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# THE CASE FOR MORE DEBT: EXPANDING COLLEGE AFFORDABILITY BY EXPANDING INCOME-DRIVEN REPAYMENT

John R. Brooks\*

## I. INTRODUCTION

One of the most important—but least discussed—legislative and regulatory accomplishments of the Obama administration was the reform and expansion of income-driven repayment (“IDR”) for federal student loans. By 2016, anyone with a federal student loan—old or new—could choose to cap their monthly student loan payments to 10 percent of their discretionary income (after a large exemption) and have any unpaid balances forgiven after a minimum of ten, twenty, or twenty-five years of repayment, depending on the plan.<sup>1</sup> IDR has the potential to effect a massive change in how the United States pays for higher education.<sup>2</sup> At its core, the promise of IDR is that higher education will always be affordable, no matter what a person’s income is after the person leaves school.

Unlike other Obama-era reforms, the Trump administration appears (mostly) willing to support IDR.<sup>3</sup> So it would seem that there is some broad agreement across the political spectrum about the idea of paying for college with a share of income, and for relieving those with low income of their debt altogether. This is some cause for celebration.

However, that celebration may be premature. Monthly payment as a percentage of income, and ultimate forgiveness after the full repayment period, apply only to money borrowed from (or guaranteed by) the federal government. But it turns out that most undergraduates can’t actually borrow that much at all—only about half the average net cost of a public university, and a quarter of the cost for a private university.<sup>4</sup> Federal law imposes hard caps on the amount it will lend to undergraduates—caps that have barely budged since 1993—even as tuitions continue to rise faster than inflation.

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> For a more expanded discussion of income-driven repayment as a way to pay for higher education, see John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO L.J. 229, 251–83 (2016); see also Sebastian Findeisen & Dominik Sachs, *Education and Optimal Dynamic Taxation: The Role of Income-Contingent Student Loans*, 138 J. PUB. ECON. 1, 1 (2016) (comparing income-contingent loans to direct public funding of higher education).

<sup>3</sup> See OFFICE OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2018 20. The budget proposal would raise the monthly payments to 12.5% of discretionary income, would make the repayment periods 15 years for undergraduate debt and 30 years for graduate school debt, and would repeal Public Service Loan Forgiveness. *Id.*

<sup>4</sup> See *infra* Part IV.A.

If students can't pay with IDR-eligible loans, they're paying some other way—drawing from family savings, working extra hours during school, or taking out private (non-IDR) loans—or maybe not going to college at all. Each of these is a clearly worse option for many students. Unless and until federal or state governments massively expand grants or direct funding of college and universities—both of which seem unlikely without a huge political shift—expanding IDR-eligible loans is the best tool to expand access and affordability of college.

This Article proceeds as follows. In Part II, I explain the various IDR programs. This is not a simple task, since the programs are quite complicated, and vary in significant, though fine-print, ways. Low lifetime loan limits are far from the only problem with IDR programs—they also suffer from unnecessary complexity and some serious substantive problems (especially the REPAYE program).<sup>5</sup> Broader reform would ideally also encompass reform of the programs themselves, though that is beyond the scope of this essay.

In Part III, I address a core irony of this Article's argument—that in order to make college more affordable, the federal government should issue *even more* debt on top of the already outstanding \$1.3 trillion.<sup>6</sup> My claim is that a robust IDR program transforms the nature of the debt so substantially that it may not be right to even think of it as “debt” anymore. In some ways, it is more akin to an income surtax—a promise to pay the government a small share of our income so that it can pay for collective goods and service (like higher education). Reframed in that way, the \$1.3 trillion is just the government's estimate of what it will collect from this surtax.

In Part IV, I explain why the lifetime loan limits are insufficient to pay for many borrowers' undergraduate education. I also contrast undergraduate loans with loans for graduate and professional school, for which there is effectively *no* lifetime limit on the amounts of IDR-eligible loans. While I do not take direct issue with the generosity toward graduate students, I do contrast that generosity with the stinginess toward undergraduates to further underscore the need for reform.

In Part V, I offer a simple reform—to double the lifetime limit for dependent undergraduates. Further, the limit should continue to be increased (by indexing or otherwise) so that it is always sufficient to pay the average net tuition, fees, room, and board at a four-year public university. I argue in this Part that such a reform would not be as expensive as it seems, for two main reasons. First, much of the increased Direct Lending would just be shifted from other lending sources (like parent loans and private loans). Second, the federal student loan program is currently projected to make money for the government, on a net present value basis, even taking into account IDR payments, forgiveness, defaults, and so on. Even if the new lending would be higher risk, any costs would still be relatively low in budgetary terms, particularly when spread across years and even generations.

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<sup>5</sup> See *infra* Part II.D.

<sup>6</sup> See Federal Student Aid, *Portfolio Summary*, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/sa/about/data-center/student/portfolio> [https://perma.cc/VKG8-ENEE].

Part VI briefly concludes on a cautionary note. IDR is still relatively new and has had its share of implementation problems. Although countries like Australia<sup>7</sup> and the UK<sup>8</sup> have had success with similar programs, the jury is still out in the United States. If students and families are sufficiently averse to debt—even the nondebt of IDR—or if the benefits of IDR are too hidden behind its daunting complexity, then it may yet fail to live up to its promise. Reforms are needed to make IDR work as best as it can—but we do not yet know if even that will be enough.

## II. THE INCOME-DRIVEN REPAYMENT PROGRAMS

The Education Department (“ED”) currently offers an alphabet soup of IDR programs, and each program operates in a slightly different way, with different terms, different costs and benefits, and different applicable borrowers. The programs are Income-Contingent Repayment (“ICR”), Income-Based Repayment (“IBR”), Pay As You Earn (“PAYE”), and Revised Pay As You Earn (“REPAYE”). ICR is older and less generous, and so current borrowers are more affected by IBR, PAYE, and REPAYE. As an additional soup ingredient, IBR actually has two forms, which are sometimes known as Old IBR and New IBR. Finally, Public Service Loan Forgiveness (“PSLF”) is available to borrowers under any of these programs.

I review the details of the programs below, but they each follow the same basic structure. Borrowers will pay no more than a fixed percentage of discretionary income as monthly loan service payments, and if any debt is still outstanding after a certain number of years, the full balance is forgiven. The plans (other than PSLF) are available to any borrower, regardless of career choice. But even sharing that basic structure, the plans still differ in significant, though easily overlooked, ways.

In particular, the treatment of unpaid interest varies significantly across the plans, and so I highlight those differences below. To aid in that discussion, I must first define some key terms. Unpaid interest *accrues* monthly, based on the loan principal and the applicable interest rate. Some accrued interest may be *capitalized*, meaning that it is added to the loan principal. Capitalized interest is thus charged interest upon itself, increasing the amount of interest that will *accrue* after capitalization. Accrued interest that is *not* capitalized (or that is paid by the government) presumably just sits in an unpaid interest account without being charged interest. It is still owed, however, and may be part of the forgiven debt at the end of the repayment period.

Another important element of the plans to address at the outset is the tax treatment of any forgiven debt. In general, cancellation of indebtedness generates gross income for tax purposes, in the amount of the debt forgiven, unless some

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<sup>7</sup> See Brooks, *supra* note 2, at 274; Helaine Olen, *How Australia Gets Student Loans Right*, SLATE.COM (Nov. 12, 2015, 7:53 PM), [http://www.slate.com/articles/business/the\\_bills/2015/11/australia\\_s\\_student\\_loan\\_system\\_should\\_make\\_americans\\_jealous.html](http://www.slate.com/articles/business/the_bills/2015/11/australia_s_student_loan_system_should_make_americans_jealous.html) [<https://perma.cc/H8EJ-RQUC>].

<sup>8</sup> See, e.g., Bruce Chapman, *Income Contingent Loans for Higher Education: International Reforms*, in 2 HANDBOOK OF THE ECON. OF EDUC. 1436, 1466 (Eric Hanushek & Finis Welch eds., 2006).

exclusion applies.<sup>9</sup> Only for debt forgiven under PSLF is there a clear exclusion.<sup>10</sup> The prevailing view is that any debt forgiven under the other plans—ICR, IBR, PAYE, or REPAYE—will generate a tax bill. In effect, the government cancels 100 percent of the debt, but then will turn around and collect 10–40 percent of it anyway (depending on the borrower’s marginal tax bracket). As I have argued elsewhere, this tax treatment (a) is perverse and (b) may also be an incorrect reading of the tax law.<sup>11</sup>

### A. *Income-Contingent Repayment*

The first of the IDR options, ICR, was enacted in 1993 and was considered a fairly important and sweeping change at the time it was enacted.<sup>12</sup> It provided for borrowers to pay no more than 20 percent of their “discretionary income,” which was defined as the borrower’s Adjusted Gross Income (“AGI”) for tax purposes minus the relevant federal poverty level for the borrower’s family size.<sup>13</sup> After twenty-five years of repayment, any remaining loan balance (including accrued interest) is cancelled.<sup>14</sup>

All unpaid interest accrues, but the amount of capitalized interest is limited to 10 percent of the original loan principal.<sup>15</sup> For example, if the loan balance was originally \$10,000, unpaid accrued interest could increase the balance to \$11,000, which would in turn increase the interest charged on that loan. Any further unpaid accrued interest would still be owed, but ED would not charge any interest on that unpaid interest.

Despite big hopes, ICR did not really catch on. As of this writing, there are only about 600,000 borrowers in ICR, a number which has been relatively flat at least since 2013, the earliest year for which ED publicly breaks down Direct Loans by repayment plan.<sup>16</sup> The low uptake was likely due to a combination of reasons. First, the program was not well understood by students or financial aid advisors, and does not appear to have been well publicized.<sup>17</sup> Second, the monthly income-contingent

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<sup>9</sup> I.R.C. § 61(a)(12) (2018).

<sup>10</sup> *See id.* at § 108(f).

<sup>11</sup> John R. Brooks, *Treasury Should Exclude Income from Discharge of Student Loans*, 152 TAX NOTES 751, 751 (2016).

<sup>12</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, § 4021, 107 Stat. 312, 346 (1993) (codified at 20 U.S.C. § 1087e (2018)). For more history on the passage of ICR, see Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733 (2001).

<sup>13</sup> 34 C.F.R. § 685.209(b)(1) (2018).

<sup>14</sup> *Id.* at § 685.209(b)(3)(iii).

<sup>15</sup> *Id.* at § 685.209(b)(3)(iv).

<sup>16</sup> *See* Federal Student Aid, *Direct Loan Portfolio by Repayment Plan*, U.S. DEP’T OF EDUC. [hereinafter *Direct Loan Portfolio*], <http://studentaid.ed.gov/sa/about/data-center/student/portfolio> [<https://perma.cc/VKG8-ENEE>].

<sup>17</sup> *See* Schrag, *supra* note 12, at 774–803.

payment was likely too high to provide much relief.<sup>18</sup> Later plans, as we will see, use a smaller percentage (10 percent) of a smaller base: AGI minus 150 percent of the poverty level, rather than 100 percent. Finally, the twenty-five-year repayment period may have been too long.

Importantly, ICR is the only IDR plan for Parent PLUS Loans, whereas graduate and professional students with Grad PLUS Loans can use any of the IDR plans.<sup>19</sup> The different treatment of Parent vs. Grad PLUS Loans is the main reason IDR is much more generous for graduate and professional students.<sup>20</sup> Note, however, that any ICR for a Parent PLUS Loan would be calculated based off of the parent's income, rather than the student's.<sup>21</sup>

### B. Income-Based Repayment

Because ICR was not a sufficient solution to the problem of college affordability and rising student debt, in 2008 Congress passed the first version of IBR ("Old IBR").<sup>22</sup> Then in 2010, Congress passed the Student Aid and Fiscal Responsibility Act ("SAFRA"), a more sweeping higher education reform, as part of the Health Care and Education Reconciliation Act of 2010 (better known as the bill that passed the final tweaks to Obamacare).<sup>23</sup> SAFRA's most important provision was the repeal of the federal subsidy for and guarantee of student loans from private lenders under the Federal Family Education Loan ("FFEL") program.<sup>24</sup> As a result, the federal government's share of all student lending went from 75 percent in 2007–2008 to 93 percent in 2009–2010, and it continues to make about 90 percent of all student loans by value.<sup>25</sup>

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<sup>18</sup> See *id.* at 832–33; CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2669, COLLEGE COST REDUCTION ACT OF 2007, at 6 (June 25, 2007), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr26691.pdf> [<https://perma.cc/7ACP-YYSN>] (noting low uptake of ICR because of, *inter alia*, income capitalization rules).

<sup>19</sup> Parent PLUS Loans can be consolidated into Direct Consolidation Loans. 34 C.F.R. § 685.220(b)(10) (2018). Direct Consolidation Loans can use ICR, *see id.* at § 685.209(b) (making ICR available for any Direct Loan), but not IBR, *id.* at § 685.221(a)(2) (stating that Direct Consolidation Loans of Parent PLUS Loans are not eligible), PAYE, *id.* at § 685.209(a)(1)(ii) (same), or REPAYE, *id.* at § 685.209(c)(1)(ii) (same).

<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See 34 C.F.R. § 685.209(b)(1) (calculating repayment based on discretionary income of the "borrower").

<sup>22</sup> College Cost Reduction and Access Act, Pub. L. No. 110-84, § 203, 121 Stat. 784, 792–94 (2007) (codified at 20 U.S.C. § 1098e (2018)).

<sup>23</sup> Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2001–2303, 124 Stat. 1029, 1071 (2010).

<sup>24</sup> *Id.* at §§ 2201–05, 124 Stat. at 1074–76.

<sup>25</sup> COLL. BD., TRENDS IN STUDENT AID 2017 13 fig. 4 (2017) [hereinafter STUDENT AID], <https://trends.collegeboard.org/student-aid> [<https://perma.cc/FPW8-DU2A>] (Total Federal and Nonfederal Loans in 2016 Dollars, 1995–1996 to 2016–2017).

More relevant for this Article, however, SAFRA also expanded IBR and made it more generous (“New IBR”).<sup>26</sup> I review the important provisions of each IBR plan below.

The IBR plans together are the most popular of the IDR plans, used by nearly 3 million borrowers and covering over \$169 billion of debt as of the third quarter of 2017.<sup>27</sup>

### 1. *Old IBR*

Under the 2008 legislation, any borrower of Direct Loans or FFEL loans in “partial financial hardship” can choose to pay 15 percent of her discretionary income instead of the standard loan payment.<sup>28</sup> Discretionary income is AGI minus 150 percent of the poverty level guideline for the borrower’s family size.<sup>29</sup> Partial financial hardship means simply that a borrower’s standard loan payment exceeds 15 percent of discretionary income,<sup>30</sup> so by definition a borrower entering IBR would lower her loan payment. After twenty-five years in Old IBR, any remaining balance (including unpaid accrued interest) is forgiven.<sup>31</sup>

For example, if a single individual had \$25,000 of student debt at 4.45 percent (the 2017 rate),<sup>32</sup> the borrower’s monthly payment under a standard ten-year repayment plan would be around \$258. Based on these numbers, the borrower would be in “partial financial hardship” if he had AGI of \$38,730 or less. If his AGI was, say, \$25,000, his monthly payment would be \$86.

The government covers any interest that is unpaid for the first three years of the loan.<sup>33</sup> After that, all interest accrues. Unlike ICR, PAYE, and REPAYE *all* accrued interest is capitalized when the borrower no longer has a partial financial hardship (whether they leave IBR or not).<sup>34</sup> In some situations, this could make a big difference. For example, an original loan of \$25,000 would grow to \$60,778 after twenty years if no accrued interest was paid, and all accrued interest was capitalized. On the other hand, the debt and unpaid interest would be only \$39,568 if capitalized interest were limited to 10 percent of the original balance (as is the case under ICR, PAYE, and REPAYE).

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<sup>26</sup> Health Care and Education Reconciliation Act of 2010 at § 2213, 124 Stat. at 1081.

<sup>27</sup> See *Direct Loan Portfolio*, *supra* note 16. ED does not break out the IBR numbers by Old and New IBR.

<sup>28</sup> 20 U.S.C. § 1098e(b)(1) (2018); 34 C.F.R. § 685.221(b)(1) (2018).

<sup>29</sup> 20 U.S.C. § 1098e(b)(1); 34 C.F.R. § 685.221(b)(1).

<sup>30</sup> 34 C.F.R. § 685.221(a)(5).

<sup>31</sup> *Id.* at § 685.221(f)(1).

<sup>32</sup> See Federal Student Aid, *Interest Rates and Fees*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/types/loans/interest-rates> [<https://perma.cc/SNL3-9PFN>].

<sup>33</sup> 34 C.F.R. § 685.221(b)(3).

<sup>34</sup> *Id.* at § 685.221(b)(4).

## 2. *New IBR*

SAFRA lowered the monthly payments to 10 percent of discretionary income (from 15 percent) and shortened the repayment period to twenty years (from twenty-five years).<sup>35</sup> The other terms, including the interest capitalization rules, are the same as for Old IBR. However, New IBR is only available to individuals whose first loan came on or after July 1, 2014.<sup>36</sup> Because the FFEL program ended after 2008, those loans do not qualify for New IBR and instead must use the Old IBR program (or one of the others).

The new payment terms are significantly more generous than for Old IBR. For example, using the same numbers as the example above, a borrower would be in partial financial hardship if he had AGI of \$49,050 (versus \$38,730 under Old IBR), and a borrower with AGI of \$25,000 would have a monthly payment of only \$57 (vs. \$86).

### *C. Pay As You Earn*

Recognizing that Old IBR was not generous enough, but that New IBR applied only to new borrowers (and had relatively ungenerous income capitalization rules), the Obama administration added the Pay As You Earn (PAYE) plan by regulation in 2012.<sup>37</sup> Like New IBR, PAYE calls for borrowers to pay 10 percent of discretionary income,<sup>38</sup> with forgiveness after twenty years,<sup>39</sup> and also will cover unpaid interest for the first three years.<sup>40</sup> Unlike IBR, however, PAYE caps the amount of capitalized interest at 10 percent of the original loan principal, just as ICR does.<sup>41</sup> The remaining unpaid interest still accrues and is owed as unpaid interest, but that interest does not compound over time.<sup>42</sup>

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<sup>35</sup> Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081 (codified at 20 U.S.C. § 1098e (2018)).

<sup>36</sup> 20 U.S.C. § 1098e(e); 34 C.F.R. § 685.221(a)(4) (stating the definition of “new borrower”).

<sup>37</sup> See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 66,088, 66,136 (Nov. 1, 2012).

<sup>38</sup> 34 C.F.R. § 685.209(a)(2)(ii) (2018).

<sup>39</sup> *Id.* at § 685.209(a)(6)(i).

<sup>40</sup> *Id.* at § 685.209(a)(2)(iii).

<sup>41</sup> *Id.* at § 685.209(a)(2)(iv)(B)(1).

<sup>42</sup> *Id.* at § 685.209(a)(2)(iv)(B)(2).



PAYE applies only to loans taken out after October 1, 2007, at the earliest,<sup>43</sup> and so as a practical matter does not apply to many FFEL loans, even if consolidated. FFEL loans are more affected by REPAYE, and so I discuss these issues more in the next sub-section.

PAYE is currently used by 1.1 million borrowers and covers \$58.5 billion in student debt.<sup>44</sup>

#### D. Revised Pay As You Earn

Because PAYE still did not apply to most loans existing prior to 2012, the Obama administration quickly started work on extending the program even further back.<sup>45</sup> The Revised Pay As You Earn (REPAYE) plan was finalized in 2015.<sup>46</sup> It still has the core features of limiting payments to 10 percent of discretionary income,<sup>47</sup> with forgiveness after twenty years,<sup>48</sup> but it differs from PAYE and IBR in important ways.

First, once a borrower enters REPAYE, she will pay 10 percent of discretionary income *regardless of income level*.<sup>49</sup> That is, she does not snap back to the standard loan repayment amount once her income is high enough, but instead continues to make ever-higher payments as her income increases.

Second, if a borrower takes out *any* debt for graduate school, the repayment period for *all* her debt (including undergraduate debt) is extended to twenty-five years, rather than twenty years.<sup>50</sup>

Third, interest accrues and capitalizes very differently than for PAYE. For the first three years, the government will cover all unpaid interest on *subsidized* loans, but only half of the unpaid interest on *unsubsidized* loans—a slightly less generous deal than PAYE.<sup>51</sup> But for years four and beyond, REPAYE will continue to cover

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<sup>43</sup> Technically, an “eligible new borrower” is someone who (a) had no outstanding balance as of October 1, 2007, and (b) receives a disbursement on or after October 1, 2011. *Id.* § 685.209(a)(1)(iii).

<sup>44</sup> *Direct Loan Portfolio*, *supra* note 16.

<sup>45</sup> See Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843 (June 9, 2014).

<sup>46</sup> See Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67,204 (Oct. 30, 2015) [hereinafter Final REPAYE Regs.].

<sup>47</sup> 34 C.F.R. § 685.209(c)(2)(i).

<sup>48</sup> *Id.* at § 685.209(c)(5)(ii)(A).

<sup>49</sup> REPAYE does not include a provision similar to 34 C.F.R. § 685.209(a)(4)(i), which recalculates the loan payment under PAYE when a borrower no longer has a partial financial hardship. See Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,618 (July 9, 2015) [hereinafter Proposed REPAYE Regs.]. For especially low payments, the rules round payments down to \$0 (for payments that would be less than \$5) or up to \$10 (for payments that would be between \$5 and \$10). 34 C.F.R. § 685.209(c)(2)(ii)(C)-(D).

<sup>50</sup> 34 C.F.R. § 685.209(c)(5)(ii)(B).

<sup>51</sup> *Id.* at § 685.209(c)(2)(iii)(A).

half of any unpaid interest for unsubsidized loans.<sup>52</sup> That is a substantial benefit. For example, for a \$25,000 loan over twenty years, that could amount to as much as \$11,125 (assuming the current interest rate of 4.45 percent). Finally, any unpaid but accrued interest is capitalized into the loan principal (and thus charged interest) *only* if someone leaves REPAYE—even if the person ends up with relatively high income but stays in the program.<sup>53</sup>

Fourth, REPAYE closed a significant loophole for married taxpayers. Under ICR, IBR, and PAYE, payments for married taxpayers are determined based on the combined couple's income only if they file taxes jointly, but not separately.<sup>54</sup> By contrast, a married couple has to combine their income for REPAYE, even if they file separately.<sup>55</sup>

Finally, REPAYE applies to all Direct Loans, not just those disbursed after a certain date.<sup>56</sup> The government estimated that this would make an additional six million borrowers eligible for IDR.<sup>57</sup> REPAYE can also apply to FFEL loans, but the process is more complicated and requires a bit of a story. To create both PAYE and REPAYE, the administration actually used its statutory authority under the ICR provisions of the Higher Education Act.<sup>58</sup> They had to do this because the more generous New IBR provisions applied only to post-2014 borrowers.<sup>59</sup> The ICR authority was handy, since it has relatively few statutory requirements.<sup>60</sup> But one of its few requirements is that ICR is only for Direct Loans, not FFEL loans.<sup>61</sup> To get around this limitation, a FFEL borrower would have to first consolidate her loan into a Direct Consolidation Loan, adding an additional (and annoying) step. So FFEL loans can qualify for REPAYE, but not as easily as for Old IBR.

An irony of REPAYE is that, while it was intended to be less generous to higher-income borrowers than PAYE or IBR, the opposite may be the case, for two main reasons. First, and most importantly, borrowers pay 10 percent of discretionary income regardless of their income, rather than capping monthly payments at the standard loan repayment amount, ostensibly so that higher-income borrowers “pay an equitable share of their earnings as their income rises” and “to better target the

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<sup>52</sup> *Id.* at § 685.209(c)(2)(iii)(B).

<sup>53</sup> *Id.* at § 685.209(c)(2)(iv).

<sup>54</sup> *Id.* at §§ 685.209(b)(2)(i) (ICR), 685.221(a)(5)(i) (IBR); 685.209(a)(1)(v)(A) (PAYE).

<sup>55</sup> *Id.* at § 685.209(c)(1)(i).

<sup>56</sup> *Id.* at § 685.209(c)(1)(ii).

<sup>57</sup> See Final REPAYE Regs., *supra* note 46, at 67,229.

<sup>58</sup> See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 42,086, 42,099 (July 17, 2012) [hereinafter Proposed PAYE Regs.]; Proposed REPAYE Regs., *supra* note 49, at 39616.

<sup>59</sup> See *supra* note 36 and accompanying text.

<sup>60</sup> See 20 U.S.C. § 1087e(e) (2018) (requiring only, for example, that payments be “based on” AGI).

<sup>61</sup> See *id.* (authorizing ICR for loans issued under “this part,” which Part D of the statute addresses only the Direct Loan program).

benefits of the REPAYE plan to struggling borrowers.<sup>62</sup> But increasing the monthly payments only forces higher-income borrowers to pay *faster* not to pay *more*. They will still only pay the loan balance plus any accrued interest, and paying faster means less accrued interest, lowering their total bill in present value terms and leaving them better off (even if a high monthly payment feels a bit painful at the time).<sup>63</sup>

The second reason it is generous to higher-income borrowers is the noncapitalization of accrued interest. If a higher-income borrower in REPAYE earlier had lower income, and therefore accrued some unpaid interest, that interest does not ever capitalize if the borrower stays in REPAYE, even if the borrower later no longer has a partial financial hardship—the accrued interest amounts to an interest-free loan of its own. This is in contrast to IBR and PAYE, where some or all of the accrued interest is capitalized once the borrower’s income gets high enough.

REPAYE is currently used by nearly 1.6 million borrowers and covers \$82.6 billion in student debt.<sup>64</sup> This is a rapid rise, since it has only been available since the beginning of 2016. As of this writing, it has already surpassed the amounts in PAYE, which has been around twice as long.

### E. PSLF

Finally, layered on top of any of the above plans (as well as the standard repayment plan) is PSLF, which provides for forgiveness after just ten years of repayment (as opposed twenty or twenty-five under the other plans), for borrowers who work in government or public interest jobs.<sup>65</sup> PSLF can apply for borrowers otherwise using any of the other IDR plans.<sup>66</sup>

As noted above, PSLF is the only IDR plan that explicitly excludes any cancellation of indebtedness from a borrower’s gross income for tax purposes.<sup>67</sup>

## III. IDR STUDENT “DEBT” IS NOT REALLY DEBT

I am arguing in this Article that student borrowers will be better served if the federal government increases the federal Direct Loan limit, so that it offers more debt than it already does. This is perhaps a counter-intuitive point—I am claiming to be both pro-student and pro-debt. The key to the argument, however, is that student “debt” subject to IDR is not really debt, or at least different enough from traditional debt that we need a new way of thinking about it.

Think of the key features of debt: a fixed principal amount with a promise to repay in full; regular periodic payments of interest (and maybe principal); some legal

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<sup>62</sup> Proposed REPAYE Regs., *supra* note 49, at 39,618.

<sup>63</sup> I commented on the proposed regulations to make this point, but ED dismissed the issue. See Final REPAYE Regs., *supra* note 46, at 67,214.

<sup>64</sup> *Direct Loan Portfolio*, *supra* note 16.

<sup>65</sup> 34 C.F.R. 685.219(c)(1) (2018).

<sup>66</sup> *Id.* at § 685.219(c)(1)(iv).

<sup>67</sup> See *supra* notes 9–11 and accompanying text.

recourse for the lender to recover unpaid amounts, etc. IDR student debt has few, if any, of these features. While a student does borrow a fixed amount, there is no enforceable promise that the student will pay all of that money back. The only promise is to make required payments for a fixed number of years (with forgiveness at the end of the period contracted for *ex ante*). Moreover, the payments themselves for borrowers in partial financial hardship (and all borrowers in REPAYE) are a function only of the person's income, and are completed unrelated to the interest and principal due on the loan.

In taxation, just as in other fields, there is often a need to look through the form of a financial instrument to determine its true substance.<sup>68</sup> Merely labeling something as “debt” is not sufficient if it is really more like equity (or vice versa). In the tax context, an instrument with terms like this might even fail to qualify as debt.<sup>69</sup>

Since this program involves not an investment interest in a company, but rather transfers to and from the federal government, the thing IDR student debt most resembles is an income tax.<sup>70</sup> In the typical tax and transfer situation, the federal government provides a good or service—a national park, missile defense, health insurance, etc.—and raises the revenue to pay for it by collecting a percentage of taxpayers' income. In essence, that is precisely what is happening with IDR student debt. The government provides higher education (by transferring money to pay tuition), and then pays for that by collecting a percentage of the student's income for a period of time.

A borrower in partial financial hardship has only one obligation: to pay a percentage of her income to the government for some fixed number of years. The fact that the payment is associated with some nominal debt amount is unimportant, since any remaining debt will be canceled at some point in the future.<sup>71</sup> To say that such a person has a “debt” is like saying that a taxpayer is indebted to the government because he will have some future tax liability based on his income. There is certainly a legal obligation to pay that future tax, but I doubt that anyone would call it a “debt.”

To be clear, this view of IDR is clearly an abstraction. There are some fundamental ways in which IDR differs from a true tax, and in which it still has some

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<sup>68</sup> See, e.g., William T. Plumb, Jr., *The Federal Income Tax Significance of Corporate Debt: A Critical Analysis and a Proposal*, 26 TAX L. REV. 369 (1971) (the classic treatment of the debt vs. equity issue in taxation).

<sup>69</sup> See, e.g., *id.* at 430–33 (discussing cases of contingent debt and cases where interest is not collected).

<sup>70</sup> I discuss this theory in more depth in Brooks, *supra* note 2, at 258–63; see also John R. Brooks, *Student Loans as Taxes*, 151 TAX NOTES 513, 515 (2016) [hereinafter Brooks, *Student Loans as Taxes*].

<sup>71</sup> I am ignoring here the potential tax bill, which admittedly complicates the analysis significantly. My view is that treating the forgiveness as taxable is both a policy and legal error, and that political forces will likely push Congress to add an exclusion at some point, particularly since its unlikely to involve large amounts of revenue. See *supra* notes 9–11 and accompanying text.

important indices of debt.<sup>72</sup> It may be better to think of it as a hybrid of a tax and a debt. But the point remains that IDR is dramatically different than traditional debt, and that for a borrower in partial financial hardship, the nominal amount borrowed has little bearing on how much the borrower actually pays.

#### IV. PROBLEMS WITH IDR

The IDR programs are far from perfect. Enormous challenges remain in making sure that they meet their goals of providing affordable higher education and debt relief. Many of the problems are detailed well by the other articles in this symposium. The discussion in Part II reveals another major category of problem: the programs are incredibly complex, and parsing the differences between them is challenging even to this tax lawyer. In what follows, however, I focus on two additional problems: the inadequate amount of federal Direct Loans available for undergraduate education, and, as a corollary to that, the relatively high amounts of IDR loans available for graduate and professional education.

##### *A. Not Enough Debt for Undergraduate Education*

IDR is only available for Federal Direct Loans, which for undergraduates means essentially just the subsidized and unsubsidized Stafford Loans. These loans have strict statutory limits. A dependent student can only borrow up to \$5,500 for her first year of college, \$6,500 for her second year, \$7,500 for each of her third and fourth year, and only \$4,000 for any years beyond that.<sup>73</sup> Thus a typical four-year college student can only borrow up to \$27,000 of IDR-eligible debt, and a student in college beyond four years can borrow a total of \$31,000.<sup>74</sup>

The available debt is not sufficient to pay the average out of pocket costs of higher education. The College Board reports that average tuition, fees, room, and board charges *net of grant aid* is currently \$14,940 per year at public four-year colleges, and \$26,740 per year at private nonprofit colleges.<sup>75</sup> Federal Direct Loans can cover only one year of private college on average. According to the College Board, in 2015–2016, the average borrower with a completed bachelor's degree had \$28,400 in debt,<sup>76</sup> meaning that many if not most students are bumping up against the debt limits.

Net tuition has been growing rapidly, even as the debt limits have stayed largely unchanged. The current lifetime limits were put in place in 2007.<sup>77</sup> Even then they

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<sup>72</sup> See Brooks, *Students Loans as Taxes*, *supra* note 70, at 515–16.

<sup>73</sup> See 20 U.S.C. §§ 1078(b), 1078-8(d)(3) (2018).

<sup>74</sup> Independent students have higher limits and can borrow a total of \$57,500. 20 U.S.C. § 1078-8(d)(4)(B).

<sup>75</sup> COLL. BD., TRENDS IN STUDENT PRICING 2017 18–19 (2017) [hereinafter STUDENT PRICING], <http://trends.collegeboard.org/college-pricing> [<https://perma.cc/ZR7Z-727Z>].

<sup>76</sup> STUDENT AID, *supra* note 25, at 20.

<sup>77</sup> See Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, § 2(a), 122 Stat. 740 (2008).

were inadequate to cover average net tuition, fees, room, and board,<sup>78</sup> and since then the average net cost has risen another 27 percent.<sup>79</sup> The rise in out of pocket costs puts increasing pressure on student and family budgets. Those without sufficient family wealth or income must look instead to extra student work during the term, choosing a cheaper school, or private loans. Each of these is problematic.

Part-time work is a reasonable and traditional activity for college students, but if students are forced to work too many hours it can cut into class and study time, and is negatively correlated with student outcomes.<sup>80</sup> Furthermore, the most common reason that students drop out of college is to work and make money—and many of those students do not return to finish their degrees.<sup>81</sup>

Choosing a cheaper school may also be a reasonable option as well in some circumstances—many schools, especially some private nonprofits, offer poor value relative to state universities.<sup>82</sup> But a student who chooses, say, a local state college over a flagship state university or over a strong private liberal arts school may be doing himself a disservice in the long run.

Worst of all are private loans—so much so that little needs to be said. Most importantly, private loans do not qualify for IDR. They also tend to have higher interest rates, and have often been issued in abusive ways.<sup>83</sup> For example, some private for-profit schools have pushed students into private loans that they know students are unable to afford and will not repay, simply in order to stay on the good side of the federal government's 90/10 rule, which says that federal loans cannot

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<sup>78</sup> According to the College Board, net tuition, fees, room, and board in 2007 was \$11,720 per year. STUDENT PRICING, *supra* note 75, at 18.

<sup>79</sup> *Id.*

<sup>80</sup> See SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 13 (2014); see generally Ralph Stinebrickner & Todd R. Stinebrickner, *Working During School and Academic Performance*, 21 J. LAB. ECON. 473 (2003) (finding evidence that increased employment during college decreases academic performance).

<sup>81</sup> See, e.g., PUB. AGENDA, WITH THEIR WHOLE LIVES AHEAD OF THEM: MYTHS AND REALITIES ABOUT WHY SO MANY STUDENTS FAIL TO FINISH COLLEGE 5–7 (2011), <http://www.publicagenda.org/media/with-their-whole-life-ahead-of-them> [<https://perma.cc/M6TL-5Z6L>].

<sup>82</sup> See, e.g., Judith Scott-Clayton, *Early Labor Market and Debt Outcomes for Bachelor's Degree Recipients: Heterogeneity by Institution Type and Major, and Trends over Time* (CAPSEE Working Paper 2016), <https://eric.ed.gov/?id=ED568162> [<https://perma.cc/76QD-Q9E5>].

<sup>83</sup> See, e.g., SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 73–74 (2011); Jonathan D. Glater, *Offering Perks, Lenders Court Colleges' Favor*, N.Y. TIMES (Oct. 24, 2006), [http://www.nytimes.com/2006/10/24/education/24loans.html?\\_r4](http://www.nytimes.com/2006/10/24/education/24loans.html?_r4) [<https://perma.cc/LAG3-T3U5>]; Jonathan D. Glater, *U.S. Is Lax on Loans, Cuomo Says*, N.Y. TIMES (Apr. 26, 2007), [http://www.nytimes.com/2007/04/26/us/26loans.html?srctp&\\_r0](http://www.nytimes.com/2007/04/26/us/26loans.html?srctp&_r0) [<https://perma.cc/8YDA-QHLT>]; Doug Lederman, *Taming the Student Loan "Wild West,"* INSIDE HIGHER ED (June 7, 2007, 4:00AM), <https://www.insidehighered.com/news/2007/06/07/loans> [<https://perma.cc/7XSY-ZEVN>].

make up more than 90 percent of the revenue for a for-profit school.<sup>84</sup> These loans are essentially loss-leaders designed to fail, issued only so that schools can still collect the remaining 90 percent.<sup>85</sup>

In the previous Part, I argued that we should think of IDR student loans as more analogous to the government paying for a service with an income tax. But if the debt available is insufficient to actually pay for that service, the analogy breaks down. To put it another way, IDR, like an income tax, provides some insurance to individuals for the risk of low income. If a person's income is low, he or she is allowed to make both lower student loan and lower tax payments, while still receiving the same services. That risk-shifting is a core feature of public finance.<sup>86</sup> But if the student has to instead rely on private loans or other funds, more of the risk of low income falls on her back alone. The risks are once again privatized.

### *B. Disproportionate Benefits for Graduate and Professional Education*

The federal government's stinginess toward undergraduates is underscored by its generosity toward graduate and professional students. While a typical undergraduate can borrow no more than \$27,000 (with an absolute maximum for some students of \$57,500), there is essentially no cap on how much a graduate student can borrow.

The Direct Loan limits for graduate students (especially medical students) is somewhat higher than for undergraduates,<sup>87</sup> but the key difference is that graduate and professional students can also use "Grad PLUS Loans." The Direct PLUS Loan was originally for parents, but in 2005, Congress created a version of the PLUS Loan for graduate and professional students.<sup>88</sup>

Both Grad and Parent PLUS Loans do not have a strict dollar cap. Instead, borrowers can borrow up to the full "cost of attendance,"<sup>89</sup> a calculated amount for each program that takes account of tuition, fees, and cost of living.<sup>90</sup> But IDR is

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<sup>84</sup> 20 U.S.C. § 1094(a)(24) (2018).

<sup>85</sup> See NAT'L CONSUMER LAW CTR., *PILING IT ON: THE GROWTH OF PROPRIETARY SCHOOL LOANS AND THE CONSEQUENCES FOR STUDENTS* 24–28 (2011), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/proprietary-schools-loans.pdf> [<https://perma.cc/9M6X-759E>].

<sup>86</sup> See John. R. Brooks, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 94–102 (2014).

<sup>87</sup> 34 C.F.R. §§ 685.203(b)(2)(iii), (c)(2) (2018) (annual limit of \$20,500); *id.* at § 685.203(e)(3) (lifetime limit of \$138,500). ED has authority to increase the limits for high cost programs have study and has used the authority to periodically increase the limits for health profession programs. See, e.g., Federal Student Aid, *Aggregate Loan Limit for Graduate and Professional Students Preparing for the Health Professions*, U.S. DEP'T OF EDUC. (Apr. 18, 2008), <https://ifap.ed.gov/dpccletters/041808GEN0804.html> [<https://perma.cc/4HQF-6SCC>].

<sup>88</sup> Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, § 8005(c) (2006).

<sup>89</sup> 34 C.F.R. §§ 685.203(f), (g).

<sup>90</sup> 20 U.S.C. § 1087ll (2018).

largely not available for Parent PLUS Loans.<sup>91</sup> By contrast, IDR is available for Grad PLUS Loans.<sup>92</sup> Thus, a graduate or professional student can borrow enough not only to pay for school, but also to fund some living expenses, and use IDR for the full amount.

For example, consider the University of Utah. For an out of state student at the College of Law, living on campus, the annual cost of attendance is \$73,198 for 2017–2018.<sup>93</sup> So a Utah law student can borrow nearly \$220,000, and use IDR for all of it. By contrast, a typical Utah undergraduate can borrow only about 12 percent of that—\$27,000.

At the current graduate-loan interest rate of 6 percent, the standard loan payment for that amount would be \$2442.45 per month. A single borrower with no children would have a “partial financial hardship,” and thus be able to lower his or her payments, if he or she had an AGI of \$311,180 or less.

Numbers like these have led some analysts to criticize IDR, not unfairly, as being excessively generous to high-income professionals, like lawyers.<sup>94</sup> But, the bigger issue is the relative *ungenerosity* of IDR for undergraduates. Some disparity in treatment between undergraduates and graduate students is reasonable. Graduate school tuitions tend to be higher—especially for law and medical school. Graduate students are more likely to be independent of their parents. And the debt itself is more expensive, because of the higher statutory interest rates. But graduate and professional students are also likely to have higher salaries and better job prospects than many undergraduates.<sup>95</sup>

This is not to say that IDR must necessarily be cut back for graduate students. Indeed, the higher salaries for graduate students means that IDR may not actually do much for many of them anyway (the extreme example above notwithstanding). The point, rather, is to underscore the inadequacy of the amounts of IDR-eligible debt for undergraduates. The IDR system is heavily tilted toward graduate students, but only because undergraduates are permitted to borrow so little that most of them will pay their loans off in full.<sup>96</sup>

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<sup>91</sup> ICR is available for Parent PLUS loans, but that has only limited relevance. *See supra* notes 19–21 and accompanying text.

<sup>92</sup> *See, e.g.*, 34 C.F.R. § 685.209(a)(ii) (2018) (excepting only Direct PLUS Loans made to parent borrowers, but not to student borrowers). Similar provisions apply for IBR and REPAYE.

<sup>93</sup> *First-Year Law Student Cost of Attendance 2017–2018*, UNIV. OF UTAH S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/admissions/financial-information/cost-of-attendance> [<https://perma.cc/3JJ8-HPHJ>].

<sup>94</sup> *See, e.g.*, JASON DELISLE & ALEXANDER HOLT, NEW AM. FOUND., SAFETY NET OR WINDFALL?: EXAMINING CHANGES TO INCOME-BASED REPAYMENT FOR FEDERAL STUDENT LOANS 10 (2012), <https://www.newamerica.org/education-policy/policy-papers/safety-net-or-windfall> [<https://perma.cc/FB24-XWG5>].

<sup>95</sup> *See, e.g.*, JENNIFER MA ET AL., COLL. BD., EDUCATION PAYS 2016: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 17 (2016), <https://trends.collegeboard.org/education-pays> [<https://perma.cc/HJ2Z-UYJU>].

<sup>96</sup> *See* U.S. DEP’T OF EDUC., STUDENT LOANS OVERVIEW: FISCAL YEAR 2018 BUDGET PROPOSAL Q-34 (2017) [hereinafter ED BUDGET], <https://www2.ed.gov/about/overview/>



## V. EXPANDING IDR DEBT TO EXPAND AFFORDABILITY

*A. Raise the Direct Loan Limit for Undergraduates*

To fulfill the promise of IDR—of affordable higher education for everyone—Congress must increase the Direct Loan limits, so that the loans are sufficient to cover student out-of-pocket costs, at least at a four-year public university. In particular, Direct Loans should be enough to cover the average four-year public university net tuition, fees, room, and board of about \$15,000 per year, or \$60,000 in total. Furthermore, some provision, by indexing or otherwise, should be made for the lifetime loan limits to increase along with net tuition levels.

Using the average net cost of public four-year universities, is, of course, a very rough approximation of a given individual's out-of-pocket cost—most students will need to pay either more or less than the average net tuition. But there are reasons to think that \$15,000 per year is a decent approximation.

First, students from lower-income families are likely to be already getting substantial grant aid, and so they won't be as likely to withdraw the full amounts available. That said, their need may be greater than it appears, since a lot of grant actually ends up with better-off families. For example, about 13 percent of the grant aid used by the College Board to calculate net tuition comes in the form tax deductions and credits,<sup>97</sup> which disproportionately benefit higher-income families.<sup>98</sup> And another 9.3 percent is just for G.I. Bill recipients.<sup>99</sup> So these grants do not lower tuition for (nonmilitary) lower-income families at all. And a lot of institutional aid goes for merit or academic scholarships, or otherwise does not track need. As a result, students from some lower-income families may still have need of greater borrowing than is available now.

Second, assuming grant aid does track income at least somewhat, net tuition for students from higher-income families may exceed this new debt limit. But those are likely to be the families that can most afford to pay out of their own pockets.

Moreover, it would be a mistake to make the loan limits as high as for graduate students, allowing undergraduates to borrow the full cost of attendance, because schools could respond by scaling back on institutional aid, particularly since schools are also largely in control of their posted tuition amounts. If students could borrow up to the full cost of attendance with IDR-eligible debt, schools may find it easier to hike tuition, cut grants, or both, since the downside risk to the student would be the same.

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budget/budget18/justifications/index.html [https://perma.cc/ZEX9-TUTM] (showing estimated lifetime dollar default rates of between 19.73% and 28.93% for undergraduates, but with recovery rates exceeding 100% on those defaulted loan amounts).

<sup>97</sup> STUDENT AID, *supra* note 25, at 11.

<sup>98</sup> *Id.* at 29.

<sup>99</sup> *Id.* at 11.

*B. Raising the Direct Loan Limit May Not Cost Much*

A \$60,000 total debt limit is, admittedly, a big jump—more than double the four-year limit for a dependent undergraduate. But for several reasons, the increase would not be as dramatic as it seems, and may not even cost the federal government much at all.

First, recall that the loan limit for *independent* students is already in this neighborhood—\$57,500. This increase would just bring the dependent limits in line with those for independent students.

Second, if students borrow more from the Direct Loan program, parents will likely borrow less under the Parent PLUS Loan program. Total Parent PLUS lending in 2016–2017 was about \$12.6 billion, while total Direct Loan lending to undergraduates was \$44.6 billion.<sup>100</sup> Direct Loan lending could be increased substantially without changing the total amount of lending, if Parent PLUS Loans were used less.

Third, it is unlikely that every borrower would max out and borrow at the new limit. Despite my argument in Part III, “debt” may remain a psychological barrier. And even when it doesn’t, the need for additional borrowing likely varies widely. As noted, those with the least family wealth or income may already get substantial federal and institutional aid, especially at the richest schools, such that there is little gap to close. And those with the most wealth may still choose to rely on family wealth and income (especially from tax-preferred savings accounts). The increased loan limit would be the biggest help to those caught in the middle—not too poor, not too rich—and also those with particular circumstances that make grants or family contributions insufficient.

Finally, the federal student loan system is, as of this writing, a net money-maker for the federal government, even including the IDR programs. Federal law requires loan-making agencies to estimate the net present cost of federal loans in the year of the loan,<sup>101</sup> and ED reestimates those loan costs as conditions change and data is collected.<sup>102</sup> Therefore, ED annually calculates and adjusts estimates of the difference between what it lends and what it collects, including interest and estimates of default. Although the IDR programs have clearly increased the costs to the federal government,<sup>103</sup> the program over all remains in a “negative” net subsidy position, meaning that all things considered, the government still expects to take in more money than it spends.<sup>104</sup> Moreover, even if the program tipped into a positive net subsidy, the costs associated with the program are not huge in budgetary terms, and having some subsidy from taxpayers may not be a bad thing.<sup>105</sup>

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<sup>100</sup> Author’s calculations using data from STUDENT AID, *supra* note 25, at 16.

<sup>101</sup> Federal Credit Reform Act of 1990, 2 U.S.C. §§ 661a(5)(B), 661c (2018).

<sup>102</sup> See ED BUDGET, *supra* note 96, at Q-15.

<sup>103</sup> See *id.*

<sup>104</sup> *Id.* at Q-24 (showing negative weighted subsidy rates).

<sup>105</sup> See Brooks, *supra* note 2, at 264–70 (discussing reasons for and against subsidizing the group of students that benefit from IDR).

These numbers are, of course, just estimates and much can change. But they at least show that, on a budgetary scale, the IDR programs are not hugely expensive, and may not cost much money at all. For example, ED's 2018 budget proposal put the overall cost of IDR around \$28 billion.<sup>106</sup> With total outstanding loans around \$1.3 trillion,<sup>107</sup> a few billions or tens of billions here or there is not big money. As comparison, the federal government spent around \$26.6 billion in Pell grants in 2016–2017 alone,<sup>108</sup> comparably to the *total* cost of the IDR program. The government can afford to be more generous here.

### C. *How to Increase the Debt Limit*

When the Obama administration wanted to implement IBR more quickly and make it more generous, they were able to act administratively, because of the expansive authority ED had under the ICR provisions of the Higher Education Act.<sup>109</sup> Sadly, it does not appear that ED would have similar latitude on the Direct Loan limits, which are baked pretty clearly into the language of the Higher Education Act itself.<sup>110</sup>

The other potential option would be to try to issue PLUS Loans directly to undergraduates, as ED currently does for graduate students, since these do not have the same statutory limit. Unfortunately, this also seems clearly precluded by the statute, which limits these loans only to graduate and professional students.<sup>111</sup>

Therefore, this seems like an area where Congress would have to act. I have no particular political insight, but this does seem to me to be a less heavy lift than it would seem. First, the limit is so clearly inadequate and outdated that the argument for increasing it is fairly obvious. Second, because of the repeal of FFEL, the private lending industry is less of a force now than it was when SAFRA passed. Thus, there may not be much lobbying against an increase, even though it would take some business away from private lenders. Third, the Trump administration has called for an expanded IDR program,<sup>112</sup> and so improvements to the Direct Loan program could bring together Republicans and Democrats. When Congress deals with reauthorization of the Higher Education Act, which is overdue as of this writing,<sup>113</sup> it should increase the lifetime limits on Direct Loans to undergraduates.

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<sup>106</sup> See ED BUDGET, *supra* note 96, at Q-15. It is difficult to know exactly what goes into ED's re-estimates of the subsidy costs, and the numbers fluctuate dramatically from year to year. But it is reasonable to assume that these numbers represent at least the order of magnitude of the costs.

<sup>107</sup> See *Portfolio Summary*, *supra* note 6.

<sup>108</sup> See STUDENT AID, *supra* note 25, at 23.

<sup>109</sup> See *supra* Part II.C.

<sup>110</sup> See 20 U.S.C. §§ 1078(b), 1078-8(d)(3) (2018).

<sup>111</sup> See 20 U.S.C. § 1078-2(a)(1) (2018).

<sup>112</sup> See OFFICE OF MGMT. AND BUDGET, *supra* note 3.

<sup>113</sup> The Higher Education Act was last re-authorized in 2008. That authorization expired in 2013, though Congress has extended it for the last few years. See DAVID P. SMOLE & ALEXANDRA HEGJI, CONG. RESEARCH SERV., FY2016 EXTENSION OF THE HIGHER

## VI. CONCLUSION: IS IDR WORTH IT?

Now a big caveat to everything said thus far. The argument that federal loan limits should be expanded relies on thinking of IDR debt not as true debt, but rather as just an accounting tool to collect a share of a college graduate's income. If that is right, it ought to remove many financial barriers to enrolling in or graduating from college. One only pays if one has sufficient income, and the more income one has, the more one pays—much like the income tax itself.

But there are important ways that this view of IDR might be wrong. First, it could be implanted so poorly that it does not do what it promises. Second, even if implemented well, students may still *perceive* IDR as true debt, and therefore as still a substantial financial disincentive.

On the first point, several other symposium participants have noted, in this issue and at our symposium, that loan servicers are often failing students and graduates, and that the cumbersome rules around IDR are a significant problem. I will not repeat their arguments, but they are serious. If the administration of the student loan system fails, the arguments in this essay are moot.

On the second point, we have to take individual psychology as it is, not as we wish it to be. Even if my argument is persuasive, if students still see high tuition and high debt as a serious financial risk, then IDR will not be enough to expand access to higher education, and could even hinder it.

The hope is that, over time, individuals would come to understand the role of IDR and student debt as they observe others' experiences. Clearly, many already see borrowing to invest in their human capital as a worthwhile investment—much as many homeowners reasonably and happily borrow money to buy a house. If those students still on the margin learn even a bit about IDR, it should be sufficient to overcome many financial worries. But this is ultimately an empirical question. Only time will tell us whether IDR student debt is truly a worthwhile policy instrument to provide affordable higher education.