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Emma Melton
Washington University School of Law

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AN ANALYSIS OF THE RIGHT TO EDUCATION IN *HURLEY AND MOORE V. SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS* AND ITS APPLICATION IN THE UNITED STATES

In the past seventy years, the idea of education as a fundamental right has spread in democratic countries throughout the world.¹ Multiple constitutions and international treaties have codified an inalienable right to education provided by the government.² Recent litigation has highlighted a possibility that high tuition rates for universities may effectively serve as barriers to accessing higher learning and infringe upon this fundamental right to education.

This Note will address a 2011 case in the United Kingdom, *Hurley and Moore v. Secretary of State for Business, Innovation & Skills*,³ which recognized the harm of increasing higher education tuition fees to low-income students, and analyze its applicability in the United States. Part I will outline the specifics of the case, the arguments made by each party, and the holding. Part II will examine the treaties and laws under which the plaintiffs claimed a cause of action. Part III will provide an overview of the educational system in the United Kingdom. Part IV will examine the effect of the *Hurley* holding in the United Kingdom. Part V will argue that the United States is bound to the terms of the International Covenant on Economic, Social and Cultural Rights as a signatory. Part VI will assert that the United States is violating the terms of the treaty by failing to provide a comprehensive system for students to access loans, and will analyze outcomes in the United States should liability under the treaty be recognized.⁴

1. The 1936 Soviet Constitution was the first constitution to mention a right to education as a duty of the state. See KONSTITUTSIYA SSSR (1936) [USSR CONSTITUTION] ch X, art. 121 (Soviet Union).

2. According to the United Nations, approximately 135 countries around the world include free and non-discriminatory education as a right in their constitutions as of 2010. See U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, EDUCATION FOR ALL GLOBAL MONITORING REPORT 2010: REACHING THE MARGINALIZED (2010), available at <http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>. Additionally, some countries are bound to provide education through international legal commitments, such as the United Nations Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); UNESCO Convention against Discrimination in Education, Dec. 15, 1960, 429 U.N.T.S. 94; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; and the African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

3. R. (on the application of Hurley & Moore) v. Secretary of State for Business, Innovation & Skills, [2012] EWHC (Admin) 201 (Eng.).

4. This Note does not address whether the United States complies with the right to education in

I. THE FACTS AND HOLDING OF *HURLEY AND MOORE V. SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS*

In 2011, two students in England brought suit against the government for allowing institutions of higher education to increase tuition fees.⁵ As students in the lower sixth form,⁶ Callum Hurley and Katy Moore wanted to attend public university in the United Kingdom the following year, but claimed the government's increasing of the maximum tuition fee limit charged by public universities infringed upon their right to education.⁷ In 2010, the government had passed the Higher Education Regulations 2010, which included a £9000-per-year tuition maximum (increased from a previous limit of £3375) to be implemented starting in September 2012.⁸ The tuition maximum raise was accompanied by other measures intended to increase access to higher education for disadvantaged students, including easier access to student loans.⁹ Even with these additional measures, Hurley and Moore argued the increase in tuition was a breach of their right to education conferred by article 2 of Protocol 1 of the European Convention on Human Rights and the Human Rights Act of 1998.¹⁰

primary or secondary schools, or whether the United States complies through equal distribution of funds to finance schools, but focuses solely on the legal implications of tuition fees and student loans for higher education in international law. For an overview of the United States' compliance with the right to education, see Krysten Urchick, *U.S. Education Law: Is the Right to Education in the U.S. in Compliance with International Human Rights Standards?* (2007) (unpublished student paper, King Scholar Program, Michigan State University College of Law), available at <http://digitalcommons.law.msu.edu/king/105/>.

5. *Hurley & Moore*, EWHC (Admin) 201 at [1].

6. "Sixth form" is the equivalent of twelfth grade or senior high school students in American schools.

7. *Hurley & Moore*, EWHC (Admin) 201 at [4].

8. Higher Education (Basic Amount) (England) Regulations 2010, S.I. 2010/3021 (U.K.). The legislation set a tuition limit of £6000 for universities which had no approved access plans for underprivileged students and a limit of £3000 on charges for certain circumstances. See Explanatory Memorandum to the Higher Education (Basic Amount) (England) Regulations 2010, S.I. 2010/3021, ¶¶ 7.6–7.7; *Hurley & Moore*, EWHC (Admin) 201 at [2]–[3].

9. Explanatory Memorandum to the Higher Education (Basic Amount) (England) Regulations 2010, S.I. 2010/3021, ¶ 7.11.

10. Specifically,

The claimants contend that the 2010 Regulations are unlawful on each of the following grounds: (1) The decision to increase the permitted limit for the basic and higher amounts is contrary to the right to education conferred by Article 2 of Protocol 1 of the European Convention on Human Rights ("A2 P1"); alternatively is contrary to that provision when read with Article 14 of the Convention. The thrust of the argument is that the new rules will have a chilling effect on the ability of those from disadvantaged social backgrounds to take up university places. (2) The decision was made in breach of the requirements of the public sector equality duties ("the PSEDs") imposed by the Sex Discrimination Act 1975, the Race

The High Court ruled that the tuition fee increases alone did not infringe upon the right to education as protected by the European Convention on Human Rights.¹¹ The court discovered that the government's debate before passing the regulation was focused on how to provide educational opportunities for students with disadvantaged backgrounds, demonstrating intent to ensure university access for all eligible students.¹² Additionally, the court found the wide availability of student loans provided by the Student Loans Company allowed underprivileged students access to higher education.¹³ The court held that the fee increase to £9000 was not prohibitively high.¹⁴ The court's decision seemed to hinge on the availability of student loans to prevent the deterrence of underprivileged students from attending university.¹⁵ The automatic and comprehensive availability of loans was frequently cited as a targeted measure that significantly lessened the burden of loans for low-income students. While the court found the increase in tuition maximums did not infringe upon the right to education, the court nevertheless agreed with the plaintiffs that the Secretary had not fulfilled the required Public Sector Equality Duty.¹⁶

Outlined in the Race Relations Act and the Equality Act statutes, the Public Sector Equality Duties require officials to evaluate whether policies are discriminatory in the decision-making process before passing the law.¹⁷ The Public Sector Equality Duty requires public bodies to have sufficient awareness of the need to eliminate discrimination, advance equality of opportunity, and foster good societal relations when designing and implementing policies.¹⁸ While the students affected by the increased

Relations Act 1976, and the Disability Discrimination Act 1995.

Hurley & Moore, EWHC (Admin) 201 at [4].

11. *Id.* at [34].

12. *Id.* at [61]. See also LORD JOHN BROWNE ET AL., INDEPENDENT REVIEW PANEL, THE INDEPENDENT REVIEW OF HIGHER EDUCATION FUNDING AND STUDENT FINANCE: SECURING A SUSTAINABLE FUTURE FOR HIGHER EDUCATION (2010), available at www.independent.gov.uk/browne-report.

13. *Hurley & Moore*, EWHC (Admin) 201 at [42].

14. *Id.* at [40], [42]–[44].

15. The court stated it would “take a very exceptional case indeed before it can be said that the charging of fees of itself, absent discrimination, deprives the right of its effectiveness *at least where loans are made available to those who need them.*” *Id.* at [42] (emphasis added).

16. *Id.* at [97].

17. Race Relations Act, 1976, c. 74, § 71 (Eng.), as amended by Race Relations (Amendment) Act, 2000, c. 34, § 2, (Eng.), and Equality Act 2010, c. 15, § 149 (Eng.).

18. “A public authority must, in the exercise of its functions, have due regard to the need to . . . advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it,” Equality Act 2010, c. 15, § 149(1)(b); “Every body or other person specified in Schedule 1A [a Minister of the Crown or government department] . . . shall, in carrying

fees were defined by their inability to pay tuition, the court recognized the applicability of the Race Relations Act because of the indirect discriminatory effect such policies could have on minority students.¹⁹ The court found that the government had not conducted a sufficient Equality Impact Assessment to determine whether the policies would significantly affect access to higher education for underprivileged students, especially from ethnic minorities or disabled households.²⁰

The decision was cited in the media both as an example of the expanding reach of judicial review in the UK and the difficulty in contesting governmental budget cuts.²¹ After the court's ruling, Hurley and Moore both stated they would be attending university in the United Kingdom, despite the fees.²²

II. INTERNATIONAL TREATIES AND BRITISH LAW

The right to education in the United Kingdom is ensured by two separate international agreements. The first is the articles of the European Convention for the Protection of Human Rights and Fundamental

out its functions, have due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups," Race Relations Act 1976, c. 74, § 71, as amended by Race Relations (Amendment) Act 2000, c. 34, § 2.

19. The court noted,

Whilst there is a significant correlation between the socially disadvantaged and those from disabled households or from ethnic minorities, clearly they are not the same thing. Indeed, the fact that specific and different issues need to be considered with respect to each protected characteristic of itself suggests that, in general at least, it cannot be enough to treat the protected groups in a homogenous way. That will not bring out such issues as are unique to a particular protected characteristic,

Hurley & Moore, [2012] EWHC (Admin) 201 at [91].

In my view, it is necessary to consider what impact that particular aspect of the policies will have. There is no basis whatsoever to suggest that the imposition of fees at the proposed level will discriminate directly against any of the protected groups. The effect, if there be any, will be indirect. The obvious reason why minority protected groups might be adversely affected—and indeed, apart from the interest problem for some Islamic students, in all likelihood the only way—is because they are disproportionately economically disadvantaged . . .

Id. at [93].

20. *Id.* at [97]–[100]. “[T]he Secretary of State did not carry out the rigorous attention to the PSEDs [Public Sector Equality Duties] which he was obliged to do.” *Id.* at [97].

21. See Colin Murray, *Why Judicial Review Didn't Overturn Tuition Fees*, GUARDIAN (Feb. 20, 2012), <http://www.guardian.co.uk/law/2012/feb/20/why-judicial-review-didnt-overturn-tuition-fees>; Karwan Eskerie, *Poor Not Singled Out by Rise in University Fees, Rules Court*, UK HUMAN RIGHTS BLOG (Feb. 22, 2012), <http://ukhumanrightsblog.com/2012/02/22/poor-not-singled-out-by-university-fees-hike-rules-court>.

22. Jessica Shepherd, *Tuition Fees Rise Does Not Breach Human Rights, High Court Rules: Judges Deny Students Claim but Declare Government Failed to Properly Analyse Equality Issues*, GUARDIAN, Feb. 17, 2012, at 6, available at <http://www.guardian.co.uk/education/2012/feb/17/tuition-fees-rise-human-rights-court>.

Freedoms (European Convention on Human Rights), actionable in British courts under the Human Rights Act 1998.²³ The European Convention on Human Rights is an international treaty that protects the human rights and basic liberties of European people.²⁴ It was ratified by all Council of Europe member states in 1950, with Protocol 1 ratified in 1952.²⁵ The applicable protection of a right to education is found in article 2 of Protocol 1, stating, “[n]o person shall be denied the right to education.”²⁶ The committee understood this text to mean that higher education should gradually be made free through targeted policies but could remain dependent on the capacity of the individual to pay.²⁷ The text of the article does not specify the extent to which the right to education applies in regards to the level of education or the ease of access for underprivileged students.²⁸

Courts have interpreted article 2 to apply both to universities and to monetary fees for primary and secondary education.²⁹ In 2004, the European Court of Human Rights found that article 2 established an obligation to afford an effective right of access to institutions of higher education in *Şahin v. Turkey*.³⁰ Addressing the right of students to wear religious headscarves in public universities, the court interpreted the article to mean that countries that have public institutions of higher learning must provide equal access to all citizens.³¹ The Turkish government did not

23. Human Rights Act, 1998, c. 42, § 1(1) (Eng). “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights,” *Id.* § 3(1).

24. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter European Convention on Human Rights].

25. Protocol 1 to European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, C.E.T.S. No. 9 [hereinafter Protocol 1].

26. *Id.* art. 2.

27. U.N. Econ. & Soc. Council, Comm. on Economic, Social, and Cultural Rights, The Right to Education, art. 13, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

28. Protocol 1, *supra* note 25, art. 2. (the rest of the provision applies to respecting the religious rights of parents but does not address what other factors might be considered an infringement on the right to education).

29. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173; *Ponomaryovi v. Bulgaria*, 2011 Eur. Ct. H.R. (forthcoming), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105295>.

30. *Şahin*, ¶¶ 131–37. “In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision.” *Id.* ¶ 137.

31. The court found,

While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed

make an argument on whether article 2 applied to public universities.³² As the case applied to religious freedom of students enrolled at public universities, *Şahin* established that colleges and universities were included under article 2, but did not address to what extent a monetary fee might constitute an illegal barrier to education. In 2011, the European Court of Human Rights determined that fees could frustrate the right to access education in *Ponomaryovi v. Bulgaria*.³³ The court found that the Bulgarian government infringed upon the article 2 rights of two Russian boys by charging them fees for their public secondary education.³⁴ The court did not entirely restrict countries from charging money for public education, but mandated that a country that provided free education to some citizens could not exclude a group of people from that privilege by charging fees.³⁵ In dicta, the court reasoned that fees for universities were more easily justified than fees for primary and secondary schools.³⁶ Nevertheless, the decision firmly established that in certain circumstances a financial burden could be found to violate a student's right to education under article 2.³⁷ As article 2 applies to all public education, including universities, this finding gives weight to a state's duty under article 2 to provide higher education at a low cost for students.³⁸

the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy

Id. ¶ 136. “Consequently, it would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1.” *Id.* ¶ 137.

32. “The applicant said that there was no doubt that the right to education, as guaranteed by the first sentence of Article 2 of Protocol No. 1, applied to higher education, since that provision applied to all institutions existing at a given time. The Government did not comment on this issue.” *Id.* ¶¶ 132–33.

33. 2011 Eur. Ct. H.R.

34. *Id.* ¶ 49.

35. The court clearly defined its scope:

The Court would emphasise at the outset that its task in the present case is not to decide whether and to what extent it is permissible for the States to charge fees for secondary—or, indeed, any—education. It has in the past recognised that the right to education by its very nature calls for regulation by the State, and that this regulation may vary in time and place according to the needs and resources of the community

Id. ¶ 53.

36. “The State’s margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large,” *Id.* ¶ 56.

37. “[T]he requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.” *Id.* ¶ 63.

38. “[A] State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction[,] and, on the other, its limited capacity to accommodate them.” *Id.* ¶ 55. The court in *Hurley v. Moore* interpreted this case by concluding, “where the state provides higher education, it is not a breach of A2P1 to charge the student. . . . [I]t is permissible, and indeed common

The Human Rights Act, passed in the United Kingdom in 1998, made it illegal for a public entity to act in any way contrary to the articles of the European Convention on Human Rights.³⁹ The Act makes any breach of the articles of the Convention actionable within United Kingdom courts, eliminating the need to pursue a remedy exclusively in the European Human Rights Court, though an individual may still pursue a claim there.⁴⁰ The Human Rights Act does not apply to Parliament when acting as a legislative body but applies to all other governmental bodies exercising public functions.⁴¹

The International Covenant on Economic, Social and Cultural Rights is a multilateral treaty voted on by the United Nations General Assembly in 1966.⁴² Article 13 recognizes the right to education as a necessity for human dignity and a means to enable all persons to participate effectively in society.⁴³ In regard to universities, article 13 states, “higher education

amongst Convention states, to charge for higher education.” R. (on the application of Hurley & Moore) v. Secretary of State for Business, Innovation & Skills, [2012] EWHC (Admin) 201 [32] (Eng.). The ECHR’s language in *Ponomaryovi v. Bulgaria* nevertheless seemed to suggest that states should be cautious in implementing high tuition payments and should not charge exorbitant fees for education, though it remarked that fees were clearly allowed for higher education under Convention protocol. *Ponomaryovi*, 2011 Eur. Ct. H.R. at ¶ 56.

39. “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Human Rights Act 1998, c. 42, § 3(1).

40. The Act states,

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings.

Human Rights Act 1998, c. 42, § 7(1).

41. “[P]ublic authority’ includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament” Human Rights Act 1998, c. 42, § 6(3).

42. ICESCR, *supra* note 2.

43. Article 13 reads:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) primary education shall be compulsory and available free to all; (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in

shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”⁴⁴ While the article guarantees access to education, it also states, “[n]o part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions.”⁴⁵ The International Covenant on Economic, Social, and Cultural Rights has been ratified by 160 countries.⁴⁶ The United Kingdom ratified the Covenant in 1976.⁴⁷

III. EDUCATION SYSTEM IN THE UNITED KINGDOM

The United Kingdom provides state-funded education for students between the ages of three and eighteen.⁴⁸ About 93.5% of children in the United Kingdom attend state-funded schools.⁴⁹ Under the Education and Skills Act 2008, all students must attend school until age eighteen.⁵⁰ Higher education has traditionally been state-funded, with the exception of a few private universities.

In 1998, the Teaching and Higher Education Act was passed, instituting fees for public universities.⁵¹ Full-time undergraduate students

particular by the progressive introduction of free education; (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. . . .

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Id. art. 13.

44. *Id.* art. 13(2)(c).

45. *Id.* art. 13(4).

46. See U.N. Secretary-General, Status of Multilateral Treaties Deposited with the Secretary-General, ch. IV, <https://treaties.un.org/pages/ParticipationStatus.aspx>.

47. The United Kingdom signed September 16, 1968, and ratified May 20, 1976. U.N. Secretary-General, *supra* note 46.

48. *What We Do*, U.K. DEP’T FOR EDUCATION, <https://www.gov.uk/government/organisations/departments-for-education/about> (last updated Jan. 23, 2014).

49. Chris Ryan & Luke Sibieta, *Private Schooling in the UK and Australia*, INST. FOR FISCAL STUDIES BRIEFING NOTES No. 106 (June 3, 2010), available at <http://www.ifs.org.uk/publications/5082>.

50. Education and Skills Act, 2008, c. 25, § 1 (Eng.).

51. Teaching and Higher Education Act, 1998, c. 30 (Eng.).

were liable for fixed tuition fees of £1000 per year.⁵² However, the poorest 30% of students could receive an education free of cost.⁵³ Students were required to pay tuition up-front.⁵⁴ Despite the fees, the government reported that the revenue was not significant enough to provide quality education without the state amassing large debt.⁵⁵

In 2003–04, the Higher Education Act was passed and maximum tuition fees increased to £3000 per year.⁵⁶ The tuition fee was variable, using a sliding scale dependent on the income of the student's family.⁵⁷ No student was required to pay the tuition up-front, but could receive an automatic loan from a non-departmental public body, the Student Loans Company (SLC).⁵⁸ In 2003 and 2004, 81% of eligible students in the United Kingdom took out a student loan from the SLC.⁵⁹ A student only repays an SLC loan once he or she makes an income over £15,000 per year, and any outstanding loans are cancelled after 25 years.⁶⁰ However, students who claim bankruptcy are not excused from loan repayment.⁶¹

52. Heidi Blake, *Grants, Loans and Tuition Fees: A Timeline of How University Funding Has Evolved*, TELEGRAPH (Nov. 10, 2010), <http://www.telegraph.co.uk/education/educationnews/8057871/Grants-loans-and-tuition-fees-a-timeline-of-how-university-funding-has-evolved.html>.

53. Teaching and Higher Education Act, 1998, Part II, c. 1.

54. *Id.*

55. A House of Commons Library Research report noted,

The Higher Education Funding Council for England (HEFCE) recently announced that universities' budget allocation for 2010/11 would be almost £600 million less than for the previous year. Together with a squeeze on student places, an increasingly competitive international market for higher education and reduced private income due to the current economic climate, this means that for many universities funding could be severely constrained for the next few years.

Sue Hubble, *Paying for Higher Education*, in KEY ISSUES FOR THE NEW PARLIAMENT 2010 42 (Adam Mellows-Facer et al., House of Commons Library Research, eds., 2010).

56. Higher Education Act, 2004, c. 8, (Eng); Blake, *supra* note 52.

57. *Id.* Part 3.

58. *Id.*

59. STUDENT LOANS COMPANY LTD., STATISTICS OF STUDENT SUPPORT FOR HIGHER EDUCATION IN THE UNITED KINGDOM—FINANCIAL YEAR 2003-04 AND ACADEMIC YEAR 2004/05 (2004), available for download from <http://www.slc.co.uk/statistics/official-statistics-archive.aspx>. The percentage of eligible students who take out loans has increased in recent years. See, e.g., Paul Bolton, House of Commons Library, *Student Loan Statistics*, Std. Note: SN/SG/1079 (Jan. 24, 2014), available at <http://www.parliament.uk/briefing-papers/sn01079.pdf>.

60. Blake, *supra* note 52.

61. Provisions may be made “with respect to sums which a borrower receives, or is entitled to receive, under such a loan after the commencement of his bankruptcy or the date of the sequestration of his estate,” Teaching and Higher Education Act 1998, c. 30, § 22(3)(e), and “with respect to the effect of bankruptcy upon a borrower's liability to make repayments in respect of such a loan (whether the repayments relate to sums which the borrower receives, or is entitled to receive, before or after the commencement of the bankruptcy),” Higher Education Act 2004, c. 8, § 42.

Even in cases of defaulted payments, the SLC rarely litigates defaulted loan payments.⁶²

The Higher Education (Basic Amount) Regulations 2010 increased the maximum tuition to £9000 per year.⁶³ Before the passage of the 2010 regulations, students in the UK protested the tuition maximum raise, marching in multiple cities across the country.⁶⁴ Though higher, the new tuition fees remained variable, were still based on the income of the student's family, and were still able to be deferred until after graduation.⁶⁵ The new legislation did nothing to alter the automatic availability of loans through the SLC, which does not require payment until the student makes above £25,000 per year.⁶⁶

IV. APPLICATIONS OF *HURLEY AND MOORE V. SECRETARY IN THE UNITED KINGDOM*

The *Hurley and Moore* decision demonstrates that monetary barriers to higher education can be found to infringe upon the right to education in the absence of easily available loans.⁶⁷ While the ruling in this individual case was not favorable to the students, the holding opens an avenue for students to challenge tuition fees that are prohibitively high and are implemented without the assurance of loans.⁶⁸ The court did not specify a numerical breaking point, but suggested that difficulty to pay could frustrate a citizen's right to education and recognized the societal importance of preventing a monetary deterrent to higher education, especially if such a policy resulted in discriminatory effects for minority

62. Extensive research yielded no record of the Student Loan Company litigating to collect on a defaulted loan. See also Julie Henry, *Thousands of EU Students Fail to Repay Loans*, TELEGRAPH (Jan. 21, 2012), www.telegraph.co.uk/education/universityeducation/9030043/Thousands-of-EU-students-fail-to-repay-loans.html.

63. Higher Education (Basic Amount) (England) Regulations 2010, S.I. 2010/3021 (U.K.).

64. See Paul Lewis, *Student Protest over Fees Turns Violent*, GUARDIAN (Nov. 10, 2010), <http://www.guardian.co.uk/education/2010/nov/10/student-protest-fees-violent>; Sean Coughlan, *Student Tuition Fee Protest Ends with 153 Arrests*, BBC (Dec. 1, 2010), <http://www.bbc.co.uk/news/education-11877034>. The protests received significant media attention.

65. Higher Education (Basic Amount) (England) Regulations 2010, S.I. 2010/3021.

66. *Id.*

67. The plaintiffs' lawyer acknowledged that while they lost the case, the court's recognition that higher fees could impede the right to education was a long-term win for underprivileged students. *Tuition Fees Case: Callum Hurley and Katy Moore Lose*, BBC (Feb. 17, 2012), <http://www.bbc.co.uk/news/education-17069298>.

68. "It is impossible to deny the growing influence of economic, social and cultural rights within UK public law." Colin Murray, *Why Judicial Review Didn't Overturn Tuition Fees*, GUARDIAN (Feb. 20, 2012), www.theguardian.com/law/2012/feb/20/why-judicial-review-didnt-overturn-tuition-fees.

and disabled students.⁶⁹ Without automatic and easy access to student loans that are not overly burdensome, the new tuition fees would likely have been found to be prohibitively high for low-income applicants and therefore discriminatory against disadvantaged students.⁷⁰ This ruling forces British lawmakers subject to the Public Sector Equality Duties to consider possible *de facto* discrimination against ethnic minorities through the use of monetary fees.⁷¹ Future tuition fee increases may be blocked by the court if Parliament restricts or complicates the SLC loans that assist low-income or underprivileged students in accessing higher education.⁷²

Though student loans have been consistently available in the past, the SLC has recently run into problems in providing students with loans in an effective, timely manner.⁷³ In 2009, the SLC was late in granting a substantial number of loans, and universities were forced to bail out

69. As explained by the plaintiff,

[S]tudents from lower socio-economic classes are more debt averse than the more privileged students and therefore will be more likely to be deterred from going to University if this involves taking out loans. This is a *de facto* barrier excluding from higher education many who would choose to take advantage of it were it free or at least substantially cheaper than it is.

R. (on the application of Hurley & Moore) v. Secretary of State for Business, Innovation & Skills, [2012] EWHC (Admin) 201 [35] (Eng.).

70. The court stated,

There can be no doubt that a steep increase in fees alone would discourage many from going to university and would in particular be likely to have a disproportionate impact on the poorer sections of the community. However, the availability of loans mitigates that effect. Further, given the existence of the various measures which are directed specifically at increasing university access to poorer students, I do not think that at this stage it is sufficiently clear that as a group they will be disadvantaged under the new scheme.

Id. at [51]–[52].

71. As Lord Justice Elias said,

In so far as the EIA purported to focus on the full package of reforms then under consideration and not merely the decision to increase fees, I cannot be sure that this has been done. I cannot discount the possibility that a more precise focus on the specific statutory duties might have led to the conclusion that some other requirements were potentially engaged and merited consideration. I recognise that it was envisaged that there would be a further assessment, but it was never explained, if it be the case, that certain matters were not thought relevant for the initial so-called interim assessment on the grounds that they would be addressed in a later one.

Id. at [96].

72. The court emphasized the importance of access to loans as easing the burden on low-income students by qualifying all statements about fees as being appropriate only with the availability of loans. “[I]t is fanciful to contend that the essence of the right itself is impaired in circumstances where anyone with the appropriate qualifications can attend university *if he or she is willing to take out the Government loan.*” *Id.* at [34] (emphasis added).

73. “The SLC said that as of October 8, 83,000 applications were still in processing. A further 33,000 applications were deemed incomplete—including those where documentation was missing possibly mislaid.” Hannah Richardson, *Student Loan Firm Explains Delays*, BBC (Oct. 12 2009), http://news.bbc.co.uk/2/hi/uk_news/education/8303294.stm.

students unable to make the payments.⁷⁴ A delay or cancellation of loans, if not effectively insured by universities, would significantly change the ability of low-income students to attend university in a given year.⁷⁵ As the court stressed the importance of loans in its decision, it is unlikely that tuition fee raises will be upheld if the loan system suffers repeated failures.

V. THE UNITED STATES' DUTY TO UPHOLD THE TERMS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

While the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, as a signatory, it has a duty to work toward the goals of the treaty and to not engage in policies that would defeat its purpose.⁷⁶ Signing a treaty demonstrates that the country agrees, in good faith, to avoid action that would frustrate the goals of the treaty, even before it formally ratifies the terms.⁷⁷ Thus, the United States has a

74. *Students Still Await Loan Money*, BBC (Nov. 10, 2009), http://news.bbc.co.uk/2/hi/uk_news/education/8352544.stm; *Universities 'Bail Out Students'*, BBC (Nov. 18, 2009), http://news.bbc.co.uk/2/hi/uk_news/education/8364790.stm.

75. "Tens of thousands of students—and particularly those that are disabled—are facing hardship or having to drop out of university because they cannot afford to keep themselves." *'Fiasco' of Student Loan Failures*, BBC (Dec. 9, 2009), http://news.bbc.co.uk/2/hi/uk_news/education/8401730.stm.

76. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States is one of seven countries that have signed the ICESCR but not ratified it, including Belize, Comoros, Cuba, Palau, São Tomé and Príncipe, and South Africa. *See* U.N. Secretary-General, *supra* note 46, ch. IV. There is a strong argument that the United States should ratify the ICESCR:

[I]f the United States is to move toward ratification of any human rights treaty, it ought to be the ICESCR. Even though the United States has historically been reluctant to fully commit to international human rights instruments, ICESCR ought to be palatable, and thus potentially effective, in light of its system of 'progressive realization' of the treaty's ultimate goals of equality for all. . . . There is no good reason for the United States to abstain from ratifying the ICESCR, while there are many good reasons supporting ratification and enactment of implementing legislation. If the United States ratifies no other human rights treaty this century, it ought to ratify the ICESCR.

Ann Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 233 (2010).

77. VCLT, *supra* note 76.

Article 18: Obligation not to defeat the object and purpose of a treaty prior to its entry into force. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a. It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or b. It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Id. art. 18. President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights for the United States on Oct. 5, 1977. U.N. Secretary-General, *supra* note 46, ch. IV.

duty to enact policies that do not frustrate the provisions of the International Covenant on Economic, Social and Cultural Rights, including the goal that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”⁷⁸ The United States, a country with one of the most advanced economic and political systems in the world, should be at the forefront of ensuring human rights and providing free higher education to citizens.⁷⁹ With the highest gross domestic product and arguably the most resources, the United States clearly qualifies under the terms “on the basis of capacity” to provide for free university enrollment.⁸⁰ Refusing to do so frustrates the goals of the Covenant and fails to provide developing countries with an example for establishing a system of free education.⁸¹

78. ICESCR, *supra* note 2, art. 13(c).

79. As Prof. Ann Piccard says,

In 1977, President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the intervening years, now well over a generation later, no discernable progress has been made toward ratification. The United States currently stands among dubious company in its failure to move forward with this fundamental human rights instrument.

Piccard, *supra* note 76, at 232.

80. *World Economic Outlook Database: October 2012 Edition*, INT’L MONETARY FUND, <https://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx> (last visited Oct. 23, 2012).

81. Systems to finance higher education in most developed nations are similar to the United Kingdom, rather than the free-market approach found in the United States. The average cost of higher education is lower in most developed countries than in the United States. ALEX USHER & JON MEDOW, HIGHER EDUCATION STRATEGY ASSOCIATES, GLOBAL HIGHER EDUCATION RANKINGS 2010: AFFORDABILITY AND ACCESSIBILITY IN COMPARATIVE PERSPECTIVE 12 (2010), available at http://www.ireg-observatory.org/pdf/HESA_Global_Higher_EducationRankings2010.pdf. “[T]he cheapest educational costs are in those countries where tuition fees do not exist or exist only in patches: Sweden, Norway, Germany, and Denmark.” *Id.* In Australia, the average cost of higher education is \$7692, and the Commonwealth Grant Scheme government program funds education for many students through graduate school. Students who do not receive a Commonwealth-funded position may still attend university and graduate school with the assistance of Higher Education Loan Programme (HELP) loans, which allow a student to defer payment until they make a salary above \$49,096. See *HELP Repayment Thresholds and Rates*, AUSTRALIAN TAXATION OFFICE, <http://www.ato.gov.au/Rates/HELP-repayment-thresholds-and-rates/>, (last visited Jan. 12, 2013). In Quebec, students protested when government officials refused to agree to tuition-freeze legislation, which averages \$5974 in Canada. *Quebec Student Protests: Tuition Talks Fall Apart*, BBC (June 1, 2012), <http://www.bbc.co.uk/news/world-us-canada-18304584>. In no other country where students take out loans to fund their education do loans last for over twenty years, and government prosecution to collect on defaulted student debt is essentially unheard of in most countries with loans.

VI. SIGNIFICANCE OF *HURLEY AND MOORE V. SECRETARY* IN THE UNITED STATES AND FUTURE COMPLIANCE UNDER INTERNATIONAL STANDARDS FOR EDUCATION

In the United States, university tuition fees are much higher and student loans are much harder to repay than in the United Kingdom.⁸² The average public university in the United States costs \$21,447 compared to £9000 in the United Kingdom, which is equivalent to \$14,560 in US dollars.⁸³ Only 52% of all public university students received scholarships or grants in 2011.⁸⁴ The amount of student debt held by Americans is staggering; aggregate student loans in the United States surpassed the amount of credit card debt held by Americans in 2011.⁸⁵ As the United States does not offer full automatic loans through a non-departmental government body like the

82. Education funding legislation is thin in the United States compared to the United Kingdom. However, the Second Circuit Court of Appeals established a test for the discharge of student loans in the 1987 case *Brunner v. New York*. The court recognized that “there is very little appellate authority on the definition of ‘undue hardship’ in the context of [student loan repayment].” *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). The district court had

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

Id. at 396. The Court of Appeals for the Second Circuit found there was “clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt” and ruled that “requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is ‘undue.’” *Id.* Extensive research yielded no record of a student suing the United States government for prohibitively high tuition fees at public universities.

83. Dollar amount calculated as of October 18, 2013. Kim Clark, *College Costs Climb Yet Again*, CNN MONEY (Oct. 29, 2011), http://money.cnn.com/2011/10/26/pf/college/college_tuition_cost/index.htm. See also Jessica Shepherd & Jeevan Vasagar, *Tuition Fees Reach £8,678.36 Average Among Universities Posting Price Lists*, GUARDIAN (Apr. 18, 2011), <http://www.theguardian.com/education/2011/apr/18/tuition-fees-universities-maximum-charge>. The cost of college in the United States has increased by about 1120% since 1978. See Ilan Kolet, *College Tuition's 1,120 Percent Increase*, BUS. WK. (Aug. 23, 2012), <http://www.businessweek.com/articles/2012-08-23/college-tuitions-1-120-percent-increase>.

84. Clark, *supra* note 83.

85. Dennis Cauchon, *Student Loans Outstanding Will Exceed \$1 Trillion This Year*, USA TODAY (Oct. 25, 2011), <http://usatoday30.usatoday.com/money/perfi/college/story/2011-10-19/student-loan-debt/50818676/1>. Sixty-six percent of four-year undergraduate students graduated with some debt in 2008, and the average cumulative debt incurred was \$27,803. CHRISTINA CHANG WEI ET AL., NAT'L CTR. FOR EDUCATION STATISTICS, 2007-2008 NATIONAL POSTSECONDARY STUDENT AID STUDY (2009). Student debt has only continued to increase in recent years and may be underreported because not all student loans can be delinquent and therefore are not always included in calculations. See Karen Weise, *Student Loan Delinquencies Are Worse Than You Think*, BUS. WK. (Mar. 7, 2012), <http://www.businessweek.com/articles/2012-03-07/student-loan-delinquencies-are-worse-than-you-think>.

SLC, students are forced to navigate payment options through federal loans to students, federal loans to parents, private loans, or a combination of these methods.⁸⁶ The loans are generally not deferrable due to low income or financial difficulty, as they are in the United Kingdom, are not automatically eliminated after a period of time or through claiming bankruptcy.⁸⁷ Very few provisions exist to allow students to escape the repayment of loans, and the requirements are quite burdensome, such as demonstrating that an individual is severely disabled and therefore unable to work.⁸⁸ Students from low-income backgrounds are more likely to have

86. Students can apply for loans through private lenders or through the government Free Application for Federal Student Aid (FAFSA) and receive aid in the form of Federal Pell Grants, work study programs, subsidized Stafford Loans, unsubsidized Stafford Loans, Perkins Loans, PLUS loans, and other grants. These federal loans are capped, and students can elect to use private student loans in lieu of subsidized or unsubsidized Stafford loans, which were funded by private lenders until 2010. CONSUMER FINANCIAL PROTECTION BUREAU & U.S. DEP'T OF EDUC., PRIVATE STUDENT LOANS: REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, THE HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES, AND THE HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE (2012), available at http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.

87. Some federal loans (direct and Perkins loans) may be deferred for up to three years, but most loans (including Stafford loans) have a maximum deferral of nine months. If a student has defaulted on a payment, deferral is not granted. Federal Student Aid Office, *Deferment and Forbearance*, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/deferment-forbearance> (last visited Jan. 8, 2013). See also Editorial, *Relief for Student Debtors*, N.Y. TIMES (Aug. 26, 2011), <http://www.nytimes.com/2011/08/27/opinion/relief-for-student-debtors.html>. “[M]ore than half of student loans are in ‘deferment,’ where the borrower can temporarily delay making payments. . . . Since 2007, delinquencies on the federal loans—which make up the vast majority of student debt—have jumped 27 percent,” Scott Cohn, *Study: Student Loan Balances Are Up, and So Are Delinquencies*, CNBC (Jan. 30, 2013), http://www.cnb.com/id/100417992/Study_Student_Loan_Balances_Are_Up_and_So_Are_Delinquencies. Students who do not receive enough federal aid must supplement with private loans. However, private loans often have higher interest rates, no deferral period, and put students in greater risk of defaulting. “Many of the [private] loans had lax underwriting standards. Minimum credit score requirements were lowered to sell more loans. Often loans were marketed directly to students, bypassing financial aid officers who advise students when they make such decisions.” Elizabeth Dvoskin & Karen Weise, *The Government Takes Aim at Risky Student Loans*, BUS. WK. (July 20, 2012), <http://www.businessweek.com/articles/2012-07-20/the-government-takes-aim-at-risky-student-loan>. Student debt has increased in recent years as overall debt has decreased, even during the recent recession.

Rising student debt burdens can also be evaluated in light of the other debts owed by households, such as property-related debt, credit card debt and all installment debt. Student debt is a growing share, rising from 3% of outstanding total debt owed by households in 2007 to 5% of all debts in 2010. This reflects growing outstanding student debt and the fact that households have reduced their other debts.

Richard Fry, *A Record One-in-Five Households Now Owe Student Loan Debt: Burden Greatest on Young, Poor*, PEW RES. CTR. (Sept. 26, 2012), <http://www.pewsocialtrends.org/2012/09/26/a-record-one-in-five-households-now-owe-student-loan-debt/>.

88. See *Brunner v. New York State Higher Educ. Svcs. Corp.*, 831 F. 2d 395 (2d Cir. 1987). Students are reminded on the federal student aid website, “You must repay a student loan even if your financial circumstances become difficult. Your student loans cannot be canceled because you didn’t

higher amounts of debt and face a larger financial burden in paying off those debts.⁸⁹ The American university funding system thus reduces social mobility for students from disadvantaged backgrounds.⁹⁰

Based on the reasoning of *Hurley and Moore v. Secretary*, the system of tuition payments for public universities in the United States infringes upon the right to education as outlined in the International Covenant on Economic, Social and Cultural Rights. Public universities in the United States are both more expensive and provide less availability of student loans than those in the United Kingdom. The structure of student loans does not provide the safety net that prevents low-income students from being deterred from attending universities.⁹¹ The result is a life of economic hardship, with no chance of relief through loan forgiveness or a bankruptcy claim.⁹² Additionally, unlike in the United Kingdom, the

get the education or job you expected, or because you didn't complete your education." Federal Student Aid Office, *Repay Your Loans*, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/repay-loans> (last visited Jan. 8, 2013). Additionally, "[f]ederal bankruptcy law requires those who wish to erase that debt to prove that repaying it will cause an 'undue hardship.' And one component of that test is often convincing a federal judge that there is a 'certainty of hopelessness' to their financial lives for much of the repayment period." Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html>.

89. "The distribution of debt levels by family income level is of great importance because students from low-income backgrounds are likely to face greater financial difficulties than more affluent students with similar debt levels and educational attainment." SANDY BAUM & PATRICIA STEELE, COLLEGE BOARD ADVOCACY & POLICY CENTER, WHO BORROWS MOST? BACHELOR'S DEGREE RECIPIENTS WITH HIGH LEVELS OF STUDENT DEBT: TRENDS IN HIGHER EDUCATION SERIES 4 (2010), available at <http://advocacy.collegeboard.org/sites/default/files/Trends-Who-Borrows-Most-Brief.pdf>. Additionally, parents are contributing less to tuition payments. "Two years ago parents paid for 47 percent of college costs from income, savings, and borrowing; their share [in 2012 was] down to 37 percent" transferring even more debt to the students themselves. Karen Weise, *College Students Are Bearing More of the Tuition Burden*, BUS. WK. (July 17, 2012), <http://www.businessweek.com/articles/2012-07-17/college-students-are-bearing-more-of-the-tuition-burden>.

90. "While many students are trying to defray some of the costs, few can actually work their way through college in a normal amount of time without debt and little or no need-based financial aid unless they have an unusual combination of bravery, luck and discipline." Ron Lieber, *Battling College Costs, a Paycheck at a Time*, N.Y. TIMES, Feb. 10, 2013, at BU1.

91. "While a college degree remains the likeliest route to employment and good wages . . . at a time of rising tuition and low employment rates for young people, fear of debt might stop some students from getting the education they needed." Tamar Levin, *Student-Loan Borrowers Average \$26,500 in Debt*, N.Y. TIMES (Oct. 18, 2012), <http://www.nytimes.com/2012/10/18/education/report-says-average-student-loan-debt-is-up-to-26500.html>. Low-income students are less likely to go to school for fear of being burdened with debt for a lifetime, and only 21% of Americans ages 18-34 think that students generally graduate with a manageable amount of student loan debt. INST. FOR COLLEGE ACCESS & SUCCESS, YOUNG ADULTS SAY HIGHER EDUCATION IS MORE IMPORTANT BUT LESS AFFORDABLE: COMES WITH TOO MUCH DEBT, AND SHOULD BE A PRIORITY FOR CONGRESS AND THE ECONOMY (2011), available at http://www.ticas.org/pub_view.php?id=793.

92. Tyler Kingkade, *Private Student Loan Bankruptcy Rule Traps Graduates with Debt Amid Calls for Reform*, HUFFINGTON POST (Aug. 16, 2012), http://www.huffingtonpost.com/2012/08/14/private-student-loans-bankruptcy-law_n_1753462.html.

United States Department of Justice often litigates defaulted loan payments.⁹³ By not changing the system of public university funding, the United States is frustrating the goals of the International Covenant on Economic, Social and Cultural Rights.

Barriers to higher education in the United States could have a significant national and international effect.⁹⁴ As public university tuition rates and student loans continue to increase in the United States, the government has a duty to halt the trend and either mandate maximum tuition limits for public universities or provide funding for automatically accessible and deferrable student loans.

Although the policies of student loan acquisition and debt repayment are not racially discriminatory on their face, the effect of high university tuition payments in the United States has a greater adverse effect on minorities.⁹⁵ Student debt is more likely to be significantly burdensome on

93. Andrew Martin, *Debt Collectors Cashing In on Student Loans*, N.Y. TIMES (Sept. 8, 2012), <http://www.nytimes.com/2012/09/09/business/once-a-student-now-dogged-by-collection-agencies.html>. In addition, private universities have begun suing students for delinquent loan payments more aggressively.

Yale, Penn and George Washington University have all sued former students over nonpayment, court records show. While no one tracks the number of lawsuits, students defaulted on \$964 million in Perkins loans in the year ended June 2011, 20 percent more than five years earlier, government data show. Unlike most student loans—distributed and collected by the federal government—Perkins loans are administered by colleges, which use repayment money to lend to other poor students.

Janet Lorin, *Yale Suing Former Students Shows Crisis in Loans to Poor*, BLOOMBERG (Feb. 4, 2013), <http://www.bloomberg.com/news/2013-02-05/yale-suing-former-students-shows-crisis-in-loans-to-poor.html>.

94. The United States educates a significant number of international students, and educated Americans have a significant effect on international affairs.

Fewer people may pursue higher education should the returns fall and the required debt burdens continue to rise. The implications for the macroeconomy of a decline in higher education enrollment are twofold. In the short run, weaker demand for educational services would be a drag on consumption, at a time when the economy continues to suffer from a shortfall in aggregate demand. Longer term, a less educated workforce would necessarily be less productive, putting the U.S. at a disadvantage relative to other countries.

Cristian DeRitis, *Student Lending's Failing Grade*, Moody's Analytics Regional Financial Review, July 2011, at 54, 59, available at <http://image.exct.net/lib/fefb127575640d/m/2/Student+Lendings+Failing+Grade.pdf>. See also Bob Willis, *Student Debt Is Stifling Home Sales*, BUS. WK. (Feb. 23, 2012), <http://www.businessweek.com/articles/2012-02-23/student-debt-is-stifling-home-sales>.

95. Student debt is especially debilitating for minority students in the United States, even controlling for family income.

High debt levels are more prevalent among black bachelor's degree recipients than among those from other racial/ethnic groups, and these differences are not entirely explained by differences in family income levels. Twenty-seven percent of 2007-08 black bachelor's degree recipients borrowed \$30,500 or more, compared to 16% of whites, 14% of Hispanics/Latinos, and 9% of Asians.

BAUM & STEELE, *supra* note 89, at 6. Additionally, Black and Latino students are more likely have difficulty emerging from student debt. "Although education is widely viewed as a way up and a way

minorities, as a higher percentage of minorities are either underemployed or unemployed.⁹⁶ Thus, the right to education is disproportionately infringed upon for minorities with the current structure of student loans. While the United States does not have an equivalent statute to the United Kingdom's Public Sector Equality Duties, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.⁹⁷ As all public universities receive federal funding, a funding policy so harsh as to deter minority students from attending universities could be found to be discriminatory in its effect.

To comply with the standards set by the treaty and ensure the right to education for its citizens, the United States federal government should pass legislation establishing maximum tuition rates for public universities. Under the Fourteenth Amendment, no state can infringe upon the individual rights of citizens.⁹⁸ Thus, as prohibitively high tuition rates can

out for poor, working-and middle-class students, the prohibitive cost of college tuition has created a virtual debtors' prison for many." David A. Love, *Blacks and Latinos Will Suffer When the Student Debt Bubble Bursts*, HUFFINGTON POST (Aug. 29, 2011), http://www.huffingtonpost.com/david-a-love/student-debt-recession_b_933569.html.

96. "More black students have student loans and have higher unemployment rates, so the debt level is more consequential," said political economist Dr. Jessica Gordon Nembhard." Dara Sharif, *Student Lending: Wall Street's Next Bubble?*, ROOT (Aug. 17, 2011), http://www.theroot.com/articles/culture/2011/08/studentloan_crisis_coming_it_could_affect_minorities_most.2.html. "The odds of paying off college debt are much tougher for minority graduates, particularly black men, who face far higher unemployment than their White counterparts[.]" Mariko Chang, *College Debt Threatens the Hopes and Dreams of Minority Students*, HILL CONGRESS BLOG (Nov. 23, 2011), <http://thehill.com/blogs/congress-blog/education/195305-college-debt-threatens-the-hopes-and-dreams-of-minority-students>. Additionally, Black and Latino students have previously been more likely to default on loan payments, even when data is controlled for income.

Black students who graduated in 1992–93 school year had an overall default rate that was over five times higher than white students and over nine times higher than Asian students.

The differences for Hispanic students are not as large, but are still substantial. Hispanic students' overall default rate was over twice that of white students and four times higher than Asian students. And these differences cannot be fully explained by differences in borrowing patterns or salaries.

Erin Dillon, *Hidden Details: A Closer Look at Student Loan Default Rates*, EDUC. SECTOR (Oct. 22, 2007), <http://www.educationsector.org/publications/hidden-details-closer-look-student-loan-default-rates>.

97. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (2012). While not all schools receive federal funding for programming affecting undergraduates, the student loans are processed through the college to pay for the students' tuition and could therefore open up Title VI liability for the purpose of student loan repayment.

98. The Fourteenth Amendment reads,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

infringe upon the right to education, the federal government must restrict the states' inflation of costs for public higher education.⁹⁹

If the federal government cannot halt the rising tuition costs of public universities, it must at minimum establish a non-departmental government agency to offer student loans to students, and pass legislation to allow forgiveness of student debt for individuals making less than a set minimum salary. It is essential for loans to be offered by a public entity to keep the interest rates low and deter risk competition by lenders, as private loan companies have substantially higher interest rates than public loans.¹⁰⁰ Additionally, some private lenders have been found to be corrupt in their lending practices and have caused further harm to students who have few resources to challenge these companies.¹⁰¹ With income-dependent payment, students would not be deterred from attending university and would be able to base their financial decisions on their ability to pay, giving them more flexibility and spending power, thus boosting the American and global economy.

President Barack Obama has moved the United States marginally closer to complying with the International Covenant on Economic, Social and Cultural Rights, but the country's system of financing higher education is still far from the goals of the treaty. In 2011, Congress passed legislation that allows students to consolidate their federal loans and reduces the amount that students are required to pay on federal loans based on their discretionary income with the Pay-As-You-Earn program.¹⁰² As

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

99. "While about two-thirds of full-time students receive grants or federal tax breaks, many are likely to have to foot more of the bill themselves this year. The College Board's economists estimate that financial aid budgets stayed flat, leaving students less money to cover rising college costs." Kim Clark, *Tuition at Public Colleges Rises 4.8%*, CNN MONEY (Oct. 24, 2012), <http://money.cnn.com/2012/10/24/pf/college/public-college-tuition/index.html>. In addition, higher dorm, cafeteria, books and other expenses added significantly to the overall increase. *Id.*

100. Catherine Rampell, *Report Details Woes of Student Loan Debt*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/20/business/government-report-details-student-loan-debt.html>.

101. *Cuomo: School Loan Corruption Widespread*, USA TODAY (Apr. 10, 2007), http://usatoday30.usatoday.com/money/industries/banking/2007-04-10-cuomo-student-loan-probe_N.htm. See also CONSUMER FINANCIAL PROTECTION BUREAU & U.S. DEP'T OF EDUC., *supra* note 86.

102. Press Release, White House Office of the Press Secretary, Fact Sheet: "Help Americans Manage Student Loan Debt" (Oct. 25, 2011) (on file with author), *available at* <http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt>. The Pay-As-You-Earn plan caps eligible student loan borrowers' loan payments at 10% of their discretionary income, and their remaining loan balance can be forgiven after 20 years of payments. Federal Student Aid Office, *Pay As You Earn Plan*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/repay-loans/understand/plans/pay-as-you-earn> (last visited Dec. 30, 2013).

expanded with an executive order by President Obama in 2014, this legislation also provides for federal student loan forgiveness after 20 years and can cap payment at 10% of earning.¹⁰³ Unfortunately, if the student defaults on a payment, the more flexible payment options are no longer available.¹⁰⁴ While these initiatives make student loans easier to pay off,¹⁰⁵ they still do not ensure access to education for all citizens in the manner that the United Kingdom's loan system does.

President Obama signed the Bipartisan Student Loan Certainty Act of 2013, which tied student loan interest rates to a fixed market-based rate, remedying the previous doubling of the rates during the summer of 2013.¹⁰⁶ This legislation does not provide a long-term solution, but merely reduces the amount of interest current students will pay on their direct loans, without addressing the larger issues of rising tuition and the high interest rates future students will face when the market rates increase. In November 2013, the Education Department introduced new rules regarding options for students with defaulted federal loan payments to "rehabilitate" their loans.¹⁰⁷ Starting in July 2014, "rehabilitation" payments will be capped at 15 percent of the borrowing student's discretionary income.¹⁰⁸ While these new rules will undoubtedly help students seeking rehabilitation of their loans, they do not apply to debtors who have not defaulted on loans but who nevertheless struggle to make ends meet.

Recent attempts to bring the United States closer to compliance with the International Covenant on Economic, Social and Cultural Rights have

103. "Among Obama's orders is a provision to expand the Pay-As-You-Earn (PAYE) repayment program, which caps payments at 10% of a borrower's income and extends the repayment period to 20 years, to as many as 5 million borrowers." Maggie McGrath, *How Obama's Executive Order Helps Student Borrowers—And Where It Falls Short*, FORBES (June 9, 2014, 6:06 PM), www.forbes.com/sites/maggiemcgrath/2014/06/09/how-obamas-executive-order-helps-student-borrowers-and-where-it-falls-short/.

104. Press Release, *supra* note 102.

105. "Today, at least 450,000 people participate in the federal income-based repayment program that started about two years ago, though there are probably many more borrowers who are eligible but don't know about it or haven't figured out how to sign up." Ron Lieber, *Clearing Up Some Confusion About the New Federal Student Loan Rules*, N.Y. TIMES (Oct. 26, 2011), http://www.nytimes.com/2011/10/27/your-money/student-loans/explaining-new-federal-student-loan-rules.html?_r=0.

106. Equal Justice Works, *Student Loan Act Could Mean Higher Federal Profits*, U.S. NEWS & WORLD REP. (Aug. 14, 2013), <http://www.usnews.com/education/blogs/student-loan-ranger/2013/08/14/student-loan-act-could-mean-higher-federal-profits>.

107. Federal Student Aid Office, *Debt Resolution*, MYEDDEBT, <https://www.myeddebt.com/> (last visited Nov. 8 2013).

108. "Discretionary" income is defined as any income that exceeds 150% of the federal poverty level for the student's current family size. Ann Carns, *New Student Loan Rules Add Protections for Borrowers*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/your-money/new-student-loan-rules-add-protections-for-borrowers.html>.

fallen short due to political opposition. Senator Elizabeth Warren introduced the “Bank on Students Emergency Loan Refinancing Act” to ameliorate the issue of outstanding student debt.¹⁰⁹ This act would have allowed debtors with loans taken before 2010 to refinance their federal and private loans at 3.86%.¹¹⁰ However, the bill was voted down in June, 2014.¹¹¹

Without drastic and timely congressional action, the grave economic burden of student debt in the United States will only worsen. Congress must adjust student loan policies to comply with the International Covenant on Economic, Social and Cultural Rights and provide an example of modern education finance for the world.

*Emma Melton**

109. S. 2432, 113th Cong. (2014).

110. *Id.* (making the refinanced loan interest rate “a rate equal to the rate for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans issued to undergraduate students for the 12-month period beginning on July 1, 2013, and ending on June 30, 2014”); *see also* Federal Student Aid Office, *Interest Rates and Fees*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/types/loans/interest-rates> (last visited June 15, 2014).

111. 160 CONG. REC. S3557 (daily ed. June 11, 2014). *See also* Erica Werner, *Senate Republicans Block Warren’s Student Loan Bill*, BOSTON GLOBE (June 11, 2014), <http://www.bostonglobe.com/news/politics/2014/06/11/senate-republicans-block-warren-student-loan-bill/4MAViNcoF5L5lcp8HG0GCM/story.html>.

* J.D. (2014), Washington University in St. Louis School of Law; M. Ed. (2011), University of Massachusetts, Boston; B.A. (2009), Harvard University.