and private-sector wages to lawyers).

4. Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 Cal. L. Rev. 1561, 1564 (2015) (setting terms of eligibility for student loans by statute).

5. *See, e.g.*, Press Release 12-8869, Dept. Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief [https://perma.cc/C4LP-QSAP].

6. *See, e.g.*, Michael Stratford, *With GOP in Control, Private Sector Pushes for Increased Role in Student Loans*, PoliticoPro (Dec. 9, 2016) (quoting bank trade group representative expressing desire for greater private sector financial institution involvement in federal student lending)

favorable terms than federal programs, and who charge interest at variable rates.[7]

Second, as of this writing the Trump administration has proposed ending the Public Service Loan Forgiveness program ("PSLF"), which, as its name suggests, allows for forgiveness of student loan debts owed by graduates who pursue careers in the public interest.[8] The Trump administration criticized this benefit because it "unfairly" favored some career choices over others.[9] If PSLF is eliminated, some number of students will make different career choices in anticipation of a heavier repayment burden.[10] More borrowing increases the riskiness of investing in higher education of any sort, including law school.[11] Students who are more risk averse, who may be disproportionately students whose life experiences have already shown them the burdens of financial insecurity, will respond to this risk shift.[12] Because more students than ever must borrow to pay for law school, [13] the impact could be significant.[14]

7. Jonathan D. Glater, *Guide to Student Loans*, N.Y. Times (Nov. 30, 2007), https://archive.nytimes.com/www.nytimes.com/ref/timestopics/topics_studentloans.html [https://perma.cc/LWX7-GV9F]. Another possible outcome is greater use of so-called "income share agreements" ("ISAs"), under which investors provide money to a student to help cover the cost of higher education in exchange for a share of the student's income for a period of years. These relatively novel contracts have not been the subject of extensive litigation or legislation, so it is not clear whether they would be treated as loans. Dowse B. (Brad) Rustin IV, Neil E. Grayson, and Kiersty M. DeGroote, Am. Enterprise Inst. Ctr on Higher Educ. Reform, Pricing Without Discrimination: Alternative Student Loan Pricing, Income-Share Agreements, and the Equal Credit Opportunity Act 12 (Feb. 2017), https://www.aei.org/wp-content/uploads/2017/02/Pricing-Without-Discrimination.pdf (hereinafter "Pricing without Discrimination"). This essay will not address the specific issues presented by ISAs.

8. 34 C.F.R. § 685.219 (2018).

9. Jonathan D. Glater, *Public Service Loan Forgiveness in the Administration's Crosshairs*, Educ. Law Prof Blog (May 24, 2017), http://lawprofessors.typepad.com/education_law/2017/05/public-service-loan-forgiveness-in-the-administrations-crosshairs-by-jonathan-d-glater.html [https://perma.cc/67CE-U3G9].

10. Students may already have been deterred given the widely reported difficulty borrowers have experienced when trying to take advantage of loan forgiveness after working in jobs they believed qualified for the benefit. Ron Lieber, *The Public Service Loan Forgiveness Rescue Hasn't Gone Well So Far*, N.Y. Times (Oct. 17, 2018), https://www.nytimes.com/2018/10/17/your-money/public-service-loan-forgiveness.html.

11. Glater, *Student Debt and Higher Education Risk, supra* note 4, at 1581 (noting that leverage in the context of higher education finance worsens the borrower's downside risk).

12. *Id.*

13. The share of law students who anticipate borrowing to pay for their legal education has increased, and a larger share of the students who expect to borrow, also expect to borrow larger amounts. Law School Survey of Student Engagement, How a Decade of Debt Changed the Law Student Experience: 2015 Annual Survey Results 10, http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-Annual-Report-2015-Update-FINAL-revised-web.pdf.

14. Both in absolute and relative terms. Elsewhere I have noted the risk that reducing public support of student decisions to work in the public interest will disproportionately deter

This essay focuses on the first policy move, which would push more law students to borrow from banks or other consumer lenders and accordingly pay interest rates that vary over time and, potentially, with borrower characteristics. Part II provides an analysis of the effects of variable pricing of student loans, especially for law students, and identifies the undesirable consequences; this part extends the analysis of a longer, prior paper critical of so-called "risk-based" pricing of student loans. Part III presents and attempts to answer the question of what current laws may limit lenders' pricing[15] of education loans in particular and then steps back to examine how those laws might also limit setting terms of other kinds of credit based on criteria related to education, such as choice of major or institution attended. The concern animating this discussion is that lender practices may have a disparate and negative effect on borrowers who are members of groups historically excluded from higher education opportunity. The analysis in Part III covers not only laws that may be applicable but the contributions of critical race theorists to understanding of the effects of judicial interpretation of those laws. Part IV examines potential implications for law schools and their students of wider use of nontraditional criteria in credit decisions. Part V concludes.

II. Changing rates, changing fates

Varying the price of credit for borrowers serves multiple purposes. First, the practice enables the lender to protect its interests more effectively, because variable pricing can compensate the lender for making a loan to a higher-risk borrower. Second, variable rates can encourage potential borrowers who are attentive to interest rates to change their behavior to improve their risk profile and reap the resulting benefit of the lower cost of credit. However, in the context of higher education in general and law school in particular, lending governed by market principles will likely have a number of undesirable effects. This part briefly identifies these effects, then turns to the implications for access to justice, and finally examines potential consequences for law schools.

A. The Risks of Variable Pricing of Student Loans

Adjusting the price of credit based on borrower characteristics is a common practice in consumer lending. This section shows why education is different and argues that adjusting the cost of credit based on perceived risk posed by the student borrower is unjustified, ineffective, unfair, and inconsistent with legislative ideals that drove the federal intervention in higher education finance.[16]

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poorer students from those careers, thus potentially changing the composition of the public interest workforce, but more importantly limiting the field of possibilities for students based on their financial resources. Those who must borrow more will have fewer choices than those who borrow less.

15. To be clear, the "pricing" of student loans here is the interest rate charged to the borrower.

16. A broader argument, that those pursuing higher education should not be burdened by debt as they start their working lives, is also possible. That subject has been addressed in a prior

This section first describes the typical justifications for tying price to characteristics or conduct and demonstrates why in the context of higher education finance those rationales are dubious. The second subsection questions whether students faced with different costs of credit would modify their behavior in response—whether, in other words, variable pricing of student loans could successfully achieve a policy goal. The third traces the undesirable effects of variable pricing of student loans, whether students modify their behavior or not. The fourth identifies the bad incentives that variable pricing of student loans creates, and the last subsection contends that adopting variable pricing would be inconsistent with the goals underlying federal legislation that established federal student aid programs.

1. Typical rationales for pricing credit based on risk do not apply.

To the extent that charging different interest rates to different kinds of borrowers represents a deliberate policy choice, the proper place to begin analysis is by asking what the goals are. In the context of consumer lending generally, higher interest rates compensate the lender for the greater level of risk that a particular borrower may pose. If the borrower is more likely to default because of either the characteristics of the borrower or characteristics of the use to which the loan will be put, the lender demands a larger premium. For example, a borrower who has previously defaulted on obligations may appear more risky to a new lender, as might a borrower who plans to put the loan proceeds to work in starting a dubious business like landline telephony. Were the lender unable to charge a higher rate to the riskier borrower, the lender might well decline to extend credit at all.

This variable, or "risk-based," pricing may consist of calculating a borrower's cost of credit as a premium above some benchmark rate. Setting interest rates in this way creates incentives for borrowers whose choices, rather than personal histories, can be changed. A lender may effectively steer a borrower toward a business venture that the lender believes to be less rather than more risky. Granting lenders this power to discriminate can be justified by faith in the wisdom of the lender and in the ability of credit markets more generally to evaluate projects. If the lender's estimate of the net benefit to the lender of funding each of two possible projects is correct, then there are advantages to permitting lenders to charge borrowers more if they pursue one project than if they pursue another. If the lender is wrong—which could result either from wrongly estimating the profitability of the loan to the lender or, from the societal perspective, from excluding from its calculation the social benefits of the project—then the mispriced credit means that a socially desirable project may not proceed.

article and will not be pursued here. Glater, *Student Debt and Higher Education Risk, supra* note 4, at 1584 (contrasting risk of leverage taken on to pursue higher education and debt for other purposes).

Using price differentials to affect behavior is not uncommon. Health insurers, for example, may charge higher premiums to people who smoke. The higher payment both compensates the insurer for the greater risk of costly health care for the smoker and encourages smokers to quit. The premium either leads to a desirable change or penalizes the person who resists making the change. Charging different prices for different consumers thus serves two purposes at once: compensating lenders for greater risk and disincentivizing socially costly or undesirable conduct. Whether it achieves these two goals, by ensuring appropriate but not excessive or inadequate compensation to the lender for risk and by effectively changing consumer behavior, is a different question.

In the context of higher education finance, the premium for risk rationale does not apply particularly well. Once upon a time, lenders had good reason to charge higher interest rates to student borrowers who were more likely to default, because those borrowers offered no collateral and lenders had no insurance regime. But today the federal government provides the most common type of student loan, which is guaranteed, ultimately by taxpayers. All student lenders, including those making "private" student loans that may carry variable rates, also enjoy the benefit of exceptional protection against nonpayment under the federal Bankruptcy Code.[17] Correspondingly, it is less clear that risk to the lender justifies varying interest rates based on student choices or characteristics.

The argument otherwise percolating in policymaking circles does not rest on lender protection but on borrower incentives.[18] If borrowers face different costs of credit depending on their education choices, they can be guided to those that are socially optimal. A higher interest rate might discourage borrowers from attending a school with a poor graduation rate or high student loan default rate. Higher rates could also deter borrowers from choosing majors in subjects associated with higher default rates or lower wages. Conversely, students attending an institution with a high graduation rate and low default rate might obtain credit at a lower cost. Again, if the lender skillfully sets interest rates in accord with the relative usefulness of student choices, then variable interest rates should produce more frequent selection of desirable options.

However, in the context of education, good reasons exist to worry about adoption of market-based assessment of student choices, as I have detailed

17. 11 U.S.C. § 523(a)(8) (2019) (permitting discharge of student loans in bankruptcy proceedings only upon showing by the borrower of "undue hardship"). Scholarship on the impact of this exceptional treatment of student debt has found that the law is inconsistently applied, though it is widely perceived as making discharge extremely difficult. Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bkrtcy. L. J. 179, 183-84 (2009).

18. *See, e.g.*, Michael Simkovic, *Risk-Based Student Loans*, 70 Wash. & Lee L. Rev. 527 (2013) (arguing for varying interest rates based on, for example, college students' choice of major).

elsewhere.[19] The focus on financial outcomes excludes consideration of other aspects of education, including the potential public benefit of pursuing careers such as teaching, which are less well-paid but nevertheless highly valued, and the intangible value to the student of pursuing one's passion. More concretely, overall assessments of the economic viability of student choices may miss the economic viability of any particular student's choices. Perhaps we do not need large numbers of students to devote themselves to study of epic poetry, but we also should not want to discourage the one student who might go on to write a Pulitzer-winning epic. Factors other than choice of major or choice of educational institution play a role in determining whether any student will be successful by any metric, financial or otherwise.

To vary interest rates based on additional characteristics might get us closer to properly aligning students with institution and course of study, but it might open the door to discriminatory pricing of credit in education and would position lenders to make judgments well outside their experience or expertise. For example, we certainly want vigorous enforcement of prohibitions against varying credit terms on the basis of race and sex, even if data suggests that financial success in a particular field correlates with such identity-based characteristics. Consider further that even if unlawful consideration of race or gender does not infect the extension of credit, a lender might still need to wade into assessing the quality of the writing of that student studying classical epic poetry to make an educated guess about how successful that student would be. The difficulty of the latter task might well increase the likelihood of resort to insidious proxies for prohibited characteristics, like race or sex.

The legislative bulwark against discrimination is the subject of Part III. This part next turns to a more pragmatic question: Does variable pricing of student loans work?

2. Variable pricing of student loans is unlikely to change borrower behavior.

Students may pay little attention to interest rates, in part because they are unaccustomed to having options and evaluating the terms of credit, in part because they may believe that whatever loans cost, higher education is worth the burden, and in part because they simply tend not to pay attention to such complex financial commitments. This should not surprise: If students were entirely swayed by monetary signals of social value, they would respond to the wages associated with particular careers and pursue educational pathways that lead to the jobs that pay the most. Some do and many do not. Studies of the effects of terms of credit on borrower behavior are not conclusive, and probably for good reasons. Not every borrower is equally able to evaluate such terms. This and other potential barriers to efficacy of interest rates as

19. *See generally* Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 Wash. & Lee L. Rev. 2137 (2013) (arguing against pricing of student loans based on borrower choices or characteristics).

an incentive were explored in more detail in a prior project, but in the years since the publication of that article, compelling empirical research that took advantage of a natural experiment has offered additional evidence.

Xiaoling Ang and Alexei Alexandrov used a policy change, the reduction in price of one type of federal student loan at a subset of educational institutions, to study whether borrowers responded by replacing other education loans with the newly cheaper loan.[20] Their research found that borrowers did not do the rational thing and substitute the less expensive loans for more expensive ones.[21] At one level, the authors note, this is not surprising, because a change of sixty basis points—0.6%—is modest, and they suggest that perhaps a larger change in interest rates would have had an effect.[22] This speculation suggests a risk that sending a signal through interest rates poses: Too great a difference may discourage pursuit of higher education entirely for those confronting the higher rate. The authors conclude that while other forms of intervention in education finance, like providing students with more information, may be effective, "policies based on free-market theories and consumer choice should be evaluated very carefully in this particular market."[23]

Though using interest rates to drive student borrowers' choices may fail to have the intended effect, it is likely to have consequences. Students who are undeterred by the higher costs of credit associated with a particular choice of major, for example, will *ipso facto* carry a higher debt burden and, presuming the student's choice also correlates with likelihood of lower earnings, may well be more likely to run into repayment difficulty than under the current regime. In other words, a mechanism intended to reduce default rates by steering students toward greater financial security may have the perverse result of driving default rates up as borrowers ignore the message that higher rates send. Predictions of a higher probability of default associated with particular courses of study would become self-fulfilling.[24] Worse still, although changing the cost of credit may not affect student behavior overall, it is quite plausible that some students are more responsive to such signals while others are less so. Raising interest rates may discourage students who belong to particular, historically excluded groups that are more averse to debt, from pursuing certain courses of study.[25] To the extent that federal student loans are intended to make higher education

20. Xiaoling Ang & Alexei Alexandrov, *Choice Architecture Versus Price: Comparing the Effects of Changes in the U.S. Student Loan Market*, 14 J. Empirical Legal Stud. 762, 763-64 (2017); *see also* Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 Harv. L. & Pol'y Rev. 175, 178 (2011) (finding, among other things, that the price elasticity of demand for student loans was "not significantly different from zero").

21. Ang & Alexandrov, *supra* note 20, at 766.

22. *Id.*

23. *Id.* at 768.

24. Glater, *Unsupportable Cost*, *supra* note 19, at 2147.

25. Glater, *Student Debt and Higher Education Risk, supra* note 4, at 1590.

more—and equally—accessible to all kinds of students, variable pricing might well be counterproductive.

If the signaling effect of a higher or lower interest rate were to succeed, that result would be disturbing even if the impact did not vary across the student population: Only students who needed to borrow would be subject to having their studies, careers, and lives shaped by the policy. Those students with greater financial resources could continue to study whatever they wanted, seek whatever jobs they wanted, and live free of the obligation to repay student debt. Students of color disproportionately have fewer financial resources and borrow more, so they would correspondingly be disproportionately affected. Overall, because varying of interest rates by choice of major, for example, would be only selectively paternalistic, the policy would be regressive, reinforcing the preexisting distribution of wealth.[26] The next subsection develops this criticism more fully.

Even this built-in inequity might not be dispositive were the ability to direct students to the most socially desirable careers perfect. But there is no reason to believe that whatever entity sets interest rates for loans to students pursuing different courses of study or different careers would get it right. Predicting the jobs of tomorrow is objectively, positively difficult in our ever more quickly evolving economy; deciding which of those future jobs, many of which may not exist, are most valuable is objectively, normatively difficult in our ever more fractious political and cultural climate. Relative to the value of students' ability to choose their own paths to self-fulfillment, one component of which may well be contributing to their community, the effort to steer young people's choices is especially misguided, as well as subject to manipulation to serve other purposes—a point to which the essay returns in Part III.

3. Variable pricing of student loans is regressive.

Only students who depend on credit to pay for higher education are subject to any incentive created by terms on which that credit is extended. Accordingly, the attempt to steer student choices through interest rates must have a regressive effect. This is inherent in the policy tool in use, yet it is too often ignored, perhaps because the point is so glaringly obvious. But if variable pricing of student loans truly aims to direct students into more desirable courses of study and ultimately professional development, it is quite underinclusive: Students who do not borrow will be immune to the incentive effect. From the perspective of efficacy alone, this is no small defect, because even though student indebtedness quite rightly dominates national debate over accessibility of higher education, most college students still do not use federal loans to help pay the cost.[27]

26. Glater, *Unsupportable Cost*, *supra* note 19, at 2156.

27. College Board, Trends in Student Aid 2017, at 17 (2017) (fig. 9), https://trends.collegeboard.org/sites/default/files/2017-trends-student-aid_0.pdf. According to the College Board, in 2016-2017, thirty percent of undergraduate students took out federal Stafford loans or used parental PLUS loans to help pay for college. *Id.* Of course, these

But efficacy is, or should be, the lesser concern. Equity is the greater one. In a higher education finance regime that discourages student choice by raising the cost of debt for those of lesser means, students who are better off financially will enjoy opportunities unavailable to their classmates. This would constitute hostile paternalism, marking students who are already socioeconomically disadvantaged as less worthy of freedom of choice. And if poorer students ignore the incentives and pursue their desired courses of study and employment despite the higher cost of borrowing, they will be penalized by higher monthly payments after they graduate or drop out. Indeed, poorer student borrowers may be more likely to drop out and more likely to default on their repayment obligations as a result of the larger debt burdens that they will have. To the extent that predictions about future earning power prove correct, students who defy the interest rate incentive and end up in lower-paying jobs will be that much more heavily burdened. Variable pricing of student loans thus perpetuates and perhaps exacerbates[28] preexisting inequality across the population of potential college students.

Over time, if variable pricing of students loans were to have the intended effect,[29] students who depend on credit to pay for higher education would end up studying whatever the interest rates encouraged them to study and pursuing related careers. Students who do not need to borrow, or at least do not need to borrow using federal aid programs, would pursue whatever courses of study they liked and would begin their careers unburdened by debt, let alone by repayment obligations made higher because of the choices they made. Students who do need to borrow would be directed into those jobs deemed important by whatever entity or mechanism determined interest rates. This tracking phenomenon would ensure greater autonomy for students with greater wealth or family income and less for those with less. Even if poorer students enjoy higher earnings as a result of responding to an interest rate nudge, they may be discouraged from and punished for pursuing careers they actually wish to enter. Variable pricing thus perpetuates wider inequality, a problem that higher education alone cannot fix but one that policy should not exacerbate. This runs very precisely counter to the vision of higher education as a socioeconomic equalizer empowering students to make independent

figures can vary from year to year.

28. This is so because students who borrow are less likely to complete a given course of study. Dai Li, *Degree Attainment of Undergraduate Student Borrowers in Four-Year Institutions: A Multilevel Analysis*, 37 J. Student Fin. Aid 5, 11 (2008), https://publications.nasfaa.org/cgi/viewcontent.cgi?article=1045&context=jsfa. And upon dropping out, indebted students may be materially worse off than they were when they started their higher education because they may fail to obtain higher-paying employment associated with graduation and because they have the obligation to repay their student loans.

29. Which, to be clear, is not likely. If higher wages do not drive student decision-making, it is hard to see how interest rate changes would. *See supra* Part II.A.2.

choices about their lives, the vision that lawmakers acted upon in approving the Higher Education Act[30] (the "HEA") nearly sixty years ago.[31]

Both the need for credit to pay for higher education and susceptibility to the incentive created by variable interest rates almost certainly are unevenly distributed across the student population. African American and Latinx students are disproportionately poor and so would be disproportionately affected by such a policy, either steered into particular courses of study and onto particular career paths or penalized for choosing disfavored courses of study and disfavored career paths. And students from historically disadvantaged racial and ethnic backgrounds may be consistently more likely to respond to variable interest rates, which could exacerbate disproportionality either in career choice or, worse, likelihood of default.[32]

4. Variable pricing creates undesirable incentives.

Variable pricing of student loans would reduce student autonomy by placing constraints on student choice. But supporters of such constraints will see the paternalism lurking within incentives as a desirable feature rather than a bug. Student autonomy is not referenced in the HEA, for example, although it is implicit in earlier discussions in Congress about predecessor legislation, when lawmakers debated whether specific fields of study should receive special treatment to encourage students to learn more about those areas and topics relevant to national defense.[33] Congress did not opt for such a heavy hand.[34]

But a price signal intended to influence student decisions would have pernicious effects well beyond burdening autonomy. First, the signal may be misguided, because the setting of terms of credit would reflect past trends. Were the federal government to implement variable pricing to steer student borrowers to high-income careers, the effort might fail because tomorrow's best-paying jobs will not be those of yesterday. Some of the most lucrative jobs of today did not exist in the past. There is a nontrivial risk that students who respond to price signals will find themselves ready for lucrative employment in an industry that is in decline or even has ceased to exist.[35] Coupled with the potential disparate impact of selectively higher interest rates on students historically excluded from higher education opportunity, this could mean that these students would consistently lag behind employment trends; variable

30. Public Law No. 89-329, 79 Stat. 1219 (1965).

31. *See infra* Part II.A.5.

32. There is evidence that students of different backgrounds are more or less averse to borrowing, suggesting the possibility of varying degrees of sensitivity (price elasticity) to interest rate changes. Glater, *Unsupportable Cost*, *supra* note 19, at 2176.

33. Glater, *Unsupportable Cost*, *supra* note 19, at 2169.

34. *Id.* In prior work I argued that education enables students to pursue their own life choices and federal policy should not constrain them; I will not rehash those arguments here. *Id.* at 2177-78.

35. *Id.* at 2149.

pricing could thus exacerbate rather than ameliorate gaps between employer needs and graduates' skills.

Complicating any effort to direct student choices is the likelihood that in the current economy, fewer and fewer employees remain with a single employer, or even in the same industry, for an entire career. Students who respond to price signals in choosing what to study and where to work may move around. Law school graduates in particular may move around given the structure of practice: In their early years, lawyers gain experience working in organizations that can provide training. As they learn and develop their skills, they become more valuable to a wider range of employers that might not have been willing to invest in training but would happily poach the now-ready lawyer. At different times in their lives, lawyers may move around to pursue more or less lucrative or more or less meaningful employment.[36] And lawyers move into and out of government service. A lawyer's career can be long and its twists and turns quite unpredictable.

Three more adverse effects have special significance for law schools. First, the variable pricing of student loans could well penalize undergraduate majors that do not lead immediately to high-paying jobs but do lead to enrollment in law school. Law students, according to a recent study of the financial value of a law degree, disproportionately have chosen undergraduate majors in, for example, "humanities and social sciences and are less likely to have majored in STEM[37] or business and economics."[38] If these students are paying higher interest rates on their loans because of their choice of major, then the policy of imposing variable rates will disproportionately burden law school graduates.[39]

Second, this problem is exacerbated because law students, like graduate and professional school students more generally, graduate with larger debts.[40] Law school, like medical school and business school, is expensive. Charging higher interest rates to law students, who default on their loans at a lower rate than do undergraduates,[41] might have the controversial effect of making

36. Indeed, empirical evidence suggests that law school graduates who may enter private practice to pay off their loans may then pursue less well-compensated careers in public service. *See* Field, *supra* note 2 (finding that law school graduates unencumbered by debt were significantly more likely to enter public interest careers).

37. Science, technology, engineering, or mathematics.

38. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. Leg. Stud. 249, 263 (2014).

39. And, of course, those who fail to complete their course of study.

40. Susan Dynarski, *Why Students with Smallest Debts Have the Larger Problem*, N.Y. Times, Sept. 1, 2015, at A3.

41. At the freestanding (i.e., not part of a larger university) law school with the highest rate of default on student loans, 4.8% of students had defaulted. Stephanie Francis Ward, *Which Freestanding Law Schools Had the Highest Loan Default Rates for Fiscal Year 2014?*, ABA Journal, Sept. 28, 2017, http://www.abajournal.com/news/article/which_law_schools_had_highest_loan_defaults_for_fy_2014 [https://perma.cc/W6QB-FBBU]. In contrast, the overall

federal student lending more profitable, but could also discourage college graduates from pursuing legal education at all. And if aversion to borrowing is unevenly distributed across the college graduate population, then the effect may be to deter disproportionately those students who historically have been underrepresented in law schools.

Third and most importantly, students who defy the signal sent by higher interest rates and choose the major associated with lower earnings, who nevertheless enroll in law school, and who then do choose lower-paying careers in public service, will be penalized. The higher interest rate and ensuing heavier repayment burden thus discourages public service, the very thing that law school repayment assistance programs and the federal Public Service Loan Forgiveness program seek to encourage.[42] If law schools and the wider legal community wish to expand access to justice, they should think long and hard before adopting a policy that makes the choice to serve those with limited or no access to representation more costly.

The challenges to law schools are more than theoretical. As law schools continue to raise tuition above $50,000 or more for each of three years of study, students confronting variable rates tied to career plans, for example, may demand a different mix of classes, asking for more transactional classes and classes that purport to make them "practice ready." The cost of institutional loan forgiveness programs will also go up. The cost of attending particular law schools associated with lower postgraduate earnings might go up, if that were included as a factor in setting the cost of a student loan. And then there is the related possibility that lenders other than the federal government tie terms of other forms of credit to academic performance. This possibility is addressed further in the next section.

5. The goals pursued through variable pricing of education loans are inconsistent with the aims of federal intervention in higher education finance.

Simply put, the HEA sought to put higher education within reach of aspiring students regardless of family wealth or income. Unlike prior federal interventions into higher education finance, such as the GI Bill[43] and the National Defense Education Act,[44] the HEA was not a component of a different project, like helping veterans readjust to civilian life or defeating the Soviet

rate of default on student loans in fiscal 2014 was more than twice as high. *Id.* Professor Simkovic and Professor McIntyre also report that for many years, law school borrowers have consistently defaulted at a lower rate. Simkovic & McIntyre, *supra* note 38, at 275.

42. Correspondingly, to the extent that law graduates benefit from PSLF as a result of pursuit of public interest careers, the greater their debts, the greater the potential cost of loan forgiveness to the taxpayer. This is an argument I am loath to make because PSLF is not properly criticized or justified on the basis of cost, but higher interest rates as described here would raise the cost of the program essentially for no reason.

43. Pub. L. No. 78-346, 58 Stat. 284 (1944).

44. Pub. L. No. 85-864, 72 Stat. 1580 (1958).

Union in a race to the moon.[45] The HEA was a broader and perhaps more idealistic effort. While it may be a form of social engineering to make higher education more widely accessible, the HEA did not aim to affect how students used new federal benefits, to direct them to study particular subjects or pursue particular careers that were more likely to yield higher salaries. To the contrary, from the beginning federal legislation included provisions intended to entice college students into *low*-pay careers, initially in teaching and later in other public service-oriented jobs.[46] Lawmakers sought to counter the messages sent by the market rather than reinforce them. Even when lawmakers have used tools of private finance, like debt, to help students pay for higher education, they have done so strategically, adding benefits and protections not typically available to consumers. For example, those students who plan to pursue a career in teaching can receive a federal grant that converts into a loan should the recipient change the plan.[47]

Lenders other than the federal government may try to use education-related indicators, like the identity or nature of the institution a student attends or that student's choice of major, to set the terms of credit generally, not just for student loans. Some lenders have made no secret of their business plan to identify students who are likely to be high earners but who are not rich yet—the highly desirable "HENRY."[48] Financial institutions like BankMobile use sophisticated analysis of borrower characteristics well beyond past repayment history, for example, to sell financial services to people who may so far only have "thin" credit histories.[49] SoFi, which refinances student loans and offers personal and home loans, among other products, advises that "additional factors, including your financial history, career experience, and monthly income vs. expenses" play a role in determining eligibility and terms of credit.[50] Sofi's loans are not fixed rate and may differ for different borrowers. Thus, decisions students make about their courses of study and their career

45. Glater, *Student Debt and Higher Education Risk, supra* note 4, at 1576.

46. *See, e.g.*, Higher Education Act, Pub. L. 89-329 (1965), §465 (providing for cancellation of teachers' student loans). The benefit was later broadened; *see* 20 U.S.C. § 1087e(m) (2019) (requiring the Secretary of Education to "cancel the balance of interest and principal due . . . on any eligible Federal Direct Loan not in default" for borrowers who are employed in public service and have met other criteria).

47. 20 U.S.C. § 1070g *et seq*. (2019).

48. Shawn Tully & Joan Caplin, *Look Who Pays for the Bailout*, FORTUNE, Oct. 27, 2008, http://archive.fortune.com/2008/10/24/magazines/fortune/tully_henrys.fortune/index.htm [https://perma.cc/QK5M-MQ3T].

49. Penny Crosman, *BankMobile Deploys AI, Alternative Data to Lend to Thin-file Millennials*, AMERICAN BANKER, Dec. 20, 2017 (describing use of educational backgrounds of potential borrowers as a factor in determining the availability and/or terms of credit), https://www.americanbanker.com/news/bankmobile-deploys-ai-alternative-data-to-lend-to-fico-poor-students [https://perma.cc/6S2W-9FVZ].

50. *Eligibility Criteria*, SOFI, https://www.sofi.com/eligibility-criteria/#eligibility-personal [https://perma.cc/E368-54Z9] (last visited July 25, 2018).

ambitions could come to affect not only the cost of the loans they use to finance higher education but the cost of the loans they will need later to buy a car, a large appliance, a house—or further education.[51]

The next part turns to the issues created and the laws governing the increasingly sophisticated marketing of credit using analysis of borrower characteristics related to education, with particular attention to the risk of disparate, adverse impact on people of color and members of other historically excluded groups.

B. Variable Pricing and the Special Context of Law Schools

The potential adverse effects of variable pricing of student loans are greater in the context of law school for at least three reasons. First, law students borrow larger amounts than undergraduate students do.[52] Second, and relatedly, the freedom of law students to make career choices is accordingly more constrained by the hard fact of indebtedness, and there is empirical evidence that debt does affect students' career choices.[53] And third, greater levels of indebtedness and worse loan terms will hamper the ability of law school graduates to serve communities that have historically been underserved or denied access to legal representation. It is this last concern that should make any policy potentially adding to law school graduates' debt burdens particularly worrisome to the wider community.

Concern over the relationship between how law students finance their legal education and their subsequent career options and choices is not new. More than fifteen years ago, an American Bar Association task force warned that "as law school tuitions and the debts of law students have increased, fewer law school graduates can afford to take the comparatively low-paying public service legal positions . . . that serve the poor."[54] Recognition of the obstacle debt places in the way of public service-oriented students has led to expansion

51. There will also likely be systemic effects if private lenders successfully lure greater numbers of low-risk borrowers, like law school graduates, out of federal loan programs, leaving behind those who more frequently default. *See infra* note 163 and accompanying text. The result could be higher costs of the federal aid program, potentially exposing taxpayers and/or causing the government to raise interest rates on student loans.

52. In the 2015-2016 academic year, bachelor's degree recipients who borrowed owed, on average, $28,400 in student loans. Trends in Student Aid 2017, *supra* note 27, at 20. The average indebtedness of law school graduates is higher. U.S. News & World Report, *Best Grad Schools 2019*, https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings [https://perma.cc/C92M-4N2S] (showing that average levels of indebtedness at different law schools range from a low of $53,237 to a high of $198,962).

53. Field, *supra* note 2 (observing that "[t]he fact that income-contingent tuition subsidies are associated with higher rates of public interest law than are financially equivalent loan repayment schemes provides strong evidence of the influence of debt burden on job choice in a real world setting").

54. ABA Commission on Loan Repayment and Forgiveness, Lifting the Burden: Law Student Debt as a Barrier to Public Service 14 (2003).

of loan repayment assistance programs ("LRAPs") at the law school level[55] and the Public Service Loan Forgiveness program, discussed above, at the federal level.[56] Yet these interventions, taking effect only after students have borrowed, come with strings[57] and may not be enough to overcome students' aversion to working in a low-pay field under a substantial debt overhang.[58]

The decisions of indebted graduates are part of a broader mosaic of well-analyzed barriers to providing access to justice to populations long denied representation.[59] Yet the impact of federal aid policy on law student decision-making deserves considerably more study, and analysis of the access gap within the civil justice system must include assessment of the role that indebtedness plays. If aid policy at the federal and institutional levels discourages graduates from embarking on public service, then successful reforms must extend beyond better funding for legal aid[60] to include more effective and more generous subsidies for law students aspiring to be legal aid lawyers. This ancillary effect of aid policy in the context of law schools emphasizes the need to make the terms of loans more generous rather than less.

III. Challenging discriminatory use of education-related criteria in lending

Whatever the wisdom of tying interest rates on student loans to student characteristics and choices, the practice is already used with consumer loans in the private sector. Some sophisticated lenders, making "private" loans that carry no government guarantee, are using diverse, nontraditional data gathered about potential borrowers to identify those likely to be low risk. Some of these lenders, financial institutions like SoFi, focus on education-related loans and offer to undercut the rates charged by the federal government for students

55. *See* American Bar Association, *Loan Repayment Assistance Programs (LRAP)*, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_lrap/ (listing LRAPs at numerous law schools) (last visited Aug. 2, 2018).

56. *See supra* note 9 and accompanying text.

57. For example, requiring students to work in a public interest job for a minimum of ten years, and keeping current on monthly student loan payments throughout that period. 34 C.F.R. §685.219(c) (2019). Further, as a practical matter and as of this writing, the federal Education Department has been notoriously stingy in providing forgiveness to students who thought themselves eligible. Stacy Cowley, *28,000 Public Servants Sought Student Loan Forgiveness. 96 Got It.*, N.Y. Times (Sep. 28, 2018), https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html.

58. *See* Field, *supra* note 2, at 19 (describing the relative impact of provision of a grant convertible to a loan and an economically equivalent loan eligible for repayment assistance and concluding that debt *qua* debt deters pursuit of public interest careers and concluding that law schools seeking to encourage public service provide grants *ex ante* rather than loan forgiveness *ex post*).

59. *See, e.g.*, Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 Fordham Urb. L. J. 1227, 1230 (2014) (identifying structural barriers to providing access to justice).

60. *Id.* at 1229 (describing cuts in funding to legal aid).

who are in repayment, for example.[61] Other lenders take into account the educational experiences of potential borrowers as one set of factors among many nontraditional criteria considered in deciding whether to extend credit and, if so, on what terms.[62] In the fast-evolving world of financial technology, or "fintech,"[63] educational background is just one type of variable that lenders use,[64] and the applicable antidiscrimination legislative and regulatory regime discussed here governs use of other criteria, too. The focus of this essay is on lender use of education-related criteria in credit decisions.

Lenders that use nontraditional criteria like educational background are exploiting both technology and culture. Technology enables them to analyze numerous variables to find and exploit correlations between propensity to repay or default on loans, as well as to gather information on potential borrowers that might previously have been more difficult to obtain. Culture, in turn, has both conditioned student borrowers to share information about themselves very readily,[65] making the lenders' data gathering easier, and reinforced the idea that terms of student loans should reflect riskiness to the lender. From this perspective, when extending credit to pay for an education, the lender is making an *individual and private* investment, rather than an investment in a larger community, and is enabling the borrower to purchase a personal and private good, rather than to serve the public good.[66] The two notions are complementary.

When lenders assess the creditworthiness of potential borrowers, there is always the possibility that bias, express or implicit,[67] may affect decision-

61. *Save Thousands on Your Student Loans*, SoFi, https://www.sofi.com/refinance-student-loan/ [https://perma.cc/L8G5-T9PL] (last visited Aug. 2, 2018).

62. Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 Chi.-Kent L. Rev. 3, 15 (2018) ("Instead of limiting their use of data to information that has a reasonably clear relationship with creditworthiness, they are embracing the unclear relationships between 'Big Data' and creditworthiness.").

63. *Id.* at 7.

64. Use of data on potential borrowers may turn any characteristic into a criterion available to lenders, from social media activity to online search history to, of course, choice of major. *Id.* at 13. Some so-called data brokers claim to have amassed thousands of data points on each and every consumer in the country. Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer 'Haves' from 'Have-Nots,'* 2014 Mich. St. L. Rev. 1411, 1413 (2014).

65. Lee Rainie & Maeve Duggan, *Privacy and Information Sharing*, Pew Research Center, Jan. 14, 2016, https://www.pewinternet.org/2016/01/14/privacy-and-information-sharing/ [https://perma.cc/ND94-DQY7] (describing people's willingness to share personal information in various contexts).

66. Tension over the goal and proper characterization of higher education is endemic in the United States generally and in federal policy in this area in particular. *See generally* David Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 Am. Educ. Res. J. 39, 41 (1997) (arguing that the "history of American education has been a tale of ambivalent goals and muddled outcomes").

67. While express or explicit bias takes the form of animus—the self-aware belief that because of group membership, an individual deserves to be treated worse than others not members of

making. Lenders may deliberately discriminate against borrowers based on borrower characteristics, for example by refusing to lend to African American applicants. Lenders may decline to lend or charge higher rates to borrowers from particular geographic areas that are dominated by African Americans, justifying the practice with a rationale that is facially race-neutral. Deliberate or intentional discrimination on the basis of the race of an applicant for credit is prohibited by law, as will be discussed further below. Policies or practices that do not explicitly consider a protected characteristic, such as race, but that still have a consistent, disparate effect on applicants for credit who share that protected characteristic, raise more complex issues. These issues persist even though technology has been touted as a means to combat discrimination by reducing the role of human, subjective, and potentially biased judgment in credit decisions.[68] Human bias can find its way into algorithms.[69]

While the preceding Part offered a critique of the practice of tying student loan terms to student decisions about courses of study to pursue, institutions to attend, and careers to enter, this Part turns to the terms of other kinds of consumer loans when lenders consider education, or borrower characteristics related to education, as a criterion. The discussion that follows explores and analyzes potential limitations of the legal framework that applies to discrimination in the extension of credit, with explicit attention to possible causes of action against lenders whose practices have the effect of penalizing borrowers who are members of groups historically excluded from and currently underrepresented in higher education in the United States. This analysis identifies the ways in which sophisticated lenders' assessment of education characteristics of potential borrowers could reinforce and perpetuate existing disparities in access to credit and socioeconomic inequality more generally.

Lender inclusion of education characteristics in decisions about whether and on what terms to extend credit could operate in disparate fashion in different ways. If students of color, for example, on average have fewer years of schooling and a lender considers years of schooling as an indicator of default risk justifying denial or higher pricing of credit, then borrowers of color will be disproportionately affected. If students of color disproportionately choose particular majors and lenders associate those majors with higher risk of default, the same thing may happen. If lenders perceive graduates of certain types of institutions, such as for-profit institutions or historically black colleges and universities ("HBCUs"), as riskier than graduates of other institutions,

that subordinated group—"[i]mplicit racial biases refer to the unconscious stereotypes and attitudes that we associate with racial groups." L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 876 (2017).

68. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671, 677 (2016) (warning that although the "very point of data mining is to provide a rational basis upon which to distinguish between individuals and to reliably confer to the individual the qualities possessed by those who seem statistically similar . . .[,] data mining holds the potential to unduly discount members of legally protected classes and to place them at systematic relative disadvantage").

69. *Id.*

imposing more costly loan terms would disproportionately affect the students of color who disproportionately attend those institutions.[70]

To be sure, educational backgrounds of borrowers are just one category of characteristics that, if considered in the consumer credit context, could have a disparate effect on historically subordinated groups. Some sophisticated modern lenders view all personal information as potentially relevant to credit decisions.[71] Lenders may combine conventional credit history, reflecting past borrowing and repayment activity, with a vast and varied assortment of data on both online and offline activity in an effort to predict more accurately the likelihood of repayment.[72] The quantity and nature of data collected on consumers using technology has drawn considerable attention and a share of critics.[73] This "big data" is used by sophisticated marketers and commercial entities, including but not limited to lenders, to target customers with differentiated products, including credit.[74] For example, lenders may develop or purchase an algorithm—a mathematical procedure that incorporates different variables that reflect consumer behavior or characteristics, such as spending habits, location, or, the concern of this essay, educational background—and use it to decide what to sell, on what terms, to whom.[75] Much of the commentary on these practices has focused on the scale and scope of data collection, the intrusiveness of collection methods, the risk of inaccuracies that have costly effects on consumers,[76] and the potential for disparate effects along lines of

70. This could be done indirectly, too, if a lender were to charge a higher rate or decline to extend credit to a borrower who graduated from or attended an institution where the overall default rate on students loans was deemed too high. This was the basis of a claim filed by one student against Sallie Mae; the case settled. Final Judgment Rodriguez v. Sallie Mae (SLM) Corp., No. 3:07-cv-01866-WWE (D. Conn. Oct. 17, 2011).

71. *See, e.g.*, *Our Story*, ZestFinance, https://internationalfintech.com/Company/zestfinance/ (last visited July 12, 2019) (touting the ability to "consume vast amounts of data to more accurately identify good borrowers—enabling higher repayment rates for lenders and lower-cost credit for consumers").

72. Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 Yale J. L. & Tech. 148, 157-58 (2016).

73. *See, e.g.*, Schmitz, *Secret Consumer*, *supra* note 64, at 1413-15 (describing the collection of vast amount of data on consumers and warning of perpetuation of "cycles of poverty" as a result of increasingly precise targeting of consumers); *see also* Edith Ramirez et al., Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and Accountability* 46-47 (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (describing commercial collection and use of data to develop consumer profiles and identifying risk of use or misuse of "sensitive" information, such as ethnicity).

74. Schmitz, *Secret Consumer*, *supra* note 64, at 1425-26.

75. Algorithms may produce composite "scores," reflecting these consumer behavior and characteristics in summary form to enable commercial entities to try to gauge consumer desirability. *Id.* at 1427 (describing "customized statistical scores that enable customized marketing").

76. The Fair Credit Reporting Act, *infra* Part III.C., focuses more on this issue of accuracy of information, but is less relevant for purposes of the discussion that follows than is the Equal

race, class, sex, gender, or other identity characteristics. Less scholarship, however, has focused on the specific implications of use of information on consumers' educational background and on the possible protection afforded by the existing federal statutory consumer protection framework. The balance of this essay contributes to analysis of these two narrower topics.

Data points that a lender might use could have disproportionate effects on people who belong to historically subordinated groups, and there is a fast-growing body of scholarship recognizing and analyzing that risk.[77] The focus here will remain on lender use of criteria related to education, in part because that is most relevant to the potential future experiences of law students and the schools they attend and in part because the consequences of using educational background as a credit criterion may have effects beyond the individual borrower, affecting access to justice.

Although the extension of credit is governed at the federal level by a complex network of statutes, consumer lending is less thoroughly and consistently regulated than is mortgage lending. Data collection and disclosure requirements and prohibitions are different in consumer lending, potentially making identification of discriminatory practices in the consumer lending context more difficult. This part explores the protections afforded by and the limits of the federal[78] laws that do reach consumer lending, including the Equal Credit Opportunity Act ("ECOA"),[79] the Fair Credit Reporting Act ("FCRA"),[80] and the prohibitions against "unfair, deceptive, or abusive act[s] or practice[s]" (known as UDAPs).[81] These laws govern consumer credit in general rather than student loans in particular.[82] It bears emphasizing that there almost certainly are possible means of regulating use by lenders of borrowers' educational background under state law, and these means should merit futher exploration.

Credit Opportunity Act, *infra* Part III.A.

77. *See, e.g.*, Hurley & Adebayo, *supra* note 72, at 152 (warning that use of big data in lending decisions could overtake civil rights protections "by using seemingly innocuous information, like consumers' retail preferences, as proxies for sensitive attributes like race"); Christopher Odinet, *The New Data of Student Debt*, forthcoming, 19 U.S.C. L. Rev. ___, 55 (2019) (warning of the risk that "use of alternative, education-based data can exacerbate existing credit inequalities" even when facially neutral, and developing a proposal for new lender underwriting guidelines), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3386205_code1528821.pdf?abstractid=3349478&mirid=1 and on file with author.

78. This essay will not extend beyond federal laws governing consumer credit.

79. 15 U.S.C. § 1691 *et seq.* (2019).

80. 15 U.S.C. § 1681 *et seq.* (2019).

81. 12 U.S.C. § 5531(a) (2019).

82. Private loans still enjoy exceptional treatment under the federal Bankruptcy Code, however. *See* 11 U.S.C. § 523(a)(8) (2019) (permitting discharge of student loans, whether federal or private, only if a borrower can demonstrate "undue hardship").

A. The Equal Credit Opportunity Act[83]

The ECOA flatly prohibits creditors from discriminating against applicants for credit "on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)."[84] Current law authorizes the Consumer Financial Protection Bureau ("CFPB") to promulgate regulations to implement this prohibition, as well as other provisions of the Act.[85] Regulation B gives effect to the prohibition on discrimination.[86] The rule repeats the statutory ban on discrimination on a "prohibited basis," and also prohibits a creditor from making statements that would discourage "on a prohibited basis a reasonable person from making or pursuing an application" for credit.[87] To discourage discrimination on a prohibited basis, Regulation B bars a creditor from "inquir[ing] about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction."[88] Perversely, in the absence of data revealing these demographic characteristics of borrowers, recognizing problematic patterns is more challenging. Creditors may seek any other information, though,[89] presumably in an effort to balance the lender's desire to "know as much as possible about a prospective borrower and . . . the borrower's right not to disclose information irrelevant to the credit transaction or relevant information that may be used in connection with discrimination on a prohibited basis."[90]

Identification of lender practices that make explicit use of prohibited applicant information is straightforward: If a lender has an express policy or practice of denying credit to African American applicants or of charging higher interest rates to financially identical applicants who differ only in their racial backgrounds, that lender has violated the law. That, however, is not the challenge posed by sophisticated techniques used by lenders with increasing frequency. The possibility of discrimination by proxy arises if a lender uses criteria that are facially neutral but that have a disparate impact on borrowers who share a prohibited characteristic. For example, a lender might decline to lend in certain ZIP codes associated with predominantly African American neighborhoods and justify the decision by identifying a connection between default risk and location. Alternatively, a lender might decline to extend credit

83. 15 U.S.C. § 1691 *et seq*. (2019).

84. 15 U.S.C. § 1691(a)(1) (2019).

85. 15 U.S.C. § 1691b (2019).

86. 12 C.F.R. § 1002.1(a) (2019).

87. 12 C.F.R. § 1002.4(b) (2019).

88. 12 C.F.R. § 1002.5(b) (2019). The rule permits a creditor to inquire about this information, however, for purposes of "monitor[ing]… compliance" with the ECOA, provided that specified disclosures are provided to the applicant. *Id*.

89. 12 C.F.R. § 1002.5(a) (2019).

90. *Pricing Without Discrimination*, *supra* note 7, at 4.

to or might impose a higher interest rate on a potential borrower who attended a particular type of academic institution, and that institution might in turn be associated overwhelmingly with students of common racial or ethnic background.[91]

These scenarios may be more likely when lenders use a greater variety of data on borrowers than was possible in the past, for at least two reasons. First, when lenders look for correlations between likelihood of nonpayment and other variables, the correlations they find may track but mask prohibited characteristics, such as race. This may be the case even if the lender does not affirmatively seek to discriminate. The discriminatory impact results if the facially neutral variable that correlates with default risk also correlates with race, national origin, color, or sex. The doctrinal challenges posed by this kind of correlation are discussed below.

The second reason that use of a wider variety of borrower characteristics in assessing creditworthiness may have disparate effects on applicants who share a prohibited characteristic is the effect of choosing facially neutral variables to consider. Using a neutral characteristic correlated disproportionately with a prohibited characteristic will then entrench inequality as surely as prior de jure exclusion from opportunity sought to. The lender's selection of particular borrower characteristics to include in the search for correlations with default risk would be limited by the universe of types of data collected and almost certainly would be affected by assumptions about which of those characteristics should be included in any assessment. Again, for example, a lender may believe geography is relevant and include that as a variable, although geography masks another variable that holds predictive power; that is, geography may not be explanatory but may correlate with the variable that is explanatory. At a deeper level, the reason that a facially neutral characteristic like where an applicant for credit lives or whether an applicant owns a home may be overt historical discrimination. Consider a lawsuit brought by black applicants for credit who alleged that a bank's use of criminal history in credit decisions violated ECOA because of the disparate impact of the policy along lines of

91. Sasha Rodriguez made this argument in a lawsuit against Sallie Mae several years ago, alleging that the lender discriminated on the basis of race by taking into account the cohort default rate at the school a borrower attended: the higher the overall default rate at that school, the higher the rate charged to borrowers who attended it, notwithstanding each borrower's risk profile. Rodriguez v. SLM Corp., Mem. Decision on Mot. Dismiss Am. Compl., 07-cv-1866 (Mar. 6, 2009), at 3 "Due to Sallie Mae's determination of rates and fees based on the school that the student attends, a student attending a school with a high minority population does not have the same rates and fees available as a similarly-situated Caucasian attending a school with a lower minority population." *Id.* at 4. And at the aggregate level, the use of institutional default rates constitutes a "fair lending concern," the CFPB found in 2012, because black and Latinx students are several times more likely than other students to attend institutions with higher default rates. Consumer Financial Protection Bureau, *Fair Lending Report of the Consumer Financial Protection Bureau* 22 (Dec. 2012), https://files.consumerfinance.gov/f/201212_cfpb_fair-lending-report.pdf.

race.[92] Black people disproportionately have criminal records.[93] However, the trial court concluded that because the bank did not automatically reject applicants with criminal histories and because "criminal record is legitimately related to its extension of credit,"[94] the practice could stand.

Courts generally have accepted statistical evidence of disparate impact to make a prima facie case that ECOA has been violated, then allowed a defendant to offer a justification, then permitted the plaintiff to argue that another practice could serve the stated goal without causing disparate impact.[95] This framework tracks doctrine in other contexts involving allegations of discrimination, including housing[96] and employment[97]—although the Supreme Court has not yet explicitly ruled that plaintiffs suing under the ECOA may rely on the same kind of statistical evidence of disparate impact as decisions under the Fair Housing Act,[98] for example, permit.[99] Regardless, plaintiffs in consumer lending cases that do not involve home loans face higher barriers than those in cases that do because of the difficulty of gathering the data needed to show a statistical disparity: The ECOA generally prohibits lenders from inquiring about applicants' race, color, religion, national origin, or sex.[100] Without such

92. A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago, 962 F. Supp. 1056, 1059 (N.D. Ill. 1997).

93. *See, e.g.*, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 4 (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ (finding that black people are "incarcerated at a rate that is 5.1 times that of whites").

94. A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago, 962 F. Supp. 1056, 1064 (N.D. Ill. 1997) (criminal history was relevant to the bank's assessment of an applicant's "judgment and character").

95. *See, e.g.*, Inclusive Communities Project, Inc. v. Tex. Dept. Hous. & Cmty. Affairs, 747 F.3d 275, 282 (5th Cir. 2014), *rev'd on other grounds*, 135 S. Ct. 2507 (2015) (reviewing recent judicial opinions and concluding that "[w]hile the approaches of our sister circuits have varied, the most recent decisions have applied a similar three-step burden-shifting approach"). The United States Supreme Court reversal is discussed *infra* note 100. *See also* Barocas and Selbst, *supra* note 68, at 701 (explaining the legal analysis of disparate impact claims in the context of employment discrimination claims).

96. Huntington Branch NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

97. Ricci v. DeStefano, 557 U.S. 557, 577-78 (2009).

98. 42 U.S.C. §3604 *et seq*. (2019).

99. Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 Rev. Banking & Fin. L. 199, 200 (2011). However, the implication of regulators' explanation of the availability of disparate impact theory suggests that the answer to this question should be yes. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994), https://www.federalregister.gov/documents/1994/04/15/94-9214/policy-statement-on-discrimination-in-lending-notice-department-of-housing-and-urban-development.

100. 12 C.F.R. §202.5(b) (2019). A lender may gather such information "for the purpose of conducting a self-test," *id.*, and the data gathered thereby is "privileged" provided that the lender takes "appropriate corrective action" if evidence of a possible ECOA violation is discovered. 12 C.F.R. §202.15 (2019). Federal legislation requires collection of data on

data, and given the potential complexity of the methods of evaluation that lenders may use to assess possible borrowers' creditworthiness, consumers seeking to make a prima facie case of an ECOA violation using statistical evidence of potential discrimination face a steep climb.[101]

When a lender does use a criterion that has a disproportionate, negative effect on consumers who share a characteristic covered by the ECOA prohibition, that lender may defend its policy or practice as justified by a "business necessity."[102] This is how a lender could justify relying on a correlation between default risk and a facially neutral characteristic that correlates with a prohibited characteristic, and this is where challenges to lenders' use of facially neutral criteria are likely to encounter difficulty. Educational background, whether reflecting the individual borrower or the borrower's institution, may be correlated with race, but it is not race itself. The Supreme Court for many years has adopted a formalistic focus on explicit use of race as a criterion.[103] A majority of the Justices object to explicit use of race to classify any individual, but not necessarily to use of criteria that may serve, intentionally or not, as proxies for race.[104]

Because lenders adopting nontraditional criteria to assess potential borrowers can assert that they are drawing on insights about creditworthiness produced by analysis of a wide range of personal data, they will be well-positioned to argue that deployment of whatever criteria they use is supported by analysis. For example, taking into account choice of major—even if that major highly correlates with race—in setting a borrower's interest rate could well be supported by a finding that a particular major correlates with a higher or lower likelihood of default. It may be that individual decision-makers within the lender organization harbor explicit racial bias, but bias is not

otherwise prohibited borrower characteristics in the context of small business lending. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

101. Taylor, *supra* note 99, at 206; *see also* Schmitz, *Secret Consumer*, *supra* note 64, at 1445 (describing criticism of ECOA as "largely ineffective in addressing the subtle discrimination that occurs with respect to lending and credit scoring").

102. Tex. Dept. Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2517 (2015). The courts have adopted this framework in other cases involving different antidiscrimination laws; this case involved the Fair Housing Act, 42 U.S.C. §3601 *et seq*.

103. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L. J. 1278, 1291-92 (2011) (describing the Court's move over time to adopt the view that the "presumption against racial classifications impugned the constitutional validity of benign, race-conscious efforts to integrate").

104. Developing such proxies using publicly available information may not present great difficulty, were a lender to try to do so. The Consumer Financial Protection Bureau undertook the task itself a few years ago in an effort to find cases of unfair lending practices despite the prohibition on lenders' collection of data on prohibited characteristics. Consumer Financial Protection Bureau, *Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity: A Methodology and Assessment* (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf (describing research project to use surname- and geography-based information to produce a proxy for race and ethnicity).

necessary, and finding evidence of bias would certainly be very difficult for any plaintiff.[105] And of course it may also be that decisions are driven by data: A lender might well insist that an automated process uncovered the correlation in the process of sifting through reams of data to identify novel indicators of default risk.[106] Indeed, a lender might not even know the criteria used by an artificial intelligence, designed to search for patterns in a great mass of data, or how it weighed them in reaching a conclusion about the appropriate terms of credit.[107] It may be necessary to reverse-engineer the credit analysis, if possible, to determine what applicant characteristics played a role. It is not impermissible for a lender to make decisions based on factors like cost and profitability,[108] both of which naturally could be affected by borrower default rates.

To overcome this business necessity defense, an applicant for credit or a borrower may allege that the lender has alternative methods to achieve the same business objective.[109] A search found few cases in which a court evaluated an ECOA plaintiff's proffered less discriminatory alternative. [110] Looking

105. Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. Rev. 1071, 1125 (2017) (concluding that "because the plaintiff has the burden to prove that illegal discrimination took place and the creditor need only present an acceptable motive for an adverse action, defendants generally prevail in" ECOA cases).

106. This is a form of machine learning. It is also of course possible to discriminate intentionally using sophisticated creditor analysis. *See* Barocas and Selbst, *supra* note 68, at 712-13.

107. Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation,* 31 Harv. J. L. & Tech. 889, 907 (2018) (describing artificial intelligence as a "back box" the workings of which may be very difficult to discern, even by those using it).

108. Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18269 ("When an agency finds that a lender's policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by a 'business necessity.' The justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification could include cost and profitability").

109. Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18269 ("a policy or practice that has a disparate impact on a prohibited basis . . . still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect").

110. The Westlaw search encompassed federal district courts, courts of appeal, and the Supreme Court, using the search terms "Equal Credit Opportunity Act" or "ECOA" and the phrase "less discriminatory." The search identified just five cases: Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64 (M.D. Tenn. 2004); Diamond Ventures LLC v. Baruah, 699 F. Supp. 2d 57 (D.D.C. 2010); Ramirez v. Greenpoint Mortg. Funding Inc., 268 F.R.D. 627 (N.D. Cal. 2010); Garcia v. Country Wide Fin. Corp., 2008 WL 7842104 (C.D. Cal. 2008) and Jones v. Ford Motor Credit Co., 2005 WL 743213 (S.D.N.Y. 2005). None reached evaluation of a plaintiff's proffered alternative policy to replace that at issue in the case. A search encompassing the same courts and searching for either "business necessity" or "business objective" along with references to the law produced seventeen cases (some of the same as those found in the first search), but in none of the cases did a reviewing court assess the offered business justification. However, in another recent case in which the jury was instructed on the need to evaluate whether a corporate defendant, accused of discrimination in violation of the ECOA, could have used a different business practice that had less of a

to other discrimination law contexts in which courts use the same burden-shifting approach, though, is suggestive. It appears that, even when provided with a plaintiff's well-supported, alternative, nondiscriminatory policy or practice, courts will not thereupon shift attention back to the defendant but will still conduct further assessment of the plaintiff's proposal. More precisely, a judge will very likely follow the steps outlined by the Supreme Court in *Wards Cove Packing Co., Inc. v. Atonio* and proceed to assess whether a plaintiff's less discriminatory alternative (i) will be "equally effective" in achieving the defendant's stated goal and (ii) will not have the same or a worse, disparate impact.[111] These considerations complicate any plaintiff's path to a remedy, effectively adding a somewhat vague pair of criteria to the three-part test[112] outlined above.

Consider *Hardie v. National Collegiate Athletic Association*, a case in which the plaintiff brought a Civil Rights Act challenge against the NCAA's practice of excluding anyone with a felony conviction from coaching at NCAA-certified youth athletic tournaments.[113] The defendant justified the rule as protecting youthful participants in sporting events.[114] The presiding judge concluded that the plaintiff could not demonstrate that his proposed alternative policy, a slightly less restrictive version of the challenged policy, would result in an identical or reduced likelihood of harm to participants in sporting events.[115] The successful plaintiff, this case suggests, would have to offer strong statistical evidence of the effect of a proposed alternative policy—evidence likely to lead to dueling experts—as well as a compelling argument that the fix would still achieve a defendant's stated goal, which almost certainly would involve somewhat subjective assessments. This is a tall order. Furthermore, the Ninth Circuit panel noted in passing that a plaintiff's alternative policy could fail the Supreme Court's two-part *Wards Cove* test if it exacerbates the discriminatory effect. This means that if a reviewing court concludes that a plaintiff's proposal, for example, makes it easier for all applicants for credit to obtain loans *but* racial disparities persist or worsen simply because more white applicants apply, then the judge could reject that alternative proposal.[116]

discriminatory effect, *Saint-Jean v. Emigrant Mortg. Co.*, the court did not require the plaintiffs to offer an actual, concrete and specific, "equally effective" alternative. 337 F.Supp. 3d 186, 200 (2018) (ruling against the defendant's post-verdict challenge to the jury instruction; the defendant argued that the jury should have been instructed that the plaintiff had to specify an alternative practice).

111. Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 660-61 (1989).

112. *I.e.*, showing of disparate impact, defendant response, plaintiff offer of alternative, but then the assessment of the proffered alternative. *See supra* note 102 and accompanying text.

113. Hardie v. Nat'l Coll. Athletic Assoc., 876 F.3d 312 (2017). The plaintiff alleged that the practice violated Title II of the Act, which prohibits racial discrimination in places of public accommodation. *Id.*

114. *Id.* at 316.

115. *Id.* at 322.

116. *Id.* at 320.

What are the implications, then, of this doctrinal framework for challenges to lenders' use of educational characteristics of applicants for credit? Of course, such characteristics are not among those prohibited by the ECOA. Absent evidence of intent to use educational criteria to discriminate along lines of race, color, national origin, or religion, to support a disparate treatment claim, a prima facie case would require evidence of disparate impact. To demonstrate illegal disparate impact, the challenger would need data to establish that education-related criteria correlated with race, because the statute does not recognize education status as a suspect classification. Here, a potential claimant would encounter the first significant hurdle: data collection.[117] As discussed more fully above, lenders not only need not but are forbidden to ask about the race, color, national origin, or sex of applicants for credit. This is a pragmatic obstacle rather than a doctrinal one.

Even when successful in gathering statistical evidence of disparate impact on credit applicants who share a prohibited characteristic, plaintiffs challenging use of education-related criteria would confront a lender's all-but-certain "business necessity" defense. The sophisticated lender drawing on nontraditional borrower characteristics could be expected to show a reviewing court that education-related criteria, including institution attended, choice of major, repayment norms among students attending the same institution, or the amount of education debt taken on all related to and were valid predictors of the likelihood of borrower default.[118] All but the most quantitatively sophisticated plaintiffs, somehow in possession of data that any defendant would protect vociferously, would have a difficult time rebutting the argument that the facially neutral characteristic, educational background, constituted useful information for the lender.[119] If the lender does not even know what variables an artificial intelligence weighed in reaching a credit recommendation or decision, the challenge is even greater.

Even if a challenger were able to access and analyze a lender's data purportedly supporting use of educational background in credit decisions by, for example, showing that the order in which criteria are considered affected the validity of the correlation with risk of default, there would remain a third barrier. Challengers must argue that there is an alternative method that the lender could use to assess creditworthiness that would not have the same, or more severe, disparate impact. Harder still, a judge could conceivably require the plaintiff to develop an alternative algorithm producing a less severe effect,

117. This is not a new challenge. *See, e.g.*, Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (1980) (reviewing court observes that "the effects test based on statistical methodology is apt to be quite difficult for a plaintiff" because the "Act specifically proscribes inquiry by the creditor into the race, sex or marital status of a credit applicant, except in loans secured by residential real estate" and rejects the plaintiff's evidence of disparate impact).

118. A lender could seek to develop an algorithm that did not have disparate effects on members of a protected class, but it might be hard to argue that a lender *must* take on such a task. And to adopt less discriminatory pricing of credit would not address the normative concerns about the practice in the context of education. *See generally* Part II *supra*.

119. Bruckner, *supra* note 62, at 54-55.

and then persuade the reviewing court that the alternative algorithm was "equally effective" in achieving the lender's goal in using the prior, challenged assessment.[120] Given that an assessment of creditworthiness is predictive and inherently uncertain, a lender might well argue that the proposed alternative would not be as effective, setting up a battle of experts over the strength of competing algorithms. Further, the reviewing court could consider the costliness of switching evaluation methods in determining whether to order the lender to adopt the plaintiff's alternative methodology.[121]

These difficulties suggest that in the absence of regulation[122] or legislation, perhaps to limit the scope of information lenders may use in deciding whether to extend credit and on what terms, or perhaps to eliminate consideration of application assessment processes and instead focus instead on credit decision outcomes, ECOA-based challenges to use of education-related criteria will prove difficult.[123] Furthermore, the difficulty of data gathering will hamper disclosure of evidence of disparities that could move a court or the court of public opinion. In the short term, a relatively modest legislative move, simply removing the prohibition on collecting information on borrower race, ethnicity, age, sex, national origin, or religious background, would help overcome this second obstacle, although at the cost of making it easier for a lender to engage in traditional discrimination. In the longer term, a sophisticated, informed, and, most important, motivated regulator probably must commit to an evaluation of the effects of lender lender practices. At the federal level, such a regulator may be a long time coming.[124]

Critical race analysis of the shortcomings of judicial interpretation of the Fourteenth Amendment and of legislation ostensibly aimed at combating discrimination in various contexts has thoroughly identified the pernicious effects of doctrine distinguishing between conduct motivated by intentional discrimination and conduct that has a disparate impact.[125] By treating disparate

120. Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 661 (1989). Of course, *Wards Cove* was not an ECOA case, so it is conceivable that a court could adopt a different standard in this context. However, in Saint-Jean v. Emigrant Mortg. Co., *supra* note 110, the judge did not require such a high degree of specificity, offering hope to future plaintiffs.

121. *Id*. The same possibility alluded to above, *supra* note 120, applies.

122. Or, potentially, novel enforcement tactics that extend the reach of existing regulation or legislation.

123. This analysis is not dissimilar to that reached by Barocas and Selbst, *supra* note 68, in their analysis of use of information gleaned by sophisticated use of data by employers in the context of Title VII. They conclude that many uses of data mining may well pass legal muster. *Id*. at 709.

124. Pursuant to the Dodd Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. No. 111-203 (2010), state attorneys general may also enforce provisions of federal consumer protection laws, including ECOA. 12 U.S.C. § 5552 (2019).

125. *See, e.g.*, Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1781 (2012) (describing the Supreme Court's shift toward exclusion of "social science to prove discrimination and insist[ing] instead on unworkable determinations of individual animus").

outcomes as constitutionally actionable when the result of explicitly biased decisions by individuals motivated by discriminatory animus, the Supreme Court has failed to block discrimination effected through facially neutral mechanisms or to overturn decisions that do not appear to be motivated by overt bias.[126] The Court appears to have accepted government use of facially neutral practices and policies even if they have racially identifiable effects. [127]

Regulations implementing the ECOA explicitly address the disparate impact of creditor practices,[128] paving the way for private as well as governmental enforcement. In this, the law lacks the shortcomings of constitutional doctrine that CRT scholars have identified. However, as a practical matter, the ECOA creates barriers for plaintiffs resembling those that the Supreme Court has erected in its recent antidiscrimination decisions: The plaintiff with evidence of evil intent is far more likely to succeed.[129] Plaintiffs alleging ECOA violations must obtain statistical evidence that is difficult to come by, more so in the context of algorithmic lending decisions informed by artificial intelligence, and then must overcome creditor argument that the data and algorithms used serve a legitimate business necessity. Thus protected by secrecy and cloaked in complexity, lender practices may be practically unassailable, and the disparate impact claims under the ECOA consequently may be available in theory but not in fact. This is not to make an argument for any particular level of enforcement, to be sure, but to note that obstacles to ECOA claims are greater than they would be were the path to disparate impact claims an easier one.[130]

B. Unfair, Deceptive, or Abusive Acts or Practices

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act"), the Consumer Financial Protection Bureau has the authority to adopt rules prohibiting lender use of UDAPs.[131] While the prohibition on such acts and practices may at first blush seem potentially viable as grounds to challenge lenders' discriminatory use of applicant characteristics like education, the law does not grant the bureau unfettered discretion to determine what practices are unfair, deceptive, or abusive. To justify a conclusion that a lender practice is unfair, for example, the CFPB must conclude that the "act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and [that] . . . such substantial injury is not outweighed by countervailing benefits to

126. Reva Siegel, *Race Conscious but Race Neutral*, 66 Ala. L. Rev. 653, 663 (2015).

127. *Id.* at 683.

128. 12 C.F.R. § 1002.6(a) (2019).

129. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stanford L. Rev. 1111, 1134 (1997).

130. If claims are too easily made, this could conceivably result in waste and a higher cost of credit—although history is not replete with examples of such an effect of antidiscrimination enforcement.

131. 12 U.S.C. § 5531(a) (2019).

consumers or to competition."[132] In making this determination, the bureau may not rely solely or primarily on considerations of public policy.[133] Nonetheless, the unfair practice definition may be most relevant for a challenge to a lender's use of complex criteria in assessing applicants for credit.

Dodd-Frank defines "abusive" practices as those involving inadequate or deliberately misleading disclosure to consumers, but the term is not more precisely defined than that.[134] The bureau must find that a practice "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or takes advantage of applicants' "lack of understanding . . . of the material risks, costs, or conditions of the product or service; . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[135] These conditions are unlikely to arise in the context of lender use of nontraditional borrower criteria—in fact, lenders are likely to trumpet their use of these criteria as a means for consumers to access credit on more favorable terms than they otherwise would receive. The bureau may not be able to curb use of nontraditional criteria using the UDAP prohibition.[136]

When given an opportunity to limit a lender's plan to use a broad variety of applicant data in assessing whether to extend credit, the CFPB declined to act,[137] likely because the effect of the lender's strategy was difficult to predict ex ante. After all, use of different types of data might indeed result in less expensive credit than some applicants might otherwise have received, especially those applicants who had "thin" credit histories containing little information of the sort typically relied upon by more traditional lenders. The company that sought the "no-action" letter, Upstart Network Inc., an "online lending

132. 12 U.S.C. § 5531(c)(1)(A)-(B) (2019).

133. 12 U.S.C. §5531(c)(2) (2019).

134. Some industry observers have concluded that the CFPB has deliberately resisted precision to retain flexibility in enforcement. *See, e.g.*, Anand S. Raman, *CFPB Defines 'Unfair,' 'Deceptive' and 'Abusive' Practices through Enforcement Activity*, Skadden's 2015 Insights—Financial Regulation (Jan. 2015), https://www.skadden.com/insights/publications/2015/01/cfpb-defines-unfair-deceptive-and-abusive-practice (noting that "[w]hile both Congress and industry groups have called upon the bureau to clarify the scope and meaning of UDAP through its rulemaking authority, the CFPB has declined to do so, choosing instead to rely upon its enforcement authority and develop its UDAP doctrine on a case-by-case basis").

135. 12 U.S.C. § 5531(d) (2019).

136. While the Act does not define the term, courts in other contexts have required an element of intent when assessing conduct alleged to be deceptive. *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 232-33 (1980) (finding insider trading on basis of access to information obtained without violation of a duty not fraudulent or deceptive within meaning of section 10(b) of the Securities Exchange Act of 1934 because of the absence of intent to breach such a duty).

137. Consumer Financial Protection Bureau, No-Action Letter - Upstart Network, Inc. (Sept. 14, 2017), http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf.

platform," committed to share with the bureau the results of its monitoring of lending for purposes of detecting disparate effects.[138] The company disclosed that it planned to pursue a strategy aimed at serving precisely this population of potential borrowers with thin histories, and in Upstart's application to the CFPB, the firm outlined the variables that it would use in assessing creditworthiness.[139] In the application, the company indicated that it would "complement[] . . . traditional underwriting signals with other variables that are correlated with financial capacity and repayment propensity." [140] The variables to be considered included "educational information including, but not limited to, the school attended and degree obtained, and [the applicant's] current employment…."[141] Significantly, Upstart's credit decisions are "based on a mix of all the variables used in Upstart's underwriting model, but they also take into account combinations of these variables."[142] This highlights the difficulty of teasing apart how sophisticated lenders' models work. Consider that a lender may base credit decisions on correlations between likelihood of repayment and facially neutral applicant characteristics. Those correlations would bolster the lender's argument that basing credit decisions on the selected borrower characteristics constituted a "business necessity" if the lender were confronted with an ECOA challenge. The method of identifying correlations—the algorithm—would likely be proprietary to the lender. Indeed, if the lender relies on artificial intelligence for analysis, then the lender might not even know either the process or the dispositive variables.

As part of its request to the CFPB, Upstart provided confidential information suggesting that its "underwriting methodology has not produced a disparate impact on protected classes in violation of ECOA or Regulation B."[143] The company also proposed that it would monitor credit decision outcomes for "specific applicant groups, including groups defined by race/ethnicity, sex, age, income, credit history, educational background, and other non-credit based variables."[144] The company pledged to work to market its products to

138. Request for a No-Action Letter - Upstart Network, Inc., at 1, 12, http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf (last visited July 7, 2019).

139. *Id.* at 1 ("Upstart's underwriting model has the ability to identify differences in risk between 'thin File' applicants.").

140. *Id.*

141. *Id.* at 4.

142. *Id.*

143. *Id.* at 9. Such data collection is possible, notwithstanding Regulation B's general prohibition on collecting protected borrower characteristics. *See supra* note 88 and accompanying text. Federal regulations permit a lender to conduct a "self-test" to detect potential disparate effects of lending practices. 12 C.F.R. § 1002.5(b)(1) (2019).

144. Request for a No-Action Letter - Upstart Network, Inc., at 14, http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf (last visited July 7, 2019)

consumers regardless of these characteristics, as well[145]; in an ideal world, the results of its monitoring efforts would be made public. However, when the chief executive of Upstart testified before Congress in the summer of 2019, he did not offer detailed data on the demographics of the lender's approved applicants and rejected applicants.[146] Opacity will, of course, get in the way of any outsider analysis of potential disparate effects that might enable recourse to the provisions of the ECOA.[147] Those effects, the results of credit decisions, matter most.

C. Fair Credit Reporting Act

Although lenders using nontraditional criteria by definition are drawing on data from multiple sources other than or in addition to credit reporting agencies, there is an argument that the Fair Credit Reporting Act (the "FCRA")[148] should apply to them. The FCRA governs collection and provision of consumer data for various purposes, including the extension of credit.[149] Its provisions apply to "consumer reports," defined as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character,

145. *Id.*

146. In his testimony, Dave Girourard, the chief executive and co-founder of Upstart, told lawmakers that the company had "demonstrated that our AI-driven model doesn't result in unlawful 'disparate impact' against protected classes of consumers," and asserted that "Upstart's model provides higher approval rates and lower interest rates for every traditionally underserved demographic." Testimony of Dave Girouard before the Task Force on Financial Technology, United States House Committee on Financial Services, July 25, 2019, at https://democrats-financialservices.house.gov/UploadedFiles/HHRG-116-BA00-Wstate-GirouardD-20190725.pdf. More detail, beyond assertions about aggregate effects, would have provided a better understanding of precisely how Upstart's technology achieved higher approval rates and lower interest rates, as well as what benchmark the company used – explaining higher approval rates than what and lower interest rates than what. As some critics have warned, artificial intelligence may approve applicants for credit who in the past would have been denied, but charge them higher interest rates, and in the process replicate racially disparate lending practies. *See, e.g.*, Aryn Bussey, *Educational Redlining? The use of education data in underwriting could leave HBCU and MSI graduates in the dark*, July 24, 2019, at https://protectborrowers.org/educational-redlining/ (describing how stratification along lines of race across educational institutions could lead to perpetuation of stratification along lines of race in credit markets, if, for example, lenders accept more students and charge lower rates to those attending the most selective institutions, because those institutions enroll fewer people from historically excluded groups).

147. Although Upstart Network, Inc., pledged to "shar[e] the results of its fair lending and access-to-credit test results with the Bureau," *id.*, the bureau may be barred from using that information against the lender. 15 U.S.C. § 1691c-1(a) (2019).

148. 15 U.S.C. §1681 *et seq.* (2019).

149. *See* 15 U.S.C. § 1681(b) (2019) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter").

general reputation, personal characteristics, or mode of living…."[150] The scope of the law is not limited to credit reporting agencies; the FCRA applies to "any person which [sic], for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."[151] This would seem to encompass the sources that a lender applying nontraditional criteria to applicants might use. The law prohibits some uses of consumer information, barring creditors from using medical information in decisions to extend credit, for example.[152] It also imposes upon credit reporting agencies the obligation to correct errors in the credit assessments they maintain when consumers notify them.[153] This approach is focused on accuracy of information, not outcomes of lender decisions, and is in any event dependent on consumers to review the data collected on them. The more variables lenders take into account, the more daunting the task the consumer faces to ensure that all those variables are accurate, let alone to identify consistent disparities in the terms or availability of credit.[154]

If a greater variety of information on consumers is available from different sources for use in credit decisions, the FCRA should apply to this wider pool of providers of such information.[155] However, some who have analyzed the use of nontraditional criteria in lending decisions have warned that companies providing "alternative credit-assessment tools" may evade the reach of the FCRA by, for example, aggregating data at the household or neighborhood level rather than using individual-level data.[156] Some companies have argued that they operate outside of the scope of the FCRA because they are not consumer reporting agencies.[157] Some critics of the limitations of the FCRA have proposed legislation that would prohibit use of data that correlates with prohibited characteristics, such as race.[158] Taking that action would require political will and would likely face industry objection. It would also raise new challenges, because myriad data points that lenders use may correlate

150. 15 U.S.C. § 1681a(d)(1) (2019).

151. 15 U.S.C. § 1681a(f) (2019).

152. 15 U.S.C. § 1681b(g)(2) (2019). This suggests that other information could also be made off-limits in credit assessments were there the political will to do so.

153. 15 U.S.C. § 1681i(f) (2019).

154. *See* Bruckner, *supra* note 62, at 55 ("To establish harm with an algorithmic credit report, a consumer would have to review the thousands of data points used by the algorithmic lender to identify an error….").

155. *Id* at 50-51. While bank-affiliated lenders drawing on a constellation of nontraditional data points might be subject to the FCRA, direct lenders that gather information about applicants and use it themselves may not be. *Id.*

156. Hurley & Adebayo, *supra* note 72, at 184.

157. *Id.* at 187.

158. *Id.* at 200 n.244.

with race—there are so many available variables that the sheer number of correlations is likely unmanageable. Innovation taking advantage of data might be hampered.[159] This is not to say that a blanket prohibition is a bad idea; in fact, such a far-reaching change in credit decision-making might be precisely what is necessary to correct disparities that have persisted for far too long, and would be responsive to the critical perspectives discussed above. In the absence of a prohibition, though, complete transparency in the credit application assessment process would at least enable evaluation of the criteria used by lenders, to enable identification of any troubling correlations with prohibited applicant or borrower characteristics.

IV. Implications for Law Schools and their Students

Predicting the impact of widespread adoption of more complex and varied lender analyses of applicants for credit, whether for student loans or consumer loans after students complete (or cease) their studies, presents certain obvious difficulties. First and foremost, lenders' methods remain undisclosed: we do not know how choice of major, choice of career, institution type, or any of numerous other variables might be weighed in a credit decision. Second, we lack data on the results of credit decisions by lenders using such nontraditional criteria. As a result, this part does not offer predictions but sketches possibilities.

To the extent that lenders associate education-related variables with a greater propensity to default, they may well penalize those who pursue particular courses of study associated with lower earnings; who attend colleges, universities and law schools associated with lower earnings or higher default rates; and who manifest in ways visible to lenders the intention to pursue a career with lower earning potential. This pattern would reinforce some preexisting and longstanding forms of inequality among student borrowers and likely introduce a few new ones. Young people who are already privileged disproportionately attend the most elite colleges and universities,[160] and presumably the most elite law schools. Lenders that offer cheaper credit to students at, or who have graduated from, those institutions will disproportionately reach students who were already advantaged, reinforcing preexisting inequality along lines of socioeconomic status, as well as race. For those who are less advantaged but who manage to enroll at an elite institution, the benefits will be real. More

159. Chris Brummer and Yesha Yadav propose that regulators (and lawmakers) face inevitable trade-offs when supervising financial services. Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 Georgetown L. Rev. 235, 243 (2018), https://georgetownlawjournal.org/articles/298/fintech-and-the-innovation-trilemma/pdf. Provision of clear rules and maintenance of market integrity may come at the expense of innovation; facilitation of innovation may come at the expense of clear rules. *Id.* at 264. While the authors do not focus on the application of the FCRA or the ECOA, the analysis is relevant.

160. Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, *Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60. Find Yours*, N.Y. Times (Jan. 18, 2017), https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html.

frequently these students will enroll at institutions less favored by prospective lenders.[161]

Turning to student loans, in particular, tying terms or availability to perceived postgraduate earnings potential would disproportionately affect law students interested in particular career paths, especially those in the public interest. The wider spread of this lender tactic would increase the importance of loan repayment assistance programs for newly minted lawyers. However, as a practical matter there may be little that law schools can do to stop lenders from continuing to expand the practice of taking into account a wide variety of characteristics of their students or of the institution when they make credit decisions. Some of the data that lenders may draw on must be disclosed, either because the Education Department requires it or the American Bar Association mandates it.

There is one concrete way law schools should prepare for this fast-changing lending environment. To assist students effectively, law school financial aid advisers should keep abreast of changes in evaluation methods by private student loan providers, whose products many students may turn to after they exhaust their federal borrowing options. To be able to advise students who may lack financial sophistication, financial aid staff should try to educate students about how loans are priced and steer them to lower-cost options. And of course, the need for financial literacy training for student borrowers is that much greater the more sophisticated lenders' methods become. Students—indeed, all consumers—must appreciate that comparison shopping will become ever more important the more customized credit offerings become. Unfortunately, there is not much evidence that financial literacy efforts work[162]; this may be an area that is ripe for carefully designed intermediaries to help consumers.

There are broader, systemic implications for student lending if borrowers offer private student loans on terms that are, at least at a given point in time, more favorable than those of federal student loans. If these lenders' assessments are accurate, they will siphon off low-risk students from the federal loan system and leave behind those student borrowers who are more likely to default. Law students in particular are relatively low risk, at least as conventionally measured using cohort default rates, and they also borrow larger amounts than do undergraduate students.[163] If such large, low-risk borrowers opt out of federal student lending, they also reduce the amount by which federal aid programs are revenue-positive.[164] Currently, federal student lending takes in more than

161. Lenders have an incentive to offer students from the same institution the same or very similar terms, because such generalized approach reduces the potential legal risk of individualized assessment that could result in a disparate impact on the basis of race or another prohibited characteristic.

162. *See, e.g.*, Lauren E. Willis, *Against Financial-Literacy Education*, 94 Iowa L. Rev. 197, 210-11 (2008-2009) (finding that "researchers have not empirically validated financial-literacy education's effectiveness as a policy tool").

163. Simkovic & McIntyre, *supra* note 38, at 275.

164. I use this term because technically, this is a "negative subsidy" rather than a "profit." Glenn

the government lends out, thanks to interest payments by borrowers,[165] and high-balance borrowers like law students pay more in interest. If lending to students comes to appear more costly to the government and by extension to taxpayers, federal student aid will become more politically vulnerable. Thus, if sophisticated lenders are successful in identifying low-risk, high-balance borrowers and luring them from federal loans, they threaten to undermine federal programs both financially and politically.

Of course, there are also risks to borrowers of moving to nonfederal student loans, even if initially the interest rates they face are lower. First, rates on private loans typically fluctuate. Second, should the borrower encounter repayment difficulty, the flexible repayment plans and the option of forbearance provided by the Education Department will be unavailable. These differences matter because, although the evidence suggests that law students tend to default less often than undergraduates on their student loans, some law students do experience considerable hardship in repayment and do default, and when they do, the balance owed may be considerably larger.[166]

V. Conclusion

Increasingly sophisticated lenders are taking advantage of the mass of data on consumers. Yet some of the data points correlate with characteristics of potential borrowers that creditors are prohibited from using in making their decisions about whom to lend to and on what terms. Lenders' choices of variables to use in assessing credit applicants may have a disparate impact on people who belong to groups historically subordinated both in higher education and in the market for consumer credit. This essay has outlined some of the reasons that linking either student loan terms or the terms of credit more generally to borrower educational characteristics, in particular, poses a threat to the accessibility of higher education and undermines the promise that such education functions as an engine of socioeconomic mobility. In the context

Kessler, *Elizabeth Warren's Claim that the U.S. Earns $51 Billion in Profits on Student Loans*, Wash. Post (July 11, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/elizabeth-warrens-claim-that-the-us-earns-51-billion-in-profits-on-student-loans/2013/07/10/7769a3c2-e9b8-11e2-aa9f-c03a72e2d342_blog.html?utm_term=.aa1d66af5230. In the public eye the distinction is likely meaningless.

165. The point of this observation is not to suggest that federal student aid should "profit," in the words of critics, from extending credit to student borrowers dependent on loans to pursue higher education. *See, e.g.*, Letter to Arne Duncan, Sec. of Education, Feb. 25, 2015, http://www.warren.senate.gov/files/documents/2015_25_02_Letter_to_Secretary_Duncan_re_Student_Loan_Profits.pdf (six members of the Senate criticized the "profit" earned by the federal government on student lending and called for the Department of Education to modify its policies to help indebted students). Rather, the point is larger: The federal role in higher education finance will become more politically vulnerable the more it appears to cost.

166. The special obstacles student borrowers face in attempting to discharge education loans in bankruptcy proceedings have been well-documented and are beyond the scope of this essay. *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bkrtcy. L.J. 179 (2009) (examining outcomes when student loan borrowers sought to discharge obligations in bankruptcy proceedings).

of legal education, such pricing of credit may disincentivize pursuit of the very public service careers that both law schools and the profession seek to promote, or—worse—punish those who pursue those careers with less favorable loan terms.

Challenges to use of data on credit applicants' educational backgrounds, however, must overcome significant obstacles. The essay has briefly reviewed the major federal laws that aim to protect consumers from discrimination on the basis of race, ethnicity, national origin, sex, or religion, in the provision of credit, focusing primarily on the Equal Credit Opportunity Act. The analysis above identified the reasons this and other applicable federal laws may require creativity on the part of regulators seeking to challenge disparate outcomes resulting from lenders' use of education-related criteria in assessing creditworthiness. Importantly, this essay has not explored possible state action to target lender practices that have such effects, and this is a potentially fruitful avenue for state regulators to explore. Evidence is difficult to obtain, untangling credit evaluation methods will require enormous sophistication, and lenders will present a strong defense of business necessity for whatever practice they have adopted. The essay has argued for collection of more data on lender decision-making and stronger regulatory responses to ever more sophisticated lender methods. Failure to recognize and respond to the risks these new methods pose will reinforce inequality along lines of race and socioeconomic status. Conversely, securing equity of opportunity requires vigilance and continuous reform.