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Democratizing Higher Education: Defending and Extending Income-Based Repayment Programs

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DEMOCRATIZING HIGHER EDUCATION: DEFENDING AND EXTENDING INCOME-BASED REPAYMENT PROGRAMS

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The Higher Education Act is now up for reauthorization.[2]

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[2] *See Reauthorizing the Higher Education Act: Exploring Barriers and Opportunities within Innovation: Hearing before the S. Comm. On Health, Education, Labor, and Pensions*, 114th Cong. (July 22, 2015), http://www.help.senate.gov/hearings/reauthorizing-the-higher-education-act-exploring-barriers-and-opportunities-within-innovation.

The Act provides support for both college and graduate students, and institutions themselves. Meanwhile, the Department of Education (DOE) is crafting rules to implement a "Revised Pay as You Earn" (REPAYE) program to help borrowers not eligible for other income-based repayment programs.[3] As each program is crafted, policymakers need to carefully consider the balance between mission and margin in the largely non-profit higher education sector.[4] Mission includes the research, teaching, and service missions of the university. Margin refers to the stable financial base of support needed to maintain the quality and continuity of independent, civil society institutions.

Without some margin, higher education institutions cannot fulfill their mission. But without clear evidence that higher education institutions are actually serving the full scope of their missions, any margin is unjustified. This complex imperative—to assure the integrity of educational mission while avoiding excessive costs—is at the core of higher education policy. There are also macroeconomic factors that make education policy decisions particularly consequential now. As reauthorization approaches, and REPAYE rules are drafted, Congress and the DOE should keep in mind four core principles that are often obscured in current policy debates.

First, higher education policy must help ameliorate the effects of an era of economic inequality.[5] Corporations have already

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[3] For background on income contingent repayment, *see* John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. (forthcoming, 2015).

[4] For background on the mission/margin balance in non-profits, *see* Thomas L. Greeley & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1 (2005). This article focuses on nonprofit institutions of higher education. For-profit institutions pose different policy questions, and given their track record, should be much more tightly scrutinized than nonprofits. *See, e.g.*, TRESSIE MCMILLAN COTTOM, LOWER ED: HOW FOR-PROFIT COLLEGES DEEPEN INEQUALITY IN AMERICA (2016); John Quiggin, *Thinking the Unthinkable*, JOHNQUIGGIN.COM, http://johnquiggin.com/2015/10/16/thinking-the-unthinkable/ ("There is now overwhelming evidence that for-profit education has been a disastrous failure wherever it has been tried, and particularly where for-profit firms can gain access to public funds through policies designed to enhance 'consumer choice.'").

[5] For documentation of inequality, *see* ANTHONY ATKINSON, INEQUALITY: WHAT CAN BE DONE (2015); THOMAS PIKETTY, CAPITAL IN

shifted many risks to individuals by, for example, switching from defined benefit to defined contribution pension plans.[6] Though most college and graduate school graduates can pay their debts, in a higher education system as open to innovation and experimentation as the United States's, there will always be some individuals for whom higher education does not pay off. For them, income-based repayment programs (IBR) are a crucial safety net. These programs should be strengthened by new legislation and rules.

Second, states have dramatically cut back their support for higher education.[7] A combination of tax cutting and expanding spending on prison populations and law enforcement has left public colleges and universities struggling to maintain programs and keep up with private institutions. Federal funding—whether for direct scholarship programs, or indirectly in the form of federal credit programs—must fill the gap left by the states, lest millions of individuals suffer economic exclusion.

Third, institutions of higher education have broad and diverse goals and purposes, often inextricably intertwined, which funders need to respect and support. Unfortunately, a permanent austerity mindset among some members of Congress (and high level DOE officials) has created interest in cheap, technology-driven quick fixes to improve access to higher education. These range from online courses, to loosened accreditation standards, to the reconfiguration of universities as mere certifiers validating the acquisition of skills and learning elsewhere.[8] While commendable

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THE 21ST CENTURY (2014).

[6] On this and similar risk-shifting, *see* JACOB HACKER, THE GREAT RISK SHIFT (2007); Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561 (2015).

[7] Michael Mitchell, *Testimony Before the U.S. Senate Committee on Health, Education, Labor, and Pensions*, June 3, 2015, at http://www.help.senate.gov/imo/media/doc/Mitchell11.pdf (documenting dramatic cuts in state funding on higher education from 2007 to 2015, and commensurate increases in tuition costs).

[8] For a critique of bare certifier and other unbundled models, *see* Frank Pasquale, *Private Certifiers and Deputies in American Health Care*, 92 N.C. L. REV. 1161 (2014) (in health care sector); Frank Pasquale, *Synergy and Tradition: The Unity of Research, Service, and Teaching in Legal Education*, 40 J. L. PROFESSION 1 (2015). For more on the problems of unaccredited schools in the law school context, *see* Michael Simkovic, *What Deregulated Law Schools Really Look Like*, BRIAN LEITER'S LAW SCHOOL REP. (July 31, 2015),

as pilot programs, low-cost options should not be permitted to prompt a predictable "race to the bottom" in educational quality. As Australia learned when it made vocational education "contestable" (i.e., gave support to students in a variety of untested or barely validated options), there are numerous entities capable of cutting corners or even offering an entirely valueless "education" to students.[9] Diploma mills, when left unchecked, can be enormously tempting profit centers for private capital. The recent findings of the Senate HELP Committee on for-profit higher education in general should offer ample cautionary tales regarding sudden "disruption" of traditional institutions.[10]

Fourth, higher education creates enormous value for both students and society as a whole. Policymakers driven by a "return on investment" (ROI) framework for federal spending and credit programs should recognize the significant and lasting earnings premiums and human capital acquisition generated by higher education.[11] Education policy should also recognize the intangible,

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http://leiterlawschool.typepad.com/leiter/2015/07/what-deregulated-law-schools-really-look-like-michael-simkovic.html.

[9] John Ross, *Senate demands contestability review*, THE AUSTRALIAN (Feb. 12, 2015), http://www.theaustralian.com.au/higher-education/senate-demands-contestability-review/story-e6frgcjx-1227217379191 ("[P]rivate education companies had made hundreds of millions of dollars in profits from public subsidies at the same time public funding for technical and further education was being slashed."); Leesa Wheelahan, *Victorian TAFE chaos: a lesson in how not to reform vocational education*, THE CONVERSATION (May 30, 2012), https://theconversation.com/victorian-tafe-chaos-a-lesson-in-how-not-to-reform-vocational-education-7296.

[10] STAFF OF S. COMM. ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 37 (Comm. Print 2012). The recent collapse of Corinthians, a for-profit chain, shows how devastating this business model can be for students taken in by it.

[11] Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, Daily Comp. Pres. Doc. 1 (June 9, 2014) ("College remains a good investment, resulting in higher earnings and a lower risk of unemployment.") (hereinafter Memorandum); Frank McIntyre & Michael Simkovic, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014); David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. TIMES (May 27, 2014), http://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html?abt=0002&abg=0&_r=0; David Leonhardt, *Even for Cashiers, College Pays Off*, N.Y. TIMES (June 25, 2011), http://www.nytimes.com/2011/06/26/sunday-review/26leonhardt.html; *Michael* Simkovic, *The Knowledge Tax*, 82 U. CHI. L. REV. (forthcoming, 2015),

hard-to-monetize, and long-term benefits generated by colleges and universities. However, even in the very narrow framework of ROI for better-skilled labor, extant federal investment in higher education is well worth it and ought to be increased.

These four principles guide this essay's commentary on two current policy debates in U.S. higher education financing. Part I addresses the DOE's proposed regulations to implement REPAYE for income-driven repayment of federal student loans.[12] Part II broadens the focus, making the case for lower interest rates on student loans and more generous debt forgiveness programs in the upcoming reauthorization of the Higher Education Act. The essay concludes with reflections on the macroeconomic value of higher education.

I. EXTENDING INCOME-BASED REPAYMENT IN THE REVISED PAY AS YOU EARN PLAN

Federal student loan programs impose unique burdens and obligations on borrowers.[13] Such loans are very rarely discharged in bankruptcy proceedings.[14] However, since 1993, Congress has required the DOE to provide a repayment program that caps payments at a certain percentage of income, and forgives the debt after a certain term of years (Income-Contingent Repayment, or ICR).[15] Given the unfavorable terms set by DOE at the

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551567; Michael Simkovic, *Do Increases in the Cost of College Pay for Themselves?*, BRIAN LEITER'S LAW SCHOOL REP. (Aug. 5, 2015), http://leiterlawschool.typepad.com/leiter/2015/08/do-increases-in-the-cost-of-college-pay-for-themselves.html.

[12] Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39608 (proposed July 9, 2015) (to be codified at 34 C.F.R. pts 668, 662, & 685).

[13] Michael Konczal, *Sweet Forgiveness,* BOS. REV. (Nov. 1, 2012), http://www.bostonreview.net/forum/sweet-forgiveness.

[14] Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L. J. 495 (2012) (noting that hardship exemptions were very rarely asked for, but were granted more often than many estimate); Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html?_r=0.

[15] Am. Bar Ass'n, Resolution Adopted by the House of Delegates, Aug. 11-12, 2014,

time, the program was not widely used.[16] However, it did provide some relief for borrowers caught between the Scylla of nondischargeability and the Charybdis of mounting debt.

By 2007, Congress was ready to improve on the ICR program. It mandated a new program, commonly deemed IBR (Income-Based Repayment). Borrowers who are enrolled in IBR pay 15% of *discretionary* income each year.[17] A person or family's discretionary income is their adjusted gross income (AGI) minus 150% of the poverty level for that person or family. For example, if a person's AGI was $30,000 in 2015 and the poverty level was $10,000, discretionary income would be $30,000 minus $15,000 (150% of $10,000) or $15,000. Accordingly, the yearly loan repayment would be capped at $2,250 (15% of $15,000). Moreover, all borrowers in this program would see the remainder of their debt forgiven after 25 years,[18] while those in public service jobs (defined as full-time work for the government or a tax-exempt organization) would see forgiveness after 10 years under the Public Service Loan Forgiveness (PSLF) program.[19]

However, it is important to note that the ultimate debt forgiveness would count as income in the year in which it occurred. Thus, if a student chose payment options that only covered interest accrual (or less), there could be a sizeable tax bill due, particularly on the 25-year plan. Moreover, given spotty administration of the program, many are concerned that borrowers will either be misled about the availability of forgiveness, or

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http://www.americanbar.org/content/dam/aba/uncategorized/GAO/PSLF2014res.authcheckdam.pdf, page 3. The 1993 legislation "required the Secretary of Education to offer borrowers an income contingent repayment plan through which students would pay 20% of their income each year toward their federal student loan repayment, and the Secretary would cancel any remaining balance at the end of a period of repayment not to exceed 25 years." *Id.*

[16] Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 830-31 (2001) ("[P]olicymakers originally anticipated ICR would be used by 15-30% of borrowers. The Secretary of Education projected that between 1996-2000, 17% of all direct loans... would be repaid under the income- contingent repayment option. In fact, [as of 2000] fewer than 1% of new borrowers at schools that offer federal direct loans [chose] income-contingent repayment.").

[17] 20 U.S.C. § 1087e(m) (2012).

[18] *Id.*

[19] 20 U.S.C. § 1087e(m)(3)(B)(i).

that government contractors will impose documentation hurdles on those attempting to avail themselves of IBR.[20]

Congress amended IBR in 2010 to shorten the repayment period to 20 years and reduce the repayment obligation to 10% of discretionary income for those who borrowed in 2014 or later.[21] In 2012, the Obama Administration deployed funds to permit those who had borrowed in 2007 or later and entered repayment in 2012 or later to enroll in this more generous version of IBR. Given extraordinary government profits from student loans in repayment (the government's costs of borrowing have been far lower than the interest earned from student debt), this was a fair change in policy. In 2014, President Obama called on the DOE to develop a program to assist pre-2007 borrowers on terms similar to those of extant IBR.[22] DOE released a plan to do so in a Notice of Proposed Rulemaking (NPRM) of July 9, 2015, deeming the proposed program the Revised Pay as You Earn plan (REPAYE).[23]

Unfortunately, the DOE has proposed several conditions on entry into REPAYE of dubious merit either as a matter of policy or as a reflection of the President's wishes. For example, DOE has chosen to include the borrower's spouse's income in calcula-

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[20] Danielle Douglas-Gabriel, *How the attempt to fix student loans got bogged down by the middlemen*, WASHINGTON POST (Aug. 23, 2015), http://www.washingtonpost.com/business/economy/how-the-education-department-turned-into-a-massive-bank/2015/08/23/7618f2fa-1442-11e5-9ddc-e3353542100c_story.html ("There are also questions about whether servicers, to maximize their profits, are misleading people about their repayment options. Advocacy groups say rather than helping struggling borrowers enroll in income-driven plans — a time- and resource-heavy effort — servicers opt for an easier, short-term solution such as deferring the payments."); DEANNE LOONIN AND PERSIS WU, POUNDING STUDENT BORROWERS: THE HEAVY COSTS OF THE GOVERNMENT'S PARTNERSHIP WITH DEBT COLLECTION AGENCIES, 16-17 (2014), *available at* http://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf.

[21] 20 U.S.C. § 1098e(e).

[22] Memorandum, *supra* note 11.

[23] Student Assistance General Provisions, *supra* note 12 ("On June 9 2014, the President issued a memorandum (79 FR 33843) directing the Secretary to propose regulations by June 9, 2015, that will allow additional students who borrowed Federal Direct Loans to cap their Federal student loan payments at 10 percent of their income.").

tions of the 10% repayment figure.[24] As education finance law expert Philip Schrag has observed, this decision expressly contradicts the intent expressed by Congress in extant legislation on the issue.[25] DOE has made the time-to-forgiveness twenty-five (25) years for those with *any* graduate school debt, even though it could have made it less.[26] DOE has also included a number of confusing provisions about eligibility for non-accrual of interest once a borrower is enrolled in REPAYE.[27] One expert commenter opined that it may be impossible for many borrowers to accurately understand their rights and obligations under the program.[28]

Other commenters also criticized REPAYE for being unduly complex and punitive. They made the case for shortening the repayment period needed to earn forgiveness of debt, and softening or elimination of the marriage penalty in the proposed rules.[29] Unfortunately, the DOE may not fully understand the

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[24] *Id.* at 39609.

[25] Philip Schrag, Comment on Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39608 (proposed July 9, 2015) (to be codified at 34 C.F.R. pts 668, 662, & 685), http://www.regulations.gov/#!documentDetail;D=ED-2014-OPE-0161-1266 ("The statutory authority for ICR did not give the Department the authority to impose a marriage penalty on borrowers who file separate tax returns. It provides that '[a] repayment schedule . . . shall be based on the adjusted gross income . . . of the borrower or, if the borrower is married *and files a Federal income tax return jointly with the borrower's spouse*, on the adjusted gross income of the borrower and the borrower's spouse.' 20 U.S.C. § 1087e(e)(2) (emphasis added). Thus, the Department is authorized only to base the repayment obligation on the AGI of the borrower, unless the borrower files a joint return.").

[26] Student Assistance General Provisions, *supra* note 12. ("a borrower would qualify for forgiveness after 25 years if the loans being repaid under the REPAYE plan include a loan the borrower received to pay for graduate or professional study or a consolidation loan that repaid a loan received to pay for graduate or professional study.").

[27] John R. Brooks, Comment on Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39608 (Proposed July 9, 2015) (to be codified at 34 C.F.R. pts 668, 662, & 685), http://www.regulations.gov/#!documentDetail;D=ED-2014-OPE-0161-2886.

[28] *Id.* ("The complex way in which interest is forgiven will make it largely impossible for borrowers to estimate what their costs of repayment will be.").

[29] Senators have also weighed in to this effect. *See Senators to Dept. of Education: Proposed Changes to Student Loan Program could Harm Borrowers*, Sheldon Whitehouse: U.S. Senator for R.I. (June 16, 2015),

value of higher education (see Part A) and the cost of federal credit programs (see Part B). Taking the true benefits and costs into account, the DOE would be well-advised to make the terms of REPAYE more accommodating and simpler (see Part C).

A. The DOE Understates the Value of Higher Education

The DOE should not understate the value of higher education. There is extensive work based on empirical data that independently documents the value of higher education.[30] There is also sophisticated work synthesizing the literature of labor economists on the earnings premium conferred by higher education (and controlling for selection effects).[31] The DOE should give a more fine-grained accounting of these benefits before imposing burdensome and complex limitations on the availability of loan forgiveness.

There are also unique equity and timing considerations that recommend more generous treatment of the borrowers targeted by REPAYE who borrowed before 2008. Specifically, between 2008 and 2013, student loans generated a $120 billion surplus for the government.[32] The education attained by these borrowers created human capital that will pay dividends to the government, in the form of higher taxes and reduced need for social services, for years to come.[33]

Moreover, pre-2007 borrowers could not have foreseen the global financial crisis that started in 2008 and devastated U.S.

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http://www.whitehouse.senate.gov/news/release/senators-to-dept-of-education-proposed-changes-to-student-loan-program-could-harm-borrowers. A proposal currently under review by the Department would, according to the Senators, "add unnecessary complexity, increase costs for responsible low- and middle-income borrowers, and result in the disparate treatment of graduate and undergraduate borrowers." *Id.*

[30] *See, e.g.*, McIntyre & Simkovic, *supra* note 11; Leonhardt, *Is College Worth It? Clearly, New Data Say*, *supra* note 11; Leonhardt, *Even for Cashiers, College Pays Off*, *supra* note 11.

[31] Simkovic, *The Knowledge Tax*, *supra* note 11; Simkovic, *Do Increases in the Cost of College Pay for Themselves?*, *supra* note 11.

[32] Shahien Nasripour, *Obama Student Loan Policy Reaping $51 Billion Profit*, HUFFINGTON POST: HUFF POST POLITICS (May 14, 2013), http://www.huffingtonpost.com/2013/05/14/obama-student-loans-policy-profit_n_3276428.html.

[33] Simkovic, *The Knowledge Tax*, *supra* note 11.

employment figures. Declines in employment in many fields were not due to a lack of initiative by such borrowers, and such borrowers did not cause and could not have foreseen many of the structural changes in the economy that hurt their earnings power. A cyclical downturn of greater intensity and duration than any the U.S. has experienced since the 1930s is ample reason for the DOE to use statutory authority to benefit borrowers straightforwardly, rather than creating a labyrinth of exceptions and exceptions to exceptions that can easily trap even the careful in suboptimal repayment plans.

In summary, the DOE should accurately count the contribution of student borrowers to workforce preparedness, overall economic growth, and future tax revenues when considering the proper scope and nature of debt forgiveness through REPAYE. The education sector generates enormous value for the economy as a whole and for most graduates, but it is a fiscal and moral imperative that the DOE ease the plight of borrowers who are experiencing difficulty repaying. Given the rising costs of housing, child care, and medical care, payments above 10% of discretionary income could significantly compromise borrowers' financial security. Just as the Affordable Care Act (ACA) aims to help individuals and families avoid excessive health costs, so too should education finance policy promote financial security by better constraining debt repayment obligations.[34]

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[34] For ACA estimates, see Allison Hoffman, *Health Care Spending and Financial Security after the Affordable Care Act*, 92 N.C. L. REV. 1481 (2014). Health care regulation has long been characterized by the kind of complex interactions between providers, private and public financers, and "consumers," which now complicate the financing of higher education. I put "consumers" in quotes because neither students nor patients are the sole beneficiaries of investments made in their education or health. Society benefits as well, and public resources are needed to avoid suboptimal investment in both fields. The federal government must do more to make up the massive reductions in state support in higher education that have occurred over the past 30 years. *See, e.g.*, Frank Pasquale, *Income-based Debt Forgiveness: The Least the Government Can Do*, BALKINIZATION (July 18, 2013), http://balkin.blogspot.com/2013/07/income-based-debt-forgiveness-least.html; Karin Fischer & Jack Stripling, *An Era of Neglect*, THE CHRON. OF HIGHER EDUC. (March 3, 2014), http://chronicle.com/article/An-Era-of-Neglect/145045/.

B. The DOE Overstates the Cost of Loan Forgiveness

Loan forgiveness is not a simple cost to government. Borrowers who have financial difficulties may default on their loans due to their inability to pay. In such cases, forgiveness simply helps the borrower avoid the kind of career-wrecking credit record that can keep defaulters from getting jobs (and paying taxes) years after they default. Without a more robust REPAYE program, there will probably be more defaults as bankruptcy judges try to expand the definition of "hardship" to accommodate overburdened debtors and debtors seek help with debts they are unable to repay.[35]

The costs of the program are presented in an opaque way in the Notice of Proposed Rulemaking (NPRM). The NPRM estimates the cost of REPAYE to the U.S. Treasury at $15.3 billion from 2016 to 2025, but that figure is not adequately balanced by an estimate of the fiscal benefits of student loan programs overall to the Treasury and to the economy as a whole. The DOE should also take into account the work of Gregory Crespi, who projects a very low number of law graduates who are eligible for REPAYE and will enter into the program given the unfavorable terms for it drafted in the NPRM.[36] Given the similar situation of many others in professional programs, estimates of the cost of these programs ought to be lowered.

C. Recommendations

Unfortunately, the NPRM draft on REPAYE does not reflect President Obama's call for a streamlined route to improved IBR options for the borrowers it is supposed to serve. One key shortcoming is the administrative complexity of the proposal. Longstanding executive branch policy has called for reducing paperwork and diminishing the already great cognitive burdens on beneficiaries of government programs.[37] REPAYE's complex rules on many issues, including determination of which payments count upon entry or exit of an IBR program, or upon consolida-

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[35] Bernard, *supra* note 14; Iuliano, *supra* note 14.

[36] Gregory S. Crespi, *The Obama Administration's New 'REPAYE' Plan for Student Loan Borrowers: Not Much Help for Law School Graduates* (2015), *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629645*.

[37] CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013).

tion, will likely deter participation. Rules regarding capitalization of interest also must be clarified, and the government should, in general, avoid creating situations where compounding interest can leave a debtor liable for paying more than twice the amount he or she borrowed. There are already reports of servicers discouraging eligible borrowers from participating in Pay As You Earn (PAYE) because of its complexity (and ostensibly because they fear that Congress will change the rules). Such worries lead to unnecessary defaults. REPAYE will risk the same fate if its complexity renders it difficult to explain in a straightforward way.

The marriage penalty embedded in the proposed rule is also unnecessarily harsh. Other commentators, such as Professor Phil Schrag, have amply explained the infirmities of the approach laid out in the NPRM. An unintended consequence of the NPRM draft will be strategic delays in marriage or divorces. The DOE should consider potential costs to the Treasury and disruptions to family life, attributable to the strategic decisions it could encourage due to the marriage penalty now embedded in the NPRM.

II. DEFENDING INCOME-BASED REPAYMENT IN THE HIGHER EDUCATION ACT REAUTHORIZATION

At present, students taking out federal loans to pay for higher education enjoy certain protections, including the income-contingent repayment options discussed above.[38] Private lenders do not offer such income-contingent repayment plans.[39] Federal loans also help level the playing field in other ways.[40] Private lenders can perform credit checks that, for those with low credit scores, can just as easily reflect misfortune or a bad economy as genuine credit risk.[41] These credit checks can exclude those par-

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[38] John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513359; *see also* Philip G. Schrag, *Failing Law Schools—Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387, 389 (2013).

[39] *Federal versus Private Loans*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/types/loans/federal-vs-private (last visited August 1, 2015).

[40] *Id.*

[41] For more details on biased and arbitrary credit checks and credit scoring, *see* FRANK PASQUALE, THE BLACK BOX SOCIETY 23 (2015) (describing

ticularly in need of help.

While federal loans are available to all at the same interest rates, private lenders often aim to charge subprime borrowers more than prime borrowers.[42] Alternatively, they may charge borrowers from wealthy families (or attending wealthy institutions) less—a form of "cherrypicking" (choosing the best risks) familiar to the pre-PPACA health insurance industry. Moreover, federal loans rarely require co-signers; private loans may.[43] While federal loans offer options "to delay or temporarily forgo payments (like deferment and forbearance)," "discharge upon a borrower's death," and "discharge upon permanent disability (with certain limitations)," private loans may not offer any of these options.[44] This divergence has led to predictable horror stories for borrowers who chose private loans.[45]

In short, private loans impose a number of disadvantages on borrowers.[46] Yet as the Higher Education Act comes up for reauthorization, many commentators are now calling for the federal government to act more like a private lender by raising student loan interest rates and cutting back on protections for borrowers. This advocacy is part of a larger debate about federal

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scores as "opaque, arbitrary, and discriminatory").

[42] *Federal versus Private Loans*, *supra* note 39.

[43] *Id.*

[44] *What are the main differences between federal student loans and private student loans?*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/askcfpb/545/what-are-main-differences-between-federal-student-loans-and-private-student-loans.html (last visited August 1, 2015).

[45] *See* Mary Pilon, *When Student Loans Live On After Death,* WALL ST. J. (Aug. 7, 2010), http://www.wsj.com/articles/SB10001424052748704741904575409510529783860.

[46] John R. Brooks and Jonathan D. Glater, Opinion, *Raise the Cap on Federal Student Loans*, L.A. TIMES (Aug. 3, 2015), http://www.latimes.com/opinion/op-ed/la-oe-0803-brooks-glater-bigger-student-loans-20150803-story.html ("Private student loans are usually much more costly for students; a government report from 2012 found interest rates in excess of 16%, and nothing has improved since then. By contrast, the rate on the most widely used federal student loan currently is 4.29%. Private loans accounted for a quarter of all student lending in 2007-08 before falling sharply in the wake of the financial crisis. But because federal loan caps have not budged even as tuition has increased, private lending is rising again, and made up about 9% of new debt in 2013-14.").

credit programs.[47] For example, some argue that there is no market failure here and that private lenders could take the government's place.[48] Observing the federal government's long run of profits from the federal student loan program, one might apply that approach to education credit—*if* one were completely unaware of the many ways in which federal loans protect borrowers. For others, this very protectiveness is suspicious. They argue that government credit programs must play by the same harsh rules as private lenders, or else quantify any ground they give as a *loss* that must be made up either by higher taxes, or reduced spending on other programs.[49]

These two, contradictory positions create a pincer attack on federal loans. One set of critics argues that government gains from student loans simply indicate the superfluity of a federal role. Another set insists that agencies need to act in as profit-oriented a manner as private lenders or account for their support in public accounting that fails to reflect the government's unique role in credit creation. Either set of arguments can be deployed strategically by commentators to undermine support for student borrowers. White papers from the New America Foundation by Jason Delisle and Alexander Holt, which are critical of current policies for income-based repayment, are particularly troubling, given their assumption of a logic of austerity and zero-sum allocation of education resources.[50]

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[47] Michael Grunwald, *The Real Bank of America,* Politico (Jan./Feb. 2015), http://www.politico.com/magazine/story/2015/01/federal-loans-bank-of-america-113920.html.

[48] *Id.* ("If the deals are low-risk layups, why is Uncle Sam involved?").

[49] Jason Delisle & Jason Richwine, *The Case for Fair Value Accounting*, 21 Nat'l Affairs 95 (2014), *available at* http://www.nationalaffairs.com/publications/detail/the-case-for-fair-value-accounting.

[50] JASON DELISLE & ALEXANDER HOLT, NEW AMERICA FOUNDATION, SAFETY NET OR WINDFALL? EXAMINING CHANGES TO INCOME-BASED REPAYMENT FOR FEDERAL STUDENT LOANS (2012), *available at* http://www.newamerica.org/education-policy/safety-net-or-windfall/ [hereinafter SAFETY NET]; JASON DELISLE & ALEXANDER HOLT, NEW AMERICA EDUCATION, ZERO MARGINAL COST: MEASURING SUBSIDIES FOR GRADUATE EDUCATION IN THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM (2014), *available at* http://www.edcentral.org/wp-content/uploads/2014/09/ZeroMarginalCost_140910_DelisleHolt.pdf [hereinafter ZERO MARGINAL COST]. The New America Foundation has received funds from the Lumina Foundation, which has had close ties to private lenders.

Evocatively designed with images of raining $100 dollar bills and a mischievous-looking student eager to grab a "windfall" of loan forgiveness, the reports have garnered a great deal of media attention. Unfortunately, they fail to give an accurate picture of the benefits of IBR while exaggerating its costs. *Safety Net or Windfall* only manages to paint IBR as a boon to the wealthy by idiosyncratically defining "high incomes" to include earnings that many would recognize as middle class—particularly in high-cost urban areas. *Zero Marginal Cost* presents some questionable distributive outcomes in a series of hypothetical repayment scenarios, but never presents solid evidence on how likely they are to come to pass. It would be inadvisable to alter the IBR program now, to the detriment of students facing volatile demand for labor, in order to fight phantom shortfalls that may only arise decades from today—and may never come about at all.

A. The Distributional Effects of Income Based Repayment

The Pay As You Earn (PAYE) plan and the Public Service Loan Forgiveness Program (PSLF) are important income-based repayment programs. Presently, those who enroll in PAYE are only obliged to pay 10% of their discretionary income[51] to-

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These lenders would greatly benefit from policy proposals to reduce federal loan forgiveness options and raise federal loan interest rates, because each move would make their own products comparatively more attractive. *See, e.g.*, Molly Hensley-Clancy & Katie J.M. Baker, *How a Private Foundation with Student Loan Ties Became a Force in Higher Education*, BUZZFEED (May 22, 2014), http://www.buzzfeed.com/mollyhensleyclancy/how-a-private-foundation-with-deep-ties-to-the-student-loan#.mqKyz8vP6. Lumina not only pays for research, but also pays for journalists to publicize the research. *See* Jennifer Ruark, *To Shape the National Conversation, Gates and Lumina Support Journalism*, CHRON. HIGHER EDUC. (July 14, 2013), http://chronicle.com/article/To-Shape-the-National/140297/. According to its own history, "Lumina was sensitive to the perception that the Foundation was linked to the student loan industry" at its inception. LUMINA FOUNDATION, FROM THE GROUND UP: AN EARLY HISTORY OF THE LUMINA FOUNDATION 22 (2007), https://www.luminafoundation.org/files/resources/from-the-ground-up.pdf. Given that important initial board members (and the current board chairman) had ties to private lenders, that is no surprise. *Id.*, at 14 (Four founding board members of Lumina were former "directors of the Sallie Mae board of directors; all others had been members of the USA Group board."); ALAN COLLINGE, THE STUDENT LOAN SCAM 76 (2009).

[51] *See Income-based Repayment*, EDFINANCIAL SERV., http://www.edfinancial.com/IBR *(last visited May 29, 2015)*. The site gives an

ward loan repayment, and their loans are forgiven after twenty years of payments.[52] Borrowers eligible for PLSF, those who have spent ten years in full-time public service employment while repaying 10% of their discretionary income,[53] are entitled to forgiveness of the remaining balance after ten years.[54]

To Delisle and Holt, this "sounds like a get-rich-quick scam."[55] They are particularly concerned about "high-income" borrowers using IBR to obtain debt forgiveness—even if their paid-down principal and interest payments more than compensate the government for the cost of making the loan.[56] They aim to require any single individual with an AGI over 300% of the federal poverty level (FPL) to pay 15%, rather than 10%, of AGI. They would force twenty-five years of repayment onto those in PAYE if their loans exceeded $40,000 when they entered repayment. In *Zero Marginal Cost,* they argue that "policymakers should consider changes to [PAYE] and PSLF that place greater limits on the benefits and the types of jobs that qualify borrowers for loan forgiveness."[57]

Given the benefits of higher education documented above, these recommendations are puzzling. Policymakers should be rewarding higher educational attainments, not worsening their terms of financing. Federal borrowing costs are at very low levels—why impose further burdens on graduates when the government itself can borrow on global markets at such low rates?

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explanation of the calculation: discretionary income is adjusted gross income minus 150% of the poverty level for a family of the size of the borrower's family. *Id.*

[52] Health Care & Educ. Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended at 20 U.S.C. § 1098e(e) (2012)); Fed. Student Aid, *Pay as You Earn Plan*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/repay-loans/understand/plans/pay-as-you-earn *(last visited May 28, 2015).*

[53] *See* 20 U.S.C. § 1087e(m)(3)(B)(i) (2012). Public service employment is defined to include full-time service for any level of government and for any organization exempt from taxation under § 501(a) and described in § 501(c)(3) of the Internal Revenue Code.

[54] *Id.*

[55] SAFETY NET, *supra* note 50, at 1.

[56] *Id.* at 11.

[57] ZERO MARGINAL COST, *supra* note 50, at 23.

But the reports make sense given the priors of the authors. Delisle has questioned the value of graduate education and assistance to graduate students. "An undergraduate degree, we've all sort of decided, is a must for earning a middle-class income," he has stated. "A master of arts? Probably not. These are all people who have an undergrad degree. They have all made it, in that sense. They are a success. The question then is, 'What is the purpose of the public support of the master's degree?'"[58] This viewpoint is a milder version of that of his New America colleague, Kevin Carey, who would essentially end the university as we know it.[59] New America's education policy group appears to have both a long and short game: reduce federal support for graduate schools now, while encouraging the "creative destruction" of institutions of higher education in the long run. Unsurprisingly, the two objectives further the commercial interests of the private student lending interests so influential at the Lumina Foundation's inception, and those of the technology firms which also support New America.

In *Zero Marginal Cost*, Delisle and Holt present a variety of scenarios in which holders of graduate degrees may be earning an above-average income, but still enjoy some student loan debt forgiven. For Delisle & Holt, this is problematic because loan forgiveness creates a moral hazard problem—why should students borrow responsibly, they ask, if they are certain that the amounts borrowed will be forgiven? But this view underestimates the problems of current income based repayment programs, including worries about their effect on credit scores and the tax consequences of forgiveness of long-accruing interest. They claim that their work is based on a "more comprehensive and long-term perspective of how IBR affects different types of borrowers, particularly as borrowers' incomes change over their repayment terms."[60] However, its "long-term" projections regarding the costs of these programs are premised on an inadequate evidence base. Worries

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[58] Vimal Patel, *Grad-School Debt is Said to Rise Rapidly and Deserve More Policy Attention*, CHRON. HIGHER EDUC. (Mar. 25, 2014), http://chronicle.com/article/Grad-School-Debt-Is-Said-to/145539/.

[59] *See* Audrey Watters & Sara Goldrick-Rab, *Techno Fantasies*, INSIDE HIGHER EDUC. (Mar. 26, 2015), https://www.insidehighered.com/views/2015/03/26/essay-challenging-kevin-careys-new-book-higher-education.

[60] SAFETY NET, *supra* note 50, at 3.

over "irresponsible" borrowers are also more properly targeted at for-profit programs' abuse of credit programs, rather than student loans as a whole.[61]

B. Accurately Accounting for Education's Costs & Benefits

The New America Foundation's (NAF) promotion of harsher terms for PAYE and PLSF is premised on the idea that these programs will eventually prove to be an unsustainable fiscal burden. However, PAYE and PLSF should be judged as part of a larger student loan program. That program has proven to be a net *benefit* to government finances. The government has made tens of billions of dollars *each year* from students.[62] Under established Federal Credit Reform Act (FCRA) models, the government made $120 billion from student loan programs from 2008 to 2013.[63]

Some have tried to downplay projected gains from the programs by promoting an alternative accounting approach, "fair-value accounting" (FVA). This approach derogates the federal student loan program as a fiscal burden by effectively assuming (a) that the government could instead lend at the higher rates

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[61] Stefan Collini, *Sold Out*, LONDON REV. BOOKS Oct. 24, 2013, at 3-12, *available at* http://www.lrb.co.uk/v35/n20/stefan-collini/sold-out.

[62] Shahien Nasiripour, *Student Loan Rates Boost Government Profit as Debt Damps Economy*, HUFFINGTON POST (Apr. 9, 2013), http://www.huffingtonpost.com/2013/04/09/student-loan-rates-debt-economy_n_3048216.html.

[63] *Id.*; *see also* Congressional Budget Office, No. 4705, Options to Change Interest Rates and Other Terms on Student Loans (June 10, 2013), http://www.cbo.gov/sites/default/files/44318-StudentLoans.pdf ("Under FCRA's rules, CBO estimates, savings from the program will be $184 billion for loans made between 2013 and 2023"). The CBO later promoted a different accounting method, but has not explained convincingly why it wants to depart from past methodology. *See* Mike Konczal, *Do Taxpayers Care if Student Loans are Paid Off Too Quickly? (On Fair Value Accounting)*, NEXT NEW DEAL (June 11, 2014), http://www.nextnewdeal.net/rortybomb/do-taxpayers-care-if-student-loans-are-paid-too-quickly-fair-value-accounting. Moreover, the CBO is required by law to use FCRA standard accounting, and when it does so, it consistently finds "negative subsidies" (i.e., profits) regarding student loan programs. CONGRESSIONAL BUDGET OFFICE, STUDENT LOAN PROGRAMS – BASELINE PROJECTIONS (Mar. 2015), https://www.cbo.gov/sites/default/files/cbofiles/attachments/44198-2015-03-StudentLoan.pdf ("the federal government will save on average about 11 cents for each new dollar loaned in 2016").

now prevailing at private institutions, and (b) that defaults will rise. The first argument fails for several reasons.[64] As Matt Yglesias states, "costs reported in the budget are generally lower than the costs to the most efficient private financial institutions because the government's costs of funds are in fact lower."[65] At an even more elementary level: what would be the point of a federal loan program if it simply copied the terms and rates of private lenders? Rate-setting for federal student loans also needs to acknowledge the harshness of the present bankruptcy regime: students already facing presumptive nondischargeability should not be further burdened with higher interest rates.

It is hard to overstate how radical a change FVA would present to current, accepted standards. For the years 2015 – 2024, "The Department of Education's four largest student loan programs would yield budgetary savings of roughly $135 billion under [long-established] FCRA accounting but cost roughly $88 billion on a fair-value basis."[66] Of course, those committed to an ideological vision of shrinking government would rejoice at this potential sea change in accounting.[67] Meanwhile, the Center on

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[64] David Kamin, *Risky Returns: Accounting for Risk in the Federal Budget*, 88 IND. L.J. 724, 771 (2013) (calling approaches like FVA "much more misleading than . . . enlightening").

[65] Matt Yglesias, *Fair Value Accounting Overestimates Lending Costs*, SLATE (Apr. 10, 2012), http://www.slate.com/blogs/moneybox/2012/04/10/fair_value_accounting_overestimates_lending_costs.html.

[66] U.S. CONG. BUDGET OFFICE, FAIR-VALUE ESTIMATES OF THE COST OF SELECTED FEDERAL CREDIT PROGRAMS FOR 2015 TO 2024 (2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45383-FairValue.pdf. Even when constrained by FCRA, the CBO has overestimated the cost of health care programs repeatedly. Frank Pasquale, *Politicized Prognostication at CBO*, BALKINIZATION (July 28, 2009), http://balkin.blogspot.com/2009/07/politicized-prognostication-at-cbo.html (quoting Bruce Vladeck, former administrator of the Health Care Financing Administration) ("'The CBO's track record in predicting the effects of health legislation is abysmal. Over the last two decades, the CBO has routinely overestimated the costs of expanded government health care benefits and underestimated the savings from program changes designed to reduce expenditures.'").

[67] PAUL RYAN, CHAIRMAN, HOUSE COMM. ON THE BUDGET, THE PATH TO PROSPERITY: RESTORING AMERICA'S PROMISE 43-44 (2013), http://budget.house.gov/uploadedfiles/pathtoprosperity2013.pdf ("Accounting for market risk in scoring these programs [student loans] would simultaneously reflect their true cost to taxpayers and make risky expansions of these programs less likely to occur."). Note that many who share this position also favor

Budget and Policy Priorities (CBPP) has soberly documented the fundamental misunderstandings about the nature of government spending it encompasses.[68] In 2012, Center for American Progress (CAP) criticized fair value as "an accounting trick" designed "to make credit programs appear more expensive than they truly are."[69] CAP argued that FCRA budgeting already accounts for "credit risk," and that accounting for "market risk"—"the rate a risk-averse private investor would charge for the perceived variability in [FCRA] estimates"—is not only unnecessary, it produces inaccurate budget estimates, adds "phantom" costs that never materialize, and harms credit programs.[70]

Concern about future defaults raises an issue that is concentrated in for-profit schools: 46% of 2012 defaulters (on loans that entered repayment in 2010) "attended for-profit colleges, which enrolled just 13% of students nationally."[71] Limitations of funds for students at schools with high default rates would be far more targeted an approach than across-the-board limits.[72] Indeed, with the implementation of Gainful Employment rules targeting for-profit colleges, the DOE has already begun to address the issue.[73] Moreover, as data emerges about borrower profiles, it appears that defaults are most common among those with the

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"dynamic scoring" of tax cuts, which presume economic effects from tax cuts long ago dismissed by Republican George H.W. Bush as "voodoo economics."

[68] RICHARD KOGAN, PAUL VAN DE WATER, & JAMES HORNEY, CTR. ON BUDGET AND POL'Y PRIORITIES, HOUSE BILL WOULD ARTIFICIALLY INFLATE COST OF FEDERAL CREDIT PROGRAMS (June 18, 2013), http://www.cbpp.org/sites/default/files/atoms/files/1-23-12bud4.pdf

[69] John Griffith, *An Unfair Value for Taxpayers: "Fair-Value" Budgeting is a Dangerous Game to Play with Federal Loans and Guarantees*, CTR. FOR AM. PROGRESS 1 (Feb. 9, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/fair_value.pdf.

[70] *Id.* at 1-2.

[71] *New Data Confirm Troubling Student Loan Default Problems: For-Profit Colleges Still Have Highest Rate*, INST. FOR COLL. ACCESS & SUCCESS (Sept. 30, 2013), http://www.ticas.org/files/pub/CDR_2013_NR.pdf.

[72] It should also be sensitive to documented default rates. Graduate schools in general have lower rates of default than undergraduate institutions, a fact not acknowledged adequately in *Zero Marginal Cost*. *See generally* ZERO MARGINAL COST, *supra* note 50.

[73] *Fact Sheet: Obama Administration Increases Accountability for Low-Performing For-Profit Institutions*, U.S. DEPT. OF EDUC. (July 1, 2015), http://www.ed.gov/news/press-releases/fact-sheet-obama-administration-increases-accountability-low-performing-profit-institutions (last visited July 1, 2015).

smallest debts—again, undermining the popular narrative that graduate students with large loan balances are fiscal threats.[74]

Any estimate of future defaults in the student loan context should adequately acknowledge how harshly bankruptcy law treats such debts with a presumption of nondischargeability. Moreover, estimates should *not* be based on extant private loan markets, because that is where the worst credit risks now are likely to be concentrated. There is a potential ratchet effect here, too. If private lenders continually lend at a rate a few percentage points above the public rate, and FVA requires public lenders to lend at the private rate, then future adjustments to government rates to reflect private rates at one point in time may simply empower private lenders to charge more at a later point in time. This is a particular danger if the private student loan market again becomes as concentrated as it was in the mid-2000s.[75]

Whatever one believes about FVA, and the changes to PAYE and PLSF that the programs' critics would make based on it, the ultimate impact of the critics' proposals is clear: financing an education will become more expensive. That would either reduce the quantity or price of education (to the extent it is dependent on loan programs), or reduce the discretionary income of students and graduates, or, most likely, have some combination of these effects. Each possibility is likely to have negative effects.

Decades of empirical research in labor economics establish that higher education not only correlates with improved labor market outcomes: it causes them. Investments in higher education also contribute to faster innovation and more rapid economic

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[74] Susan Dynarski, *Why Students With Smallest Debts Have the Larger Problem*, N.Y. TIMES, Aug. 31, 2015, http://www.nytimes.com/2015/09/01/upshot/why-students-with-smallest-debts-need-the-greatest-help.html ("It's natural for people listening to the politicians to connect the two facts with a causal arrow: More debt leads to more default. But the reality is surprising: Borrowers who owe the most are least likely to default.").

[75] DEANNE LOONIN, THE SALLIE MAE SAGA: A GOVERNMENT-CREATED, STUDENT DEBT FUELED PROFIT MACHINE (2014); ALAN COLLINGE, THE STUDENT LOAN SCAM 13 (2009) ("By 2006, Sallie Mae virtually dominated the student loan industry. It was about four times larger than its nearest competitor (Citibank), manag[ing] $123 billion in student loans.").

growth.[76] Delisle and Holt warn about IBR subsidizing "high-cost graduate and professional schools."[77] But costs and quality are correlated: aside from those in the for-profit sector, more expensive programs devote more resources to instruction and therefore produce better student outcomes. Student loan default rates are typically *lower* for more expensive and higher quality programs, while default rates are higher for less expensive and lower quality programs and those with lower completion rates.[78]

Higher education provides public benefits in the form of increased income and payroll tax revenues and lower burdens on publicly-funded social services. The tax revenue benefits alone—approximately forty percent of every extra dollar an individual earns because of increased educational attainment—are typically more than enough to fully cover the costs of higher education.[79] Most individuals who defer payment of their loans in early years while their incomes are low will eventually repay their loans in full and with interest. Educated workers' earnings grow rapidly as they gain experience and typically peak decades after they have completed their degrees. Even partial repayment of a loan can still produce a profit for lender because the partial payments are often more than sufficient to cover financing and administrative costs.

Critics of IBR say that life-cycle equities counsel against forgiving loans at ten or twenty years into repayment because a borrower *may* be entering a highly paid phase of their career. But to correct for that fairly, they should also be advocating for reducing how much borrowers must pay at earlier, lower-paid phases of their career. Life-cycle equity cannot be a one-way ratchet toward squeezing borrowers, or else the concept loses all meaning.

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[76] *See generally* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527 (2013).

[77] SAFETY NET, *supra* note 50, at 13.

[78] Simkovic, *Risk-Based Student Loans*, *supra* note 76; Simkovic & McIntyre, *supra* note 11. Consider as well recent evidence on for-profit law schools. Patricia Cohen, *For-Profit Colleges Accused of Fraud Still Receive U.S. Funds,* N.Y. TIMES (Oct. 12, 2015), http://www.nytimes.com/2015/10/13/business/for-profit-colleges-accused-of-fraud-still-receive-us-funds.html?_r=1 ("Kaplan's schools, including its online California law school, where only one in five students graduates, received $776.3 million worth of federal student loans and grants last year.").

[79] Simkovic & McIntyre, *supra* note 11, at 283.

C. Fiscal Analysis of Loans should not be Partial

Program performance should be evaluated with respect to the percent of loans originated, not the percent currently outstanding. Many successful graduates repay their loans and shrink their balances, while those who are less successful defer payment and grow their balances.[80] Measuring performance of the percent of loans *outstanding* introduces survivorship bias.[81]

If federal student loans were abolished in favor of private provision of credit, students would be forced to pay more for an education of lower quality.[82] Furthermore, more education spending would go to interest payments and less would go to instruction and support services that benefit students.[83] Additionally, fewer students would complete their degrees, unemployment would be higher, economic growth would be slower, and the federal budget would be on a shakier footing than it is today.[84]

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[80] *See* RONIT DINOVITZER ET AL., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 80-83 (2009), *available at* http://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.

[81] *See generally* Tyler Shumway, *Forecasting Bankruptcy More Accurately: A Simple Hazard Model*, 74 J. BUS. 101 (2001).

[82] Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 34 (2011) ("If graduates' loans came through federal loan programs, then all debts would be eligible for repayment assistance programs supporting careers in the public interest."). Glater has also critiqued the variable pricing of loans that would likely be accelerated by further privatization of educational credit programs. Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137 (2013).

[83] Reallocating funds from higher education institutions to the higher interest payments demanded by private lenders would be doubly self-defeating: it would deter students from enrolling, and reduce funds available for instruction. For more on the negative fiscal impacts of the latter point, *see* Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. ECON. 1491, 1524 (2002) ("We do find that students who attend colleges with higher average tuition costs tend to earn higher income years later, after adjusting for student characteristics . . . . [T]uition matters because higher cost schools devote more resources to student instruction."). Reduced incomes mean reduced future tax-paying potential.

[84] Paul Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S71 (1990) ("[T]he stock of human capital determines the rate of growth [and] too little human capital is devoted to research in equilibrium."); Philippe Aghion & Peter Howitt, *A Model of Growth through Creative Destruction*, 60

As technology changes the job market, graduate education is needed more than ever. Yet the risks inherent in training are also high. For example, while open pharmacist positions were once plentiful, now pharmacists in most states "are seeing either a surplus of candidates, or a rough balance of supply and demand."[85] It may take a few years for a new equilibrium to be reached, as older pharmacists retire, or newer ones take on roles in accountable care organizations, patient-centered medical homes, integrated community health management teams, or other innovative forms of health delivery and administration. IBR is designed to assure that students who take on the risk of investing in their human capital are not beset by onerous repayment obligations if, through no fault of their own, structural changes in the economy or cyclical downturns adversely affect their employability.[86] And, for those individuals who do not attain above-average incomes, it offers a fair deal: the debt burden eventually ends for those for whom education has not been a winning financial proposition. The alternative, of perpetual obligations, is deeply unfair, given norms enabling bankruptcy and "fresh starts" for nearly all other forms of debt.

Against such reasonable present accommodations of risk in an era of precarity, Delisle and Holt's *Zero Marginal Cost* presents scare scenarios stretched decades into the future. Even a professional labor economist would probably blanch at predicting the likely income patterns of professionals, let alone their repayment strategies, decades hence. By and large, graduates from non-profit graduate schools entering repayment tend to hear advice like Heather Jarvis recently offered to recent law school graduates on the American Bar Association website:

ECONOMETRICA 323, 324 (1992); Richard Blundell et al., *Human Capital Investment: The Returns from Education and Training to the Individual, the Firm and the Economy*, 20 FISCAL STUD. 1, 16–19 (1999); Alan B. Krueger & Mikael Lindahl, *Education for Growth: Why and For Whom?*, 39 J. ECON. LITERATURE 1101, 1102, 1108, 1130 (2001).

[85] Katie Zadavski, *The Pharmacy School Bubble is About to Burst*, NEW REPUBLIC (Sept. 29, 2014), http://www.newrepublic.com/article/119634/pharmacy-school-crisis-why-good-jobs-are-drying.

[86] ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY (2003) (proposing insurance designed to protect educated individuals from an economy-wide decline in their area of expertise, so as to encourage and facilitate greater investment in specialized areas of knowledge).

> [There are] federal student loan repayment plans that include low monthly payments based on income. But understand that the longer it takes you to repay your loans, the more you will pay over time. If you can establish an aggressive repayment strategy, you can significantly lower the cost of your loans over time.[87]

Finally, even if a much higher than expected percentage of graduate students take advantage of IBR, there is plenty of time to deal with that putative crisis *when it arises,* rather than preemptively imposing austerity on recent graduates facing a volatile job market.

Some claim that loan forgiveness just leads to tuition inflation, but it is difficult to verify that claim.[88] The "sticker price" of many schools is indeed high—but close examination of *net tuition paid* over the past twenty years tells a more nuanced story. After adjusting for inflation, David Leonhardt reports, net tuition and fees at private four-year colleges rose 22% from 1992-2014, and 60% at public four-year colleges.[89] Gas prices rose 83% in that period, and child care, 44%.[90] In graduate schools, the data is not as robust, but "price wars" in legal education have been going on for years. While it is intuitively plausible that increases in federal support for education cause increases in tuition (a proposition known as the "Bennett Hypothesis," for former Secretary of Education William Bennett),[91] actual evidence is mixed. As Michael

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[87] Heather Jarvis, *Heads Up ILs: How to Finance Your Legal Education the Smart Way*, STUDENT LAW., Oct. 2014, at 18.

[88] U.S. Gov't Accountability Office, *Impact of Loan Limit Increases on College Prices is Difficult to Discern*, GAO-14-7, at 2 (2014), *available at* http://www.gao.gov/assets/670/660991.pdf ("GAO's analysis found that the economic effects of recession, which affected families' employment income, and net worth make it difficult to isolate the impact the recession had on students' decisions to borrow money to finance college expenses versus the impact of the loan limit increases.").

[89] David Leonhardt, *How the Government Exaggerates the Cost of College*, N.Y. Times (July 29, 2014), http://www.nytimes.com/2014/07/29/upshot/how-the-government-exaggerates-the-cost-of-college.html.

[90] *Id.*

[91] For more on the Bennett Hypothesis, *see* Samantha Stainburn, Cathching Up on the Bennett Hypothesis, N.Y. Times (Nov. 1, 2013), http://www.nytimes.com/2013/11/03/education/edlife/catching-up-on-the-bennett-hypothesis.html.

Simkovic has observed, "there is little evidence in the peer-reviewed literature that increases in the availability of public student loans drive up tuition net of scholarships and grants at non-profit and public institutions of higher education."[92] Simkovic observes that "there is some evidence" that the Bennett Hypothesis holds for for-profit trade schools, but this is a problem better targeted by rules governing those schools, not ones undermining financing opportunities generally (or pushing students out of government lending programs and into more risky private ones).[93]

Delisle and Holt fail to give a credible estimate of the overall negative fiscal impact of even their own very high estimates of future participation in loan forgiveness programs. And if they had to estimate all the positive impacts professional schools have on our economy—such as leading "meds & eds" redevelopment of inner cities, research on cutting edge medicine, and care and advocacy for the most marginal members of our society, to name a few—they would find that the government, if anything, massively *underfunds* the education sector. Education is a public good, and plans to increase the cost of its financing are likely to reduce growth and productivity.

D. Cutting PAYE and PLSF is an Unwise Policy

Delisle & Holt's recommendations for IBR promise little, if any, savings to the federal government once a full accounting of the benefits of education is made. Squeezing the often precarious finances of young graduates will not contribute to economic growth or fiscal stability. Delisle's work is not limited to student loans; he has also advocated for "fair value accounting" as a general principle of budgeting.[94] As the CBPP has observed, this approach would artificially inflate the cost of a wide array of federal credit programs—thereby either reducing their availability, or raising their costs to beneficiaries.[95] This campaign against feder-

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[92] Michael Simkovic, *Public Versus Private Student Loans*, Brian Leiter's Law School Reports, (Aug. 3, 2014), http://leiterlawschool.typepad.com/leiter/2015/08/public-versus-private-student-loans-michael-simkovic.html.

[93] *Id.*

[94] Delisle & Richwine, *supra* note 48.

[95] Paul N. Van de Water, *"Fair-Value" Approach Would Make Student Loan Accounting Less Accurate, Not More*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS BLOG (Apr. 25, 2014),

al credit programs would impose a double bind on virtually any federal loan: if it makes too much money for the government, it is characterized as something the market should do, while if it loses money, it's shamed as a Solyndra-style subsidy.[96]

Many students who might be afraid to enroll without IBR will not actually end up needing IBR. Even if they do, many will probably still pay enough in interest and taxes that the government comes out ahead. This is why insurance is, overall, a profitable business—individuals are overly risk averse. Providing contingent, targeted social insurance to students via PAYE and PLSF is a small price to pay for increasing the United States' economic competitiveness, and it may not be a price at all. The question is: in aggregate, does IBR increase tax revenue and student loan revenue by more than its cost? This depends on how it affects behavior of would-be students. Given the high rate of return on education and high marginal tax rates on educated labor, it doesn't take much of a boost to enrollments and educational attainment for IBR to generate a profit for the federal government.

By raising alarms about the possibility of borrowers, decades hence, filing *en masse* for debt forgiveness, NAF is building a case for cutting back on loan forgiveness. If it succeeds, students are likely to rely more heavily on private loans. This could be a disaster for borrowers, because private lenders often have no legal obligation to adjust their terms if borrowers become ill or lose their jobs, whereas government loans include provisions for income-based repayment and waivers for certain disabilities. Cuts to IBR would also burden the U.S. economy with a less-

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http://www.offthechartsblog.org/fair-value-approach-would-make-student-loan-accounting-less-accurate-not-more/; Richard Kogan, *Altering Accounting for Federal Credit Programs Would Artificially Inflate Costs, Raise Risk of Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 10, 2014), http://www.cbpp.org/research/altering-accounting-for-federal-credit-programs-would-artificially-inflate-costs-raise-risk; Richard Kogan et al., *House Bill Would Artificially Inflate Cost of Federal Credit Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (June 18, 2013), http://www.cbpp.org/research/house-bill-would-artificially-inflate-cost-of-federal-credit-programs.

[96] For an example of this double bind reasoning, *see* Grunwald, *supra* note 46; for a response, *see* MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS 129-32 (2013) (on Solyndra).

educated labor force, less able to pay the taxes needed to improve the country's fiscal outlook. It would be unwise to radically change PAYE and PSLF on the basis of speculative projections.

III. CONCLUSION: BRINGING THE MACROECONOMIC IMPACT OF HIGHER EDUCATION BACK IN

Policymakers should be wary of the dominant critiques of the federal role in lending, especially given troubling alternatives like increased private loan provision. A common talking point is that government is spending too much on its credit programs, but there is no documented unfair subsidy of student loans. There is some dispute—proponents of traditional accounting show a government profit from the loans, while the "fair value accounting" (FVA) approach shows a loss.[97] But FVA is based on a category mistake about the government's cost of lending, and ignores the documented reduction in costs via government lending.[98] Moreover, until the law of government accounting is changed, it makes little sense to cite the idiosyncratic, biased, and ideologically driven FVA analysis. It serves to corrode the terms of credit available to students while doing nothing to advance its purported fiscal aims.

Without competition from federal loans, private lenders will fill the vacuum, offering shoddier terms to most borrowers (such as no IBR, higher interest rates, and harsher repayment terms).[99] Some claim that higher rates on loans will lead students to demand lower tuition, end up with a lower principal balance,

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[97] Shahien Nasiripour, *Student Loan Borrowers' Costs to Jump as Education Department Reaps Huge Profit*, HUFFINGTON POST (Apr. 15, 2014), http://www.huffingtonpost.com/news/student-loan-profits/.

[98] *See* Mike Konczal, *Finance 101 Problems in National Affairs' Case for Fair-Value Accounting*, NEXT NEW DEAL (Nov. 4, 2014), http://www.nextnewdeal.net/rortybomb/finance-101-problems-national-affairs-case-fair-value-accounting (observing the fundamental difference between "public and private risks").

[99] Glater, *supra* note 82. *See also* Libby Nelson, *Counting on Banks to Protect Students from Predatory Colleges is Insane*, VOX (updated Apr. 3, 2014), http://www.vox.com/2015/4/3/8341647/federal-student-loans-banks-no ("Allowing bankruptcy protection for student loans is a good idea. So is trying to ensure that students aren't borrowing to pay for worthless programs that won't help them get ahead in life. But banks aren't going to do that — they're just going to make sure they get their money.").

and keep monthly payments at an equilibrium. But the Federal Reserve Bank of New York has found that "changing the mortgage rate by 2 percentage points only changes willingness to pay by about 5 percent on average" for mortgages.[100] Is elasticity of demand higher for higher education than for houses? If not, projected cost savings from interest rate increases are likely to be minimal at best. Critics of IBR have not credibly demonstrated that federal lending distorts the higher education market more than it makes up for predictable market failures. Even worse, if federal lending programs' terms become more harsh, private lenders may further entrench inequalities by imposing ever more "risk-based" pricing—for example, by charging higher interest rates to students at lower ranked schools in order to subsidize lower rates at higher ranked schools. Such pricing may end up a self-fulfilling prophecy: students paying a higher interest rate will have a more difficult time paying off their loans precisely because of the higher rate.

The comparison between housing and education is instructive in another sense. At present, interest rates on mortgages are much lower than interest rates on Grad PLUS loans for law students and other graduate students. There is not much independent good in people investing in owning their homes, as opposed to their investing in mutual funds, bonds, or real estate investment trusts of properties more diversified than a single family's home.[101] Those working hard to invest in their human capital to be engineers, nurses, social workers, lawyers, and other professionals, are more clearly contributing to society. So, if we accept a basic assumption that ease of lending terms raises the value of the thing or service the lending is for, then rates should be reversed: graduate loans should be less expensive than mortgage loans.

Many educators are concerned about the rising cost of education for low-income and middle class households. However, simply "reducing costs" is a deeply troubling policy response,

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[100] Andreas Foster & Basit Zafar, Fed. Reserve Bank of N.Y., The Sensitivity of Housing Demand to Financing Conditions: Evidence from a Survey (2014) (rev. 2015), *available at* http://www.newyorkfed.org/research/staff_reports/sr702.html.

[101] *See generally* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home,* 107 MICH. L. REV. 1093 (2009).

since the impact on equity and quality are far from clear. The majority of college instruction is done by exploited adjuncts; it is hard to imagine how their "cost" could be cut further.[102] Revenues at educational institutions could be productively reallocated, but there is little to no objective evidence that higher education itself takes an unfair share of national GDP.[103] Assuming standard levels of economic growth, societies may rationally choose to devote more resources to human services like education and health care, and less to, *inter alia*, military and finance costs.[104] These macroeconomic principles should guide future policy directions in the financing of higher education.

We are now entering a critical phase in the development of income-based repayment. The program is not helping many of the students it was designed to aid. At the very least, potential enrollees need straightforward tools to compare the value of various repayment plans. More substantively, they need faster enrollment and better terms offered by those plans. Almost no borrowers should be in default on loans qualified for IBR, but arduous requirements for gaining IBR protections (or incompetence or misinformation from servicers) have left struggling debtors vulnerable. Even worse, some commentators are using the existence of IBR to justify harsh treatment of student loans in bankruptcy—even though it is now clear that it could hit some borrowers with a large tax penalty and unknown risks to credit scores. If education finance reform moderates do not substantially improve the terms and accessibility of IBR, the program will lose popularity and credibility.

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[102] Jordan Weissman, *Someone Calculated How Many Adjunct Professors are on Public Assistance, and the Number is Startling*, SLATE (Apr. 13, 2015), http://www.slate.com/blogs/moneybox/2015/04/13/adjunct_pay_a_quarter_of_part_time_college_faculty_receive_public_assistance.html?wpsrc=sh_all_dt_tw_top.

[103] Leonhardt, *supra* note 89.

[104] WILLIAM J. BAUMOL, THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T 52, 52-53, 85 (2012).