



Spring 3-1-2009

Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry

Katherine Houren

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Katherine Houren, *Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry*, 15 Wash. & Lee J. Civ. Rts. & Soc. Just. 561 (2009).

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Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry

Katherine Houren*

Table of Contents

I. Introduction	562
II. Portrait of the Payday Loan Industry	564
A. Industry History.....	564
B. Payday Loans Explained	565
C. Efficacy of Payday Loans as a Source of Short-Term Financing	566
III. Why Undocumented Immigrants Make Good Payday Loan Customers.....	570
A. The Typical Payday Loan Customer	570
B. Banking Habits of Undocumented Immigrants	571
IV. Legislation and Regulation Governing Payday Lending.....	574
A. Existing Federal Legislation.....	575
B. State Regulation: Bold, Yet Ineffective.....	576
V. Proposed Solutions.....	579
A. Should Federal Legislation Ban Payday Lending?	580
B. Pending Federal Legislation	581
C. Solutions that Protect the Undocumented.....	582
VI. Conclusion.....	585

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I. Introduction

Between 2006 and 2007, major news outlets devoted marquee coverage to the low-income financial crisis of the day: payday loans.¹ The media convened experts on payday lending who cautioned against the industry's usurious fees and the cyclical refinancing trap into which cash-strapped borrowers often fell.² Momentum began to build to create a federal solution to a problem that had long eluded effective state regulation.

At the same time, major banks began to publicize their efforts to make mainstream consumer banking services, like checking accounts and credit cards, generally available to the undocumented immigrant population.³ New legislation included in the USA Patriot Act of 2001⁴ allowed banks, for the first time, to legally

1. See generally *A Call for Payday Lending Reform*, NPR, NEWS & NOTES, Apr. 27, 2007, <http://www.npr.org/templates/story/story.php?storyId=9875136> (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Minding Your Money: Payday Lending*, NPR, NEWS & NOTES, Apr. 27, 2007, <http://www.npr.org/templates/story/story.php?storyId=9875133> (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *A Day at the Payday Loan Center*, NPR, NEWS & NOTES, Apr. 27, 2007, <http://www.npr.org/templates/story/story.php?storyId=9875139> (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Payday Loans Plague New Mexico's Working Poor*, NPR, MORNING EDITION, Feb. 5, 2007, http://www.npr.org/search.php?sort=DREDATE:numberdecreasing &start=40&topicId=0&prgId=0&how_long_ago=0&matchany=false&aggId=0&stopwords=false&soundex=false&text=payday%20loan (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Erik Eckholm, *Seductively Easy, Payday Loans Often Snowball*, N.Y. TIMES, Dec. 23 2006, at A1, available at <http://www.nytimes.com/2006/12/23/us/23payday.html?scp=5&sq=payday%20loans&st=cse>.

2. See, e.g., Eckholm, *supra* note 1 (noting that "[o]ver several months, [borrowers] can easily spend far more on fees than they ever received in cash and may end up by borrowing from multiple sites to pay off others" if they refinance frequently); see also Madeline Brand, *"Shortchanged": Preying on Low-Income Americans*, NPR, DAY TO DAY, Apr. 27, 2007, <http://www.npr.org/templates/story/story.php?storyId=4930888> (last visited on Apr. 17, 2009) (quoting Howard Karger quipping that the payday loan industry charges higher rates than the mafia) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. See Scott Horsley, *Bank Defends Credit Cards for Illegal Immigrants*, NPR, ALL THINGS CONSIDERED, Feb. 13, 2007, <http://www.npr.org/templates/story/story.php?storyId=7388709> (last visited on Apr. 17, 2009) (same) (describing a Bank of America pilot credit card program for undocumented immigrants that requires immigrant customers to open a checking account with Bank of America) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Miriam Jordan & Bob Justich, *Should U.S. Businesses Market to Illegal Immigrants?*, NPR, TALK OF THE NATION, Feb. 13, 2007, <http://www.npr.org/templates/story/story.php?storyId=7385444> (same) (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter

open accounts for and lend to undocumented immigrants, provided the immigrant could present a valid individual taxpayer identification number (ITIN) and a second piece of foreign-source identification.⁵

With access to mainstream banking products, banked undocumented immigrants are at risk for abuse by the payday loan industry. Lack of experience with checking and savings accounts, difficult economic conditions, and an inability to use the existing law to protect against abusive lending practices make the undocumented immigrant population a prime target for payday lenders. Existing federal and state legislation has, so far, done little to protect citizens from abusive payday lending practices, and state efforts at industry reform do not include special protection for the undocumented community.⁶ The recession provides an environment in which payday lending can thrive.⁷ But for the first time, lawmakers have begun to debate two recently proposed federal bills that purport to curb abusive lending by the payday loan industry.⁸ The first would ban payday lending, while the

USA Patriot Act] (expanding bank "Customer Identification Program" requirements to allow ITINs plus another foreign source piece of identification to furnish adequate documentation for the bank to have a reasonable idea of who it is lending to).

5. See Customer Identification Programs for Banks, Savings Associations, Credit Unions, & Certain Non-Federally Regulated Banks, 31 U.S.C.S. § 5318(l) (2001) codified at 31 C.F.R. § 103.121 (describing the types of information that a bank must obtain before opening an account for an undocumented immigrant). The regulations provide that banks:

must implement a written Customer Identification Program (CIP) [that]... include[s] risk-based procedures... [that] enable the bank to form a reasonable belief that it knows the true identity of each customer. At a minimum [that bank must obtain] the following information from the customer prior to opening an account:

- (1) Name;
- (2) Date of birth, for an individual;
- (3) Address,
- (4) Identification number, which shall be:

(ii) For a non-U.S. person, one or more of the following: a taxpayer identification number; passport number and country of issuance; alien identification card number; or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

Id. at §103.121(b)(2)(i)(A).

6. See *infra* Part IV.

7. See NPR Planet Money Blog, *Get \$20,000 Today*, http://www.npr.org/blogs/money/2009/01/quick_cash_in_crisis.html (last visited Apr. 17, 2009) (providing anecdotal evidence that the number of payday loan outlets is increasing during the recession) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

8. See Editorial, *391 Percent Payday Loan*, N.Y. TIMES, Apr. 12, 2009, at A20, available at <http://www.nytimes.com/2009/04/13/opinion/13mon2.html?scp=2&sq=payday>

second would do little to reform the payday loan industry. Better federal regulation would find a compromise between the two proposed bills, and Congress should work toward such a solution.

To illustrate the need to reform in this area, Part II of this Note explains how payday lending works and evaluates the efficacy of the payday loan as a source of short-term credit for low- and moderate-income individuals. Part III compares demographic characteristics of payday loan customers with the characteristics of Hispanic undocumented immigrants to show why the payday loan industry could find the undocumented immigrant population an attractive target consumer base. This Note focuses on Hispanic undocumented immigrants because they are by far the largest nationality represented in the undocumented population.⁹ Part IV discusses federal and state laws that govern the industry, explains why state regulation has been inadequate, and evaluates recent federal legislation purporting to offer reform. Part V proposes basic elements necessary for effective reform and suggests ways to implement those reforms. Lawmakers must not waste the opportunity to curtail abusive lending by the payday loan industry, but given the size of the undocumented population in the United States,¹⁰ it is vitally important that any effort to curb payday lending include protection for undocumented immigrants.

II. Portrait of the Payday Loan Industry

A. Industry History

Until the late nineteenth century, state usury laws prevented lenders from offering short-term consumer loans.¹¹ Around 1900, unlicensed lenders began

%20loans&st=cse (discussing new House bill sponsored by Rep. Luis Gutierrez (D) that would "allow payday operators to charge what amounts to an annual percentage rate of 391 percent"); Bob Driehaus, *Ohio Seeks to End Interest Abuses in Payday Loans*, N.Y. TIMES, Apr. 15, 2009, at A20, available at <http://www.nytimes.com/2009/04/16/us/16ohio.html?scp=3&sq=payday%20loans&st=cse> (describing the failure of "[a]n Ohio law intended to cap interest rates on payday loans at 28 percent [, which] has been thwarted by lenders who have found ways to charge up to 680 percent interest); Eckholm, *supra* note 1 (describing how industry lobbyists killed efforts to regulate payday loans in New Mexico).

9. See PEW HISPANIC CENTER, MEXICAN IMMIGRANTS IN THE UNITED STATES, 2008, at 1 (2009), available at <http://pewhispanic.org/files/factsheets/47.pdf> ("Mexicans now account for 32% of all immigrants living in this country. The second-largest nationality group of immigrants, Filipinos, account for just 5% of all immigrants in the U.S.").

10. See JEFFREY S. PASSEL & D'VERA COHN, REPORT, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (Pew Hispanic Ctr. 2009), available at <http://pewhispanic.org/files/reports/107.pdf> (estimating the undocumented immigrant population to be between 8.3 and 11.9 million).

11. JOHN P. CASKEY, FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND

offering the first payday loans, termed "salary purchase agreements," in which "the lender 'buys' the borrower's wages at a discount in advance of the borrower's payday."¹² Between 1916 and 1935, most states adopted small loan laws that defined salary purchase agreements as small loans, in order to bring these so-called purchase agreements within state usury ceilings.¹³ At the same time, these states provided a higher usury rate ceiling that allowed a legal small loan industry to emerge.¹⁴ Until recently, payday lending remained a relatively small industry.

Evidence suggests that the payday lending explosion of the late 1990s and early 2000s followed the deregulation of the financial service markets in the late 1980s, which allowed mainstream banks to exit the short-term consumer loan market in order to enter the more lucrative large loan market.¹⁵ Payday lenders filled the small, short-term consumer loan gap: between 1990 and 2002 the number of payday advance offices grew from a few hundred to more than 25,000, and the industry "expects to double in size over the next few years."¹⁶

B. Payday Loans Explained

Payday loans are short-term consumer loans.¹⁷ In a typical transaction, the borrower offers the lender a post-dated check, with the understanding that the lender will not attempt to cash the check until the borrower's next payday—typically two weeks from the loan origination date.¹⁸ In return, the lender provides the borrower

THE POOR 31 (Russell Sage Found. 2004) [hereinafter CASKEY, FRINGE BANKING].

12. *Id.* at 32.

13. *See id.* ("The Uniform Small Loan Laws, which many states adopted between 1916 and 1935 . . . defined salary buying as cash lending, thereby subjecting it to small loan regulations.").

14. *Id.*

15. GREGORY ELLIEHAUSEN & EDWARD C. LAWRENCE, PAYDAY ADVANCE CREDIT IN AMERICA: AN ANALYSIS OF CUSTOMER DEMAND 1 (Georgetown Univ. Press 2001) [hereinafter Georgetown Survey], available at <http://www.creditresearch.org/editor/assets/files/Georgetown.pdf> (explaining that operating costs increase less than proportionately with loan size in the consumer finance industry, such that larger loans have lower costs per dollar of credit than smaller loans).

16. HOWARD KARGER, SHORTCHANGED: LIFE AND DEBT IN THE FRINGE ECONOMY 73 (Berrett-Koehler 2005).

17. CASKEY, FRINGE BANKING, *supra* note 11, at 30.

18. NAT'L CONSUMER LAW CTR., PREDATORY SMALL LOANS: A FORM OF LOANSHARKING, http://www.consumerlaw.org/issues/payday_loans/pay_menu.shtml#_ftn2 (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 10 (2002) (explaining that most lenders also require borrowers to present a driver's license, pay stub, bank statement, and telephone bill

with cash in an amount less than the face value of the check.¹⁹ The difference between the face amount of the check and the amount received by the borrower is the loan fee, which ranges from about fifteen to twenty dollars per one hundred dollars borrowed.²⁰ When the check date arrives, the borrower can either (1) repay the principal and take back the original check, (2) allow the payday lender to deposit the check, (3) allow the check to bounce, or (4) pay a fee to refinance the principal until the next pay period, paying the same fifteen to twenty dollar loan fee each time the loan is refinanced.²¹ Should the borrower choose to refinance the loan, the loan fee never constitutes repayment of the outstanding principal balance.²² If a borrower refinances five or six times, she can incur fees far in excess of the loan principal.²³

C. Efficacy of Payday Loans as a Source of Short-Term Financing

Critics of the industry argue that payday lenders do not improve access to short-term credit and that payday loans destroy the finances of working middle and lower income Americans.²⁴ When viewed as an annual percentage rate (APR), the fees charged by payday lenders grossly exceed normal APRs for even high-risk borrowers.²⁵ On average, payday lenders

to prove that they are not insolvent).

19. See *id.* at 9–10 (“[A] nontraditional lender makes a small cash advance (ranging from \$50 to \$1000) to the consumer in exchange for the consumer’s post-dated personal check written for the amount of the loan plus a fee.”).

20. See Georgetown Survey, *supra* note 15, at 3 (“Finance charges are typically between \$15 and \$20 per \$100 of the loan amount.”).

21. KARGER, *supra* note 16, at 74; see also Johnson, *supra* note 18, at 10 (“Instead of taking a post-dated check, some lenders require the consumer to authorize a debit to the consumer’s bank account when the loan is due.”).

22. Johnson, *supra* note 18, at 11.

23. See *id.* at 11 (“No matter how the lender characterizes or collects the fee, the fee does not count towards the original principal, and the consumer, therefore, remains indebted until he or she pays the entire original loan in a single payment.”).

24. See UNC CTR. FOR CMTY. CAPITAL, NORTH CAROLINA CONSUMERS AFTER PAYDAY LENDING: ATTITUDES AND EXPERIENCES WITH CREDIT OPTIONS 1 (Univ. of N.C. Press 2007) (explaining findings of a survey of North Carolina residents conducted after the state banned payday lending in 2006). The report found that (i) “the vast majority of households surveyed reported being unaffected by the end of payday lending,” (ii) “[p]ayday borrowers gave first-hand accounts of how payday loans are easy to get into but a struggle to get out of,” and (iii) “[n]early nine out of ten households surveyed think that payday lending is a bad thing.” *Id.*

25. See John P. Caskey, *Fringe Banking and the Rise of Payday Lending*, in CREDIT MARKETS FOR THE POOR 19 (Patrick Bolton & Howard Rosenthal eds., 2005) [hereinafter Caskey, *Fringe Banking*] (noting that despite the fact that payday borrowers have high-risk credit histories, the lenders do not incur loan losses as high as one might expect). Loan losses are about 10% to 20% of annual revenues. *Id.*

nation-wide charge between 350% and 1000% APR,²⁶ far in excess of the typical 36% usury ceiling on consumer loans.²⁷

The following hypothetical timeline illustrates how the payday loan industry can trap borrowers in a cycle of debt.²⁸

		Interest Paid
November 1 (date of original loan)	Connie takes out a \$300 payday loan and writes a 14-day postdated check for \$300 to cover the loan plus the \$60 in interest charges (\$20 per \$100 borrowed). She receives \$240 in cash.	\$60
November 15 (Due date for original loan, and first extension)	Connie cannot repay the loan and pays another \$60 in interest fees to extend it. She receives no additional money but has now paid \$120 in interest charges on the original \$300 loan.	\$120
November 30 (second extension)	Connie extends the loan again and pays another \$60. She has now paid \$180 in interest charges on the \$300 loan.	\$240

26. *Id.* at 18.

27. See PREDATORY SMALL LOANS: A FORM OF LOANSHARKING, *supra* note 18 (noting that "twenty states and the Virgin Islands and Puerto Rico require payday lenders to comply with the state's small loan or criminal usury laws which maintain interest rate caps of up to 36% per annum"); Protecting Consumers from Unreasonable Credit Rates Act of 2009, S. 500, 111th Cong. (2009) (placing a 36% APR cap on all payday loans); Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 10 U.S.C. § 987 (2006) (capping APRs on loans offered to military personnel at 36%).

28. Timeline taken from KARGER, *supra* note 16, at 74.

December 15 (third extension)	Connie still can't repay the original \$300 loan, so she pays yet another \$60 to extend it. In only eight weeks Connie has paid \$240 in interest charges on the \$240 she received.	\$240
December 30 (loan due in full)	The payday lender deposits Connie's last check. If there are insufficient funds in her account, she will be charged a non-sufficient funds (NSF) fee by the bank and the lender. The lender will pursue Connie for the original \$300 which she still owes.	\$240

Although the industry advertises payday loans as short-term solutions to emergency liquidity problems, data suggest that a significant number of borrowers use payday loans like credit card advances.²⁹ Over half of all borrowers take out five or more loans each year, and one third of borrowers take out twelve or more loans each year.³⁰ Frequent borrowers account for nearly all of the industry's profits, and profits per borrower increase exponentially with each additional loan.³¹

Alternatively, less than half of all borrowers take out fewer than five loans each year and are better able to manage their short-term emergency

29. See KARGER, *supra* note 16, at 77 (citing a report by the Center for Responsible Lending (CRL report) that revealed that "only 1% of all payday loans go to one-time emergency borrowers who pay their loan within two weeks and don't borrow again during the year").

30. See *id.* ("Ninety-one percent of all payday loans are made to borrowers with five or more loans a year. On average, payday customers receive 8–13 loans a year.").

31. See *id.* (citing the CRL report, which found that "borrowers who receive 5 or more payday loans a year account for 90% of payday lenders' revenues, and 56% of this revenue is generated by customers who take out 13 or more loans a year").

credit needs. To view the fees charged by payday lenders as an APR could be misleading because most borrowers do not refinance a loan every month for an entire year.³² Additionally, the payday loan industry argues that it must charge rates equivalent to at least 100% APR in order to break even,³³ and they claim that surveys, which indicate a high rate of customer satisfaction with the service, prove that the industry's fees are not usurious.³⁴

Regardless of whether one is a critic or supporter of payday loans, the two-week loan repayment schedule is inconsistent with the advertized purpose of the loan—to help individuals with emergency expenses. If an individual has an emergency need for cash, she is unable to pay her emergency expense with her current income plus any savings she might have. It is highly unlikely that the same individual will make enough money in the two-week loan period to cover the cost of her extraordinary expense. Because most people are more likely to incur unexpected expenses in excess of their income and savings in a recession, payday loans generally, and especially the loan repayment period, must be adjusted now through better regulation.

Whether payday loans should be banned, because they are a usurious and predatory practice, or whether the federal government should attempt to regulate payday loans, to make them better products for the cohort they aim to serve, is up for debate in Congress now.³⁵ At the state level, governments have had only two choices: ban payday lending or allow it to continue, unregulated, within its borders.³⁶ At the federal level, however, well-crafted legislation could (1) allow the industry to continue lending and (2) make the service fair for low-income borrowers. As the recession has

32. Compare Georgetown Survey, *supra* note 15, at 6 (noting that "nearly four in five [payday loan customers] had advances outstanding less than half the year. . . . [and] [o]ver half of customers' longest consecutive sequence of advances was less than a month"), with Caskey, *Fringe Banking*, *supra* note 25, at 19 ("For example, the annual percentage interest rate on a two-week \$200 loan for which the lender charges \$30 is 390% (15 percent for 2 weeks multiplied by 26) [per year in two-week cycles]."). The Caskey formula assumes, of course, that the borrower actually pays thirty dollars every two weeks for an entire year.

33. See Georgetown Survey, *supra* note 15, at 5 ("Allowing for taxes and return on invested capital produced a breakeven annual percentage rate of over 100%.").

34. See *id.* at 35–36 (noting that 92% of customers strongly agreed or somewhat agreed with the statement, "Payday advance companies provide a useful service to consumers," and that "over two-thirds of payday advance customers" strongly or somewhat disagreed that the number of payday loans a customer is allowed to take out in a year should be limited).

35. See *infra* Part V.

36. See *infra* Part IV.

proved, allowing firms to offer unregulated financial products to consumers can create a fiscal disaster, but effective regulation can make financial products safe for the public and profitable for firms. This Note, therefore, does not agree that any federal solution to the payday loan problem for undocumented immigrants must necessarily ban payday lending, but it does argue that effective regulation must protect citizens, non-citizens, and undocumented immigrants from predatory small loan practices.

III. Why Undocumented Immigrants Make Good Payday Loan Customers

A. The Typical Payday Loan Customer

Researchers largely agree on the demographic characteristics of payday loan customers.³⁷ Given the structure of the transaction, payday loan customers are typically low- to moderate-income Americans with a checking account, job, and compromised credit history.³⁸ Borrowers are also more likely to be female, receive federal assistance, and live in low-income neighborhoods.³⁹ Indeed, the payday loan industry targets single mothers and women on welfare, and many lenders will accept disability payments, child support or alimony payments, and Social Security benefits as collateral.⁴⁰

Surveys have found that payday loan borrowers are more likely to be ineligible for home equity credit, to file for bankruptcy, to reach or exceed a credit card limit, to pawn personal property, or to be ineligible for a credit

37. Caskey, *Fringe Banking*, *supra* note 25, at 18.

38. See KARGER, *supra* note 16, at 72 (noting that payday lenders "generally deal with the working poor or those with compromised credit"); see also Johnson, *supra* note 18, at 99. Citing the Georgetown Survey, the article explained that:

Georgetown University professors, using data supplied by payday lenders, conducted telephone interviews of the customers and reported that 51.5% have moderate incomes ranging from \$25,000 to \$49,999. Compare this finding with a 2001 study by the Wisconsin Department of Financial Institutions that reported an average gross income of \$24,673, a 1999 study of data collected by the Illinois Department of Financial Institutions that found an average income of \$25,131, and a study by the California office of Consumers' Union that calculated an average annual income of \$25,417.

Id.

39. See Johnson, *supra* note 18, at 100 (noting that minorities and women are far more likely to use payday lenders and that "low-income and minority households are significantly more likely to have [check-cashing outlets] located within one mile of their homes than higher-income and nonminority households").

40. KARGER, *supra* note 16, at 72, 74–75.

card.⁴¹ At least one nation-wide survey has found that payday loan customers on average have attained higher levels of education than the general population and are familiar with other sources of credit.⁴² This finding is consistent with the expectation that payday loan customers are banked but lack access to other mainstream sources of short-term consumer credit. Surveys disagree about customers' median salary: the industry claims that the median customer income is \$35,000,⁴³ but independent surveys of states with the highest concentrations of payday lenders find the median customer income level hovers between \$24,000 and \$25,000.⁴⁴

B. Banking Habits of Undocumented Immigrants

Since 2001, the USA Patriot Act has allowed banks to issue checking accounts and other bank products to undocumented immigrants.⁴⁵ As more undocumented immigrants with jobs begin to open checking accounts with mainstream banks, they also become eligible for payday loans. For several reasons, the Hispanic undocumented immigrant population is at risk for abuse by the payday loan industry. Given the size of the Hispanic undocumented immigrant population in the United States,⁴⁶ the negative effect that payday lending could have on this population should not be ignored.

41. Georgetown Survey, *supra* note 15, at 28–47.

42. *See id.* at 33 (explaining that "the percentage of payday advance customers with some college (36.1%) is nearly one and one half times greater than the 21.1% of adults with some college" in the general population).

43. *See id.* at 28 (noting that over half of payday advance customers have family incomes between \$25,000 and \$49,000); Caskey, *Fringe Banking*, *supra* note 25, at 18 ("The vast majority [of customers are] employed and [have] a household income between \$15,000 and \$60,000.").

44. *See supra* note 38 and accompanying text; *see also* Georgetown Survey, *supra* note 15, at 28 (finding that average household incomes for payday loan customers ranged from 25,000 to 50,000, which is consistent with both the industry study and the Wisconsin study cited above).

45. *See supra* note 4 and accompanying text.

46. *See* JEFFREY S. PASSEL & D'VERA COHN, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW (Pew Hispanic Ctr. 2008) (reporting that the U.S. experienced rapid growth in the undocumented immigrant population between 1990 and 2006, reaching 11.9 million in 2008); *see also* JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 10, (reporting that seventy-six percent of the undocumented immigrant population in the U.S. are Hispanics and that undocumented immigrants make up 4% of the population and 5.4% of the workforce).

Like payday loan customers, undocumented immigrants on average have low to moderate incomes, are employed, and have some education.⁴⁷ Unlike payday loan customers, undocumented immigrants generally have not had a negative experience with credit in the past. In fact, evidence suggests that they have little to no experience with credit.⁴⁸ Several factors contribute to the relatively high level of unbanked immigrants, but evidence suggests that undocumented immigrants are increasingly accessing mainstream banking services.⁴⁹

Despite their relative inexperience with finance, several factors indicate that undocumented immigrants might find payday loans attractive. First, undocumented immigrants tend to live in urban neighborhoods that are heavily populated with payday loan outlets.⁵⁰ Second, undocumented immigrants are probably already familiar with payday lending if they formerly used these outlets for check cashing services, in person utility bill-pay services, or remittance services.⁵¹ Moreover, the ostensible structure of payday loans, as a fee-for-service transaction, rather than a traditional loan that requires periodic payments based on an interest rate and loan due date,

47. See PASSEL & COHN *supra* note 10, at 4–5 (comparing the demographic characteristics of undocumented immigrants of Mexican birth to native born Americans).

48. Data suggest that more immigrants are accessing mainstream banking services over time. Compare SHEILA C. BAIR, IMPROVING ACCESS TO THE U.S. BANKING SYSTEM AMONG RECENT LATIN AMERICAN IMMIGRANTS 4 (Multilateral Inv. Fund 2003), available at <http://www.iadb.org/exr/PRENSA/images/IADBFULLREPORT.pdf> (noting that less than 50% of Latino immigrants own a bank account), with ANNA PAULSON, AUDREY SINGER, ROBIN NEWBERGER & JEREMY SMITH, FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES 6 (Fed. Reserve Bank of Chi. & Brookings Inst. 2006), available at http://www.chicagofed.org/community_development/files/fai-lessons_from_diverse_perspectives.pdf (noting that 63% of immigrant households have a checking account).

49. See ROBERTO SURO, SERGIO BENDIXEN, B. LINDSAY LOWELL & DULCE C. BENAVIDES, BILLIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES, AND BANKING 13-18 (Pew Hispanic Ctr. & Multilateral Inv. Fund 2001), available at <http://pewhispanic.org/files/reports/13.pdf> (noting that undocumented immigrants lack interest in mainstream banking because of the high fees, minimum deposit requirements, and, for some, legal status concerns); Laura Sonderup, *The Business of Immigrant Markets: Providing Access to Financial Services*, 60 CONSUMER FIN. L.Q. REP. 503, 503 (Fall 2006) (explaining the banking industry's interest in including undocumented immigrants in its customer base).

50. See PASSEL & COHN, *supra* note 10, at 1–3 (noting that the majority of undocumented immigrants live in urban areas); RICK JURGENS, REPORT: UTILITIES AND PAYDAY LENDERS: CONVENIENT PAYMENTS, KILLER LOANS (Nat'l Consumer Law Ctr. 2007), <http://www.consumerlaw.org/reports/content/paydayutility.pdf> (providing cover photo of a payday loan storefront with advertisements written in Spanish).

51. See JURGENS, *supra* note 50, at 3 ("Hundreds of high-cost lenders have arrangements with utilities to collect bill payments from their customers, according to a review of authorized payment locations listed on the web sites or in regulatory filings of 21 large utility companies that operate in states that allow payday lending.").

might make more sense to a population that has "limited English speaking ability, a cultural distrust of banking institutions, and minimal experience in dealing with the U.S. banking system."⁵²

Perhaps most importantly, Hispanic undocumented immigrants are at high risk to incur emergency medical expenses because most undocumented immigrants are uninsured.⁵³ Paradoxically, the cost of health care for uninsured Americans far exceeds the cost for insured Americans,⁵⁴ and the high cost of care, in general, is bankrupting otherwise healthy families who have some health care coverage.⁵⁵ Even a relatively minor adverse health event could cause an uninsured undocumented immigrant to incur a very large and unexpected expense that could make a payday loan attractive.

Finally, undocumented immigrants are unlikely to seek legal protection or report their activities to authorities for fear that they will be deported. Some states, like Florida and Mississippi, have linked formerly separate agency records with law enforcement databases in order to conduct raids on undocumented immigrant populations in their communities.⁵⁶

52. BAIR, *supra* note 48, at 2–3.

53. See PASSEL & COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 10, at 18–19 (noting that 59% of undocumented adults had no health insurance during all of 2007, which is "more than double the uninsured share among legal immigrants and four times the uninsured share among U.S.-born adults"). The report also explained that "[t]he children of unauthorized immigrant adults are less likely than their parents to lack insurance, but their uninsured rate is still substantially higher than that of U.S.-born children." *Id.* at 18.

54. See Mark A. Hall & Carl E. Schneider, PATIENTS AS CONSUMERS: COURTS, CONTRACTS, AND THE NEW MEDICAL MARKETPLACE, 106 U. MICH. L. REV. 643, 664 (2008).

[H]ospitals bill uninsured patients [on average] 250% more than insured patients. . . . list prices have increased almost three times more than costs, and markups over costs have more than doubled, from 74% to 164%. . . . Charges alleged or found in recent lawsuits include \$20,000 for two nights' hospitalization for pregnancy complications, \$12,863 for a day's treatment for shortness of breath, "\$52 for a single tablet of Tylenol with codeine," and a half million dollars for twenty-three days of treatment—twice what Medicare insurance allowed.

Id.

55. See David U. Himmelstein, Elizabeth Warren, Deborah Thorne, & Steffie Woolhandler, *Illness And Injury As Contributors To Bankruptcy*, HEALTH AFFAIRS, Feb. 2, 2005, <http://content.healthaffairs.org/cgi/content/full/hlthaff.w5.63/DC1> (last visited on Apr. 17, 2009) (finding that in 2001, "1.9-2.2 million Americans (filers plus dependents) experienced medical bankruptcy" and noting that many of these filers had health insurance when the illness began) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

56. See, e.g., Martin Kaste, *Employers May Face More Immigration Scrutiny*, NPR,

Because any state contact threatens deportation, under the current system payday lenders could virtually ignore any applicable state or federal regulations when dealing with undocumented immigrants, knowing that those customers will never report illegal lending practices. Effective regulation must take these concerns into account to make sure that the industry does not prey upon the undocumented.

IV. Legislation and Regulation Governing Payday Lending

Historically, federal law governing payday lenders, has focused on requiring lenders to adequately disclose important aspects of the loans they provide, while state law has focused on controlling the structure and kinds of loans lenders may offer.⁵⁷ Federal regulations have not been adequately enforced against payday lenders, and states have not been able to adequately enforce their laws governing payday lending without banning the industry from operating within its borders.⁵⁸ Growing concern over the deleterious effects of payday lending has led many more states to pass laws that attempt to ban payday lending, with mixed success.⁵⁹ As a result, Congress has now proposed two competing bills that could determine whether payday lending will continue in the United States. This Part discusses current federal and state regulation of payday lending, and the historical problems states have had with the industry. The next Part will discuss and evaluate the two bills currently in Congress.

Apr. 3, 2009, <http://www.npr.org/templates/story/story.php?storyId=102723012> (last visited on Apr. 17, 2009) (discussing the first workplace raid for undocumented immigrants under the Obama administration and predicting the Obama administration's response to illegal immigration) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Should Local Police Add Immigration Beat?*, NPR, Mar. 9, 2009, <http://www.npr.org/templates/story/story.php?storyId=101612103> (last visited on Apr. 17, 2009) (discussing section 287(g) of the Immigration and Nationality Act, which allows state and local police to enforce federal immigration law) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). See generally Nicholas Neidzowski, *The Unconstitutionality of Mississippi's Employment Protection Act and a Framework for Assessing Similar State Immigration Employment Laws*, 16 WASH. & LEE J.C.R. & SOC. JUST. (forthcoming Fall 2009).

57. See *infra* sections A and B of this Part.

58. See *id.*

59. See *id.*

A. Existing Federal Legislation

The Truth in Lending Act (TILA)⁶⁰ requires that "creditors," including payday lenders disclose certain facts about their loan products to customers.⁶¹ Rather than providing rate caps, TILA requires only that creditors comply with various rate disclosure requirements and advertising restrictions.⁶² TILA has separate disclosure requirements for oral and written inquiries. Payday loan employees are not required to orally volunteer the applicable APR for a loan, but if a customer requests this information, the employee is required to disclose the correct APR.⁶³ TILA requires that payday lenders provide written information about the loan, including the fees, repayment due date, and APR before the loan is consummated.⁶⁴ Payday lenders are also required to disclose their fees as an APR if they choose to advertize their rates.⁶⁵

Evidence suggests that payday lenders do not comply with TILA. In two recently conducted surveys in Ohio, roughly one third or fewer payday loan employees attempted to disclose the applicable APR.⁶⁶ Most lenders either reported the APR incorrectly or stated that there was no APR on a two-week loan, clearly in violation of TILA.⁶⁷ Lenders also violate TILA's advertising regulations.⁶⁸ Most creditors surveyed in the Ohio study advertised their services, but the majority (84%) "had fee schedules that

60. 15 U.S.C. §§ 1601–1667 (2000).

61. See 12 C.F.R. § 226(2)(a)(14) (2001) (stating that "transactions commonly known as "payday loans" constitute credit for purposes of TILA").

62. See Johnson, *supra* note 18, at 14 ("Primarily a credit disclosure statute, TILA does not generally regulate what terms a creditor must offer, but requires that those terms, whatever they are, be uniformly disclosed to the consumer.").

63. 12 C.F.R. § 226.17 (2001).

64. *Id.*

65. *Id.*

66. See Johnson, *supra* note 18, at 38–39 (noting that an Ohio survey found that only 32% of payday lenders disclosed applicable APR; CFA's 2001 Rent-A-Bank Payday Lending Report, found that "only 21% of payday lenders in twenty-six states verbally disclosed an APR in response to a customer's inquiry").

67. See *id.* ("32% of the payday lenders surveyed denied that there was an APR associated with the loan while 18% claimed they did not know the APR. Roughly, 14% stated that the \$15 finance charge was the APR, and one of the twenty-two lenders answered evasively: 'That doesn't count because you don't have the money for a whole year.'").

68. See *id.* at 40 ("TILA provides that if a creditor advertises the finance charge, the cost of credit must be stated 'as an annual percentage rate.'"); 12 C.F.R. § 226.24(b) (2002) (same).

failed to disclose the APR for each loan amount."⁶⁹ Finally, payday lenders often fail to disclose the terms of the loan prior to completing the contract, as required by TILA.⁷⁰ The Ohio survey found that although payday lenders made the APR available to borrowers, borrowers were not allowed to keep these documents or inspect them prior to signing the loan agreement.⁷¹

In addition to the TILA, Congress passed legislation in 2006 to protect military personnel from high payday loan rates. The Limitations on Terms of Consumer Credit Extended to Service Members and Dependents,⁷² commonly known as the "Military Lending Act," caps payday loan rates offered to military personnel at 36%.⁷³

B. State Regulation: Bold, Yet Ineffective

State regulation of payday lenders varies. Payday loans are currently banned in fifteen states and the District of Columbia.⁷⁴ In states that do not ban payday lending, state laws have traditionally attempted to regulate payday lending by restricting the number of times a customer may refinance the same loan, setting a rate ceiling on short-term consumer loans, or capping fees charged by lenders.⁷⁵ Recently, a few states have coupled

69. Johnson, *supra* note 18, at 40.

70. See 12 C.F.R. § 226.17(1) (2007) ("The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep.").

71. See Johnson, *supra* note 18, at 44 (noting that when survey participants "asked the loan clerks to allow them to take the contracts and review them prior to signing, 77% of the payday loan clerks surveyed would not allow the consumer to take the contract."). Johnson further notes that "[s]ome clerks even held onto the corner of the written contract while the research assistants were reviewing it prior to signing." *Id.*

72. 10 U.S.C. § 987 (2006).

73. *Id.*

74. See *Payday Loans*, AMERICANS FOR FAIRNESS IN LENDING, Jan. 2009, http://www.affil.org/consumer_rsc/payday.php# (last visited Apr. 17, 2009) (explaining that payday loans are illegal in Arkansas, Connecticut, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). In states that ban payday lending, the ban is usually explicitly stated in regulation. *Id.*

75. See Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 159 (2004). As the following table shows, rent-a-bank has allowed payday lenders to circumvent state efforts to cap rates or fees. *Id.*

traditional regulations with loan tracking systems that are intended to both enforce existing laws and gather reliable data on the industry's practices.⁷⁶ Despite the growing appetite for reform in many states, payday lenders continue to find ways to circumvent state laws and provide loans at rates that far exceed standard caps.⁷⁷ Virginia and several other states are

Table 1. Average Payday Loan APRs by State Regulatory Environment, 2001

Regulatory Environment	States Surveyed	Avg. APR
Usury ceiling on small loans prohibits payday lending	GA, MA, MD, NY, PA, VA	606%
No usury ceiling, payday lending permitted	NM, WI	504%
"Safe harbor" permits payday lending, caps fees	AZ, CA, CO, DC, FL, IA, IL, KY, NC, OH, OR, SC, TX	443%
	National average	470%

Source: CFA/PIRG, 2001

Id.; see also ELIZABETH RENUART, EMILY CAPLAN, MICHAEL WROBLEWSKI, GAIL HILLEBRAND, & JEAN ANN FOX, SMALL DOLLAR LOAN PRODUCTS: INTRODUCTION TO THE SCORECARD (Nat'l Consumer Law Ctr., Consumers Union, & Consumer Fed. of Am. 2008), <http://www.nclc.org/reports/content/CU-Small-Dollar-IntroScorecard-8-28-08.pdf> (last visited on Apr. 17, 2009) (using 2008 data to rate whether existing state laws are effective at protecting state residents from abusive payday lending practices) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Virginia scored an F and had an effective APR of 350% on two-week payday loans. *Id.* at 13.

76. See, e.g., KEITH ERNST, JOHN FARRIS & URIAH KING, QUANTIFYING THE ECONOMIC COST OF PREDATORY PAYDAY LENDING 7 n.21 (Ctr. for Responsible Lending, rev. ed. 2004), <http://www.responsiblelending.org/pdfs/CRLpaydaylendingstudy121803.pdf> (describing the Florida system which prohibits "making a payday loan while another loan is outstanding with another lender," and enforces this prohibition "by the use of a statewide database that tracks individual borrowers"). Note, however, that "payday lenders partnering with banks through [rent-a-bank] schemes claim preemption of state payday laws and routinely do not follow state law requirements." *Id.* Kentucky recently passed a similar law that requires the state to maintain a database to track payday lending. See Elizabeth Fairchild, *Washington, Idaho, Kentucky Pass Payday Loan Bills*, PERSONAL MONEY STORE, <http://personalmoneystore.com/moneyblog/2009/03/26/washington-idaho-kentucky-pass-payday-loan-bills/> (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

77. See, e.g., Driehaus, *supra* note 8 (noting that in addition to Ohio, "Georgia, New Hampshire, North Carolina, Oregon and Pennsylvania had to pass a second round of legislation or aggressively enforce regulations after their initial reform efforts"). Whether or not new reforms are effective is yet to be seen. *Id.*

currently revisiting 2008 payday lending legislation that has so far failed to curb abusive lending practices in their states.⁷⁸

The "rent-a-bank" practice, common in the industry, has thwarted state attempts to regulate payday lending. Rent-a-bank refers to partnerships between Federal Deposit Insurance Corporation (FDIC) banks and payday lenders "to offer 'agent-assisted loan programs.'"⁷⁹ Through agent-assisted loan programs, the National Bank Act allows nationally chartered banks to export the interest rates charged in their home states to customers in other states.⁸⁰ Payday lenders partner with national banks chartered in states that do not cap interest rates on small loans; they then export rates to other states, regardless of whether those other states have usury laws or rate ceilings that apply to payday lending.⁸¹ Rent-a-bank is highly effective and the most significant barrier to effective regulation at the state level.⁸² In 2005, the FDIC issued guidance⁸³ that limits, but does not eliminate, the "rent-a-bank" loophole that has for years allowed payday lenders to circumvent state usury ceilings.⁸⁴ The guidance restricts the number of payday loans the lender may issue and requires banks to implement programs by which borrowers with long-term credit needs can transition

78. See Jeff E. Schapiro, *Lending Restrictions Pass Senate Unanimously*, RICHMOND TIMES DISPATCH, Jan. 30, 2009, available at <http://www.responsiblelending.org/news/newsbriefs/lending-restrictions-pass-senate-unanimously.html> (describing new Virginia legislation designed to close loopholes in ineffective 2008 legislation that failed to curb payday lending as intended).

79. KARGER, *supra* note 16, at 78.

80. *Id.*

81. See *id.* ("Lenders with rent-a-bank partnerships often charge higher interest rates, make larger loans, or maybe repeat loans that violate state laws.")

82. See Donna Tanoue, Chairman, FDIC, Keynote Address, Seventh Annual Greenlining Economic Development Summit (June 13, 2000), available at <http://www.fdic.gov/news/news/speeches/archives/2000/sp13June00.html> (describing process known as "charter-renting" by which large banks rent out the state usury law of their charter state to payday lenders operating across the nation to circumvent state rate capping legislation).

83. FIDC, Financial Institution Letter, FIL-14-2005, Mar. 1, 2005, available at <http://www.fdic.gov/news/news/financial/2005/fil1405.html>.

84. See FDIC's Revised Examination Guidance on Payday Lending, CTR. FOR RESPONSIBLE LENDING, <http://www.responsiblelending.org/issues/payday/policy/page.jsp?itemID=28012674> (last visited on Apr. 17, 2009) (noting that the guidance calls "on banks to develop procedures to ensure that they do not make payday loans to customers who have had payday loans outstanding from any lender for a total of more than three months in the previous 12 months") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

their short-term payday loans to long-term loans, but it does not specifically prohibit rate exporting to restricted jurisdictions.⁸⁵

V. Proposed Solutions

Trade groups argue that payday lenders cannot function if interest rates are capped at 36% per year.⁸⁶ Financial Service Centers of America, a trade group representing "neighborhood financial centers," estimated, however, that 2007 payday loan volume exceeded thirteen billion dollars and that more than thirty-two million loans were made nation-wide.⁸⁷ Studies report that payday lenders make at least a 30% return on investments, and some industry advertisements for investment in payday loan corporations suggest much higher returns.⁸⁸ With such high profits, payday lenders should not be allowed to prey on low- and middle-income households. Because states have largely failed to regulate payday lending, despite significant efforts, payday loan customers need a federal solution.⁸⁹

85. See *supra* note 84 and accompanying text. Note that payday lenders continue to evade state restrictions with dexterity; see, e.g., Marc Lifsher, *Internet Payday Lenders With Ties to Indians Dodge California Regulators*, L.A. TIMES, Apr. 13, 2009, <http://www.latimes.com/business/la-fi-internet-loans13-2009apr13,0,5737402.story> (explaining that payday lenders have gone online and partnered with Indian tribes in yet another ploy to circumvent state usury laws).

86. See Stephen J. Dubner, *Pity the Payday Lenders?*, N.Y. TIMES, Aug. 21, 2006, <http://freakonomics.blogs.nytimes.com/2006/08/21/pity-the-payday-lenders/> (last visited on Apr. 17, 2009) (quoting industry spokeswoman stating, "[a]t a 36% APR, the fee on a \$100 payday advance would be \$1.38, less than 10¢ per day. Payday advance lenders could not even meet employee payroll at that rate, let alone cover employee payroll, other fixed business expenses and make a profit") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

87. See PATRICIA J. CIRILLO, SURVEY OF KEY FISCAL MEMBER ORGANIZATIONS ON TRANSACTION VOLUMES 9 (Cypress Research Group 2007), available at <http://www.fisca.org/Economic%20Inclusion%20Handout-Attachment%201.pdf> (estimating the total gross dollar amount of all payday advances at \$13,236,686,046 and the total number of payday advances at 32,443,313). But see Georgetown Survey, *supra* note 15, at 27 (suggesting that payday lenders must charge an APR of at least one hundred percent just to break even).

88. See Barr, *supra* note 75, at 152–53 ("[P]ayday lending is a highly profitable enterprise, with a return on sales of 30%."); Johnson, *supra* note 18, at 72 ("[L]enders like Check 'n Go are advertising that if a national bank partners with it, the bank may receive a 20% return on equity.").

89. See Johnson, *supra* note 18, at 116–45 (explaining why a state solution will never adequately regulate payday lending or provide the five minimum consumer protections that must be included in any proposed federal regulation.); Barr, *supra* note 75, at 162–63 ("[I]t is incumbent on the regulators to use their authority under the Federal Trade Commission Act to take action against banks and thrifts that are engaged in 'unfair and deceptive trade

A. *Should Federal Legislation Ban Payday Lending?*

It is not clear that federal legislation should ban payday lending. In dealing with the industry, states have had two choices: (1) ban payday lending within its borders or (2) allow it to exist, effectively, unregulated. The fact that the industry has managed to thrive despite significant efforts by states to substantially constrict its business model suggests that a meaningful portion of the population demands access to short-term credit. If Congress attempts to ban payday lending entirely, other short-term forms of credit will almost certainly take the place of payday lending, thereafter requiring an entirely new batch of legislation to deal with the new industry's abusive practices. This Note accepts that the payday loan industry has exploited the working poor since it became one of the primary sources of short-term credit in the mid-1990s, but it does not foreclose the possibility that good federal regulation could transform the industry into a fair, yet viable, source of short-term credit for individuals with compromised credit histories.

Regardless of whether Congress bans payday lending or attempts to regulate it, undocumented immigrants must receive equal protection under the new law. Federal law allows banks to extend credit to undocumented immigrants.⁹⁰ It would be unfair to give undocumented immigrants access to mainstream banking products without corresponding protection from abusive lending practices that involve those accounts. It would also be unwise. A recent Harvard Business School study found that involuntary bank account closures increase by about 11% in areas with higher concentrations of payday lending locations.⁹¹ Mainstream banks stand to benefit enormously by tapping into the undocumented immigrant customer base. If payday loans given to undocumented immigrants cause banks to close newly opened accounts for undocumented immigrants, neither the immigrants nor the banks will benefit from the USA Patriot Act's regulations. Perhaps most importantly, legislation that can curb abusive payday lending without eliminating the industry must protect

practices' in the course of payday lending activities.").

90. See *supra* note 4 and accompanying text.

91. See Dennis Campbell, Asis Martinez Jerez, & Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures 2* (Harvard Bus. Sch., Working Paper, 2008), available at http://www.bos.frb.org/economic/eprg/conferences/payments2008/campbell_jerez_tufano.pdf (finding "that access to payday lending seems to lead to higher rates of involuntary account closure").

undocumented immigrants to ensure that the industry does not continue to operate unregulated in the undocumented immigrant community.

B. Pending Federal Legislation

Two competing bills, both recently introduced by Democratic members of the House and Senate, purport to effectively regulate the payday loan industry. Senator Durbin's bill would amend TILA to include a "maximum rate of interest" provision that caps consumer credit transactions at 36% APR.⁹² The bill provides a limited exception for ninety-day loans, but it highly restricts the fees the lender may charge and limits consumers to one loan per year.⁹³ A competing bill introduced by Representative Luis Gutierrez would also amend TILA, but to "establish additional payday loan disclosure requirements and other protections for consumers, and for other purposes."⁹⁴ His bill would require disclosures in English and Spanish; requires that loan documents include language in "14-point bold font" that states that lenders will not press criminal charges for delinquency; includes a mandatory extended payment plan, similar to what is encouraged under 2005 FDIC guidance; and prohibits "rollovers" and lending multiple loans to the same customer at the same time.⁹⁵

Consumer protection groups who want to see payday loans banned strongly favor Senator Durbin's bill because only double digit rate caps have effectively banned payday lending.⁹⁶ The payday loan industry backs Representative Gutierrez's bill because it purports to restrict, not eliminate,

92. Protecting Consumers from Unreasonable Credit Rates Act of 2009, S. 500, 111th Cong. (2009), available at <http://www.opencongress.org/bill/111-s500/text>.

93. See *id.* (noting that fees cannot exceed \$30 or 5% of the credit limit, up to \$120, with other restrictions).

94. See Payday Loan Reform Act of 2009, H.R. 1214, 111th Cong. (2009), available at <http://www.opencongress.org/bill/111-h1214/text>.

95. *Id.*

96. See CTR. FOR RESPONSIBLE LENDING, QUICK REFORM COULD PLUG \$5 BILLION HOLE IN WORKER WALLETS (2009), <http://www.responsiblelending.org/pdfs/payday-and-the-economy.pdf>.

Payday lending industry representatives have lobbied for other reforms, such as payment plans and limits on loan amounts, because they understand that these measures have done nothing to slow the rate at which they can flip loans to the same borrowers. But an interest rate cap is the only measure that has proven effective in putting an end to the cycle of debt caused by these loans.

Id. at 2.

payday lending.⁹⁷ Consumer groups have not noticed, however, that Senator Durbin's bill would do nothing to protect undocumented immigrants. As discussed in Part Three, even if payday loans are banned (or capped at double-digit interest rates), payday lenders could still lend to undocumented immigrants because the undocumented could never report the lender for violating the rate cap. Senator Gutierrez's bill does provide some protection for undocumented immigrants by requiring that loan disclosures be made in Spanish, but it might not adequately protect borrowers from predatory practices.⁹⁸

C. Solutions that Protect the Undocumented

Because Senator Durbin's bill would likely eliminate payday lending, this Note does not consider it further. Representative Gutierrez's bill could provide adequate protection for undocumented immigrants from abusive payday lending practices if it is improved to protect against abusive lending practices and to better include undocumented immigrants in the protections offered.

Consumer groups have argued that the H.R. 1214 fails to protect consumers on the following grounds: (1) the fee cap of fifteen cents per

97. In fact, some argue that Representative Gutierrez and other members of Congress have been "bought" by the payday loan industry lobby. See Carey, *House Preparing To Legalize Payday Loans With 391% APRs*, THE CONSUMERIST, Apr. 5, 2009, <http://consumerist.com/5198880/house-preparing-to-legalize-payday-loans-with-391-aprs> (last visited on Apr. 17, 2009) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

98. Compare Editorial, *391 Percent Payday Loan*, N.Y. TIMES, Apr. 12, 2009, at A20, available at <http://www.nytimes.com/2009/04/13/opinion/13mon2.html?scp=2&sq=payday%20loans&st=cse> (discussing new House bill sponsored by Rep. Luis Gutierrez (D) that would "allow payday operators to charge what amounts to an annual percentage rate of 391 percent"), with Luis V. Gutierrez, Letter to the Editor, *Regulating Payday Loans*, N.Y. TIMES, Apr. 22, 2009, available at <http://query.nytimes.com/gst/fullpage.html?res=9405EFD91630F931A15757C0A96F9C8B63&scp=4&sq=gutierrez%20payday%20&st=cse> (arguing that the bill would "lower the annual percentage rate on payday loans for nearly 113 million Americans, ban 'rollovers,' create a mandatory repayment plan and establish a federal floor on which stronger state and federal laws can then be built"). See also Donny Shaw, *Congress Going Easy on Payday Lenders*, OPEN CONGRESS, Apr. 8, 2009, <http://www.opencongress.org/articles/view/942-Congress-Going-Easy-on-Payday-Loan-Dealers> (last visited on Apr. 17, 2009) ("[A] range of consumer, community and civil rights groups [believe that the Act] . . . would actually protect the 'predatory payday loan business model and will stall or stop the significant progress that has been made at the state level to curb usurious lending.'") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

dollar borrowed does not effect fairer APR rates,⁹⁹ (2) its narrow definition of a payday loan would allow borrowers to evade its scope, as the industry has so often done with state payday loan laws,¹⁰⁰ (3) direct electronic access authorization provisions, that allow creditors to gain e-access to consumer banking accounts, is unsafe, unfair, and violates other federal laws,¹⁰¹ (4) the bill only bans multiple loans from multiple lenders, but not multiple loans from all lenders,¹⁰² and (5) protections against unfair debt collection do not do more than other, existing, laws to protect consumers.¹⁰³ Many of these defects can be eliminated if the bill more generally defines payday lending, eliminates specific definitions for "creditor" and "payday loan," and prohibits lenders from accessing borrowers' bank accounts electronically. State experience with specific definitional language in

99. See Jean Ann Fox, Director of Financial Services, Consumer Federation of America, Statement to the House, Subcommittee on Financial Institutions and Consumer Credit, Apr. 2, 2009, at 8, available at http://www.house.gov/apps/list/hearing/financial_svcs_dem/fox_testimony.pdf (explaining that "[f]or the typical two-week payday loan term, the fee authorized by H.R. 1214 translates to 391 percent APR. For a one-week loan, loans would be authorized at 782 percent APR"). Fox also notes that "[d]escribing the costs allowed by the bill as pennies per dollar and not mentioning the very short loan period for payday loans can mislead people into believing that the bill sets a 15 percent annual interest rate cap." *Id.*

100. See *id.* at 9 ("HR 1214 includes numerous requirements that must be met in order for a payday loan to fall under its purview.").

101. See *id.* at 11–15 (providing several examples of situations in which a consumer might compromise his or her relationship with a bank if a payday lender is allowed electronic access to his or her account).

102. See *id.* at 15–16 (explaining why the bill's roll-over provision does not prevent consumers from taking out more payday loans than they can afford at any given time).

103. See *id.* at 16–17 (explaining that "the Federal Trade Commission Act, the FTC's credit practices rule, the Fair Debt Collection Practices Act, state common law, and/or many state laws" already prevent payday lenders from threatening criminal action against defaulting debtors). Fox's statement references the case of *Florida v. Ellis Crosby & Assocs., Inc.*, where the Florida Attorney General brought a successful action against a payday collection agency. *Id.* The complaint alleged that:

[d]efendant ECA and Defendant CROSBY illegally contacted consumers at work, engaged in harassing, oppressive and abusive conduct, failed to identify themselves as collections agents, falsely represented themselves as law enforcement officers or attorneys, falsely threatened legal action, falsely threatened criminal arrest, threatened violence, misrepresented that the consumer had committed a crime, falsely represented the amount due, falsely implied they were government investigators, falsely stated their office is in a federal building, falsely claimed that an Order of Homeland Security prevented disclosure of their address, falsely threatened to seize computers, falsely stated that non-payment would result in arrest, and falsely stated that the sum owed could only be paid in full.

Id. at 9.

payday lending regulation should teach Congressional leaders that payday loans must be defined broadly to prevent the industry from evading the scope of its legislation. Prohibiting lenders from having e-access to borrower bank accounts will allow consumers to have greater control over their finances and prevent payday lenders from drawing more than what is required from a borrower's bank account to satisfy a payday loan. Rate caps and additional regulation to protect consumers against unfair collection practices are unnecessary. As discussed above, whether the effective APR of a payday loan is usurious depends upon one's point of view and is not conclusively demonstrated by data on either side of the debate. Additional regulation to protect consumers against unfair collection activity is already included in other federal legislation. To the extent that provisions in the Gutierrez bill represent concessions by the payday loan industry, they might have some force and effect, but funding for better enforcement of existing regulations and/or the Gutierrez bill if it passes, is essential to make sure stated reforms are implemented.

Assuming that H.R. 1214 can be improved to effect industry reform, both the USA Patriot Act and the H.R. 1214 must be improved to specifically protect undocumented immigrants from abusive payday loans. First, the USA Patriot Act must require banks provide oral and written instructional materials to customers who open accounts with an ITIN and one or more piece of foreign identification. The instructional materials must generally explain how mainstream bank products work, when the customer can incur fees, and how the customer can avoid incurring fees. It should also explain why payday loans make the customer more susceptible to bank fees and involuntary account closures. Bank regulatory agencies could be tasked with providing sample language for the oral and written communication, and all communication must be provided in the language in which the bank transaction was consummated.

H.R. 1214 must be improved to provide better protection against the threat of criminal prosecution or deportation. Language in the loan documents that states that the lender will not press criminal charges against delinquent borrowers does not adequately protect undocumented immigrants from the threat of such action by lenders and their collections agencies. The bill should provide funding for a non-profit organization to track the habits of collection agencies with respect to citizens, documented immigrants and undocumented immigrants. Many states have active consumer groups who monitor the lending practices of payday and other

lenders in their states.¹⁰⁴ A grant program would provide Congress with useful information about the banking habits of marginal borrowers and the practices of payday lenders, and undocumented immigrants would not fear that the organization would "out" their undocumented status to the government. Coupled with funding for a non-profit study, the Gutierrez bill should also mandate a federal payday loan database to track borrowers' habits and ensure that lenders do not issue more than one loan to a consumer at a time.¹⁰⁵ Similar to the Florida database, the federal database could track the industry's practices and help enforce regulations that limit the total outstanding principal amount of a payday loan that a consumer may have at any given time.

Over time, it might become apparent that additional reforms are needed to make the Gutierrez bill or future federal legislation more effective at protecting consumers from unfair practices, but careful study of the effect a federal solution can and would have on the industry and consumers is necessary to help lawmakers craft effective controls on potentially risky financial products before a ban is considered.

VI. Conclusion

Undocumented immigrants are at risk for abuse by the payday loan industry, and their demographic characteristics suggest that they, too, are likely to demand access to short-term forms of credit. States, however, have not been able to successfully implement adequate industry regulation to ensure that short-term credit is safe for most borrowers. Congress has and should continue to take seriously the need for regulation of the payday loan industry and seize the opportunity to legislate afforded by a recessionary climate.

Whether a ban or regulation would be a better solution to the payday loan problem as it applies to undocumented immigrants is debatable. A ban

104. See generally Ohio Coalition for Responsible Lending Home Page, <http://ohio-coalition-for-responsible-lending.org/>; Virginia Partnership to Encourage Responsible Lending Home Page, <http://www.virginiafairloans.org/news.html>; Kentucky Coalition for Responsible Lending Home Page, <http://kyresponsiblelending.wordpress.com/>.

105. See Gwyneth K. Shaw, *Almost Here: Less Painful Payday Loans*, ORLANDO SENTINEL, Apr. 21, 2001 (describing a Florida legislatively mandated database that tracks how many payday loans a lender may issue to a borrower at any given time). The article quotes Dorene Barker, a lobbyist for Florida Legal Services, who argues that the database "will stop people from getting caught on the treadmill, which has been our biggest concern." *Id.*

would solve the payday loan problem but leave lenders much space to create a new form of short-term credit that would present at-risk populations with similar difficulties. Careful legislation of payday lenders that provides funding to monitor and collect data on the industry, its consumers, and the effect legislation has on both groups would help Congress in the future to regulate payday loans in a way that (1) allows the industry to continue and (2) provides low-income consumers, including undocumented immigrants, with access to a fair form of micro-finance. To collect this data, the government should provide grant funding to a non-profit organization to study the effects of payday loans on undocumented immigrants because the undocumented are more likely to participate in a study conducted by a non-governmental organization.

Now that undocumented immigrants have access to checking accounts, only adequate federal regulation can prevent the payday lending industry from exploiting this population. In order to ensure the future financial health of the undocumented immigrant population and the continued success of the new relationship between this population and mainstream banking institutions, Congress must provide undocumented immigrants with the tools they need and the protection they deserve to deal with the threat of predatory payday loans.