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In this article, Brooks describes how federal student loan repayment programs that cap loan payments based on income and forgive debt actually operate like tax systems, and he explains what reforms would be needed to make them more progressive.

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The growth of college tuition and the corresponding rise in student loan debt have become major issues of public importance. Total outstanding student debt is at least \$1.3 trillion,¹ and tuitions keep growing, even while we arguably need to invest more in higher education to add skills and grow our economy.² Sen. Bernie Sanders, I-Vt., has made higher education reform a major part of his Democratic presidential campaign platform, proposing a new financial transactions tax to pay for large grants to states that offer free tuition to public universities.³ His opponent, Hillary Clinton, has proposed grants to states to offer “no-debt-tuition,” paid for in part by repealing several tax expenditures.⁴ These and other plans would essentially increase federal spending on higher education through expanded progressive taxation.

However, somewhat lost in all the noise around these problems and proposals is the fact that, to a large degree, college and graduate school tuition is *already* paid for through a system of progressive taxation. We just don’t call it that. Instead, we call it income-driven repayment of student loans.

Since 2012 any federal student loan borrower can choose to pay no more than 10 percent of discretionary income,⁵ and after a maximum of 25 years, any remaining loan balance is forgiven. Thus, the government is paying for a service — in this case higher education tuition — and financing that payment by collecting a percentage of graduates’ income. Normally, we would call that an income tax to pay for government benefits, but because it is cloaked as a loan, its tax-like nature is somewhat opaque. But we should still recognize it for what it is. One could imagine Sanders embracing a plan to pay for tuition with an income surtax on higher-income graduates. The fact that we call it paying back a loan shouldn’t change that.

Income-Driven Repayment

Options for income-driven repayment of student loans have been around for a while but have only recently become generous enough to make a difference. An early program, called Income-Contingent Repayment (ICR), was established back in 1993.⁶ It limited borrowers’ monthly payments to no more than 20 percent of “discretionary income,” which was defined as income that exceeded 150 percent of the relevant poverty line.⁷ After 25 years, any remaining loan balance was forgiven. This program had very low uptake, however, likely because of these relatively ungenerous terms.⁸

¹See Federal Reserve, “Statistical Release G.19, Consumer Credit” (Feb. 2016). Of the \$1.3 trillion, roughly \$1.2 trillion is from the federal government, either as direct loans or as guaranteed private loans under the old Federal Family Education Loan program. See Federal Student Aid, “Federal Student Aid Portfolio Summary,” Department of Education.

²See, e.g., Claudia Goldin and Lawrence F. Katz, *The Race Between Education and Technology* (2008).

³See College for All Act, S. 1373, 114th Congress (introduced May 19, 2015).

⁴See “College Compact: Costs Won’t Be a Barrier, Hillary for America” (2015); and Patrick Healy, “Hillary Clinton to Offer Plan on Paying College Tuition Without Needing Loans,” *The New York Times*, Aug. 10, 2015.

⁵Discretionary income is adjusted gross income less 150 percent of the relevant poverty line. See 34 C.F.R. sections 685.209(a)(1)(v) and 685.221(a)(5).

⁶See Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, section 4021, 107 Stat. 312, 341-354 (1993). For the history around ICR, see Philip G. Schrag, “The Federal Income-Contingent Repayment Option for Law Student Loans,” 29 *Hofstra L. Rev.* 733, 764-774 (2001).

⁷See 20 U.S.C. section 1078(b)(9)(A)(iv); and 34 C.F.R. section 685.209(b).

⁸As of this writing, only about 600,000 borrowers are in ICR, compared with nearly 4 million in the other income-driven plans. See Federal Student Aid, “Direct Loan Portfolio by Repayment Plan,” Department of Education.

In 2007 Congress created the Income-Based Repayment (Old IBR) program, which called for payments of 15 percent of discretionary income, with loan forgiveness after 25 years.⁹ Recognizing that this still was not generous enough, in the Health Care and Education Reconciliation Act of 2010 (which also enacted Obamacare), Congress lowered the payments to 10 percent of discretionary income, with forgiveness after 20 years (New IBR).¹⁰ Importantly, the 2010 bill also effectively nationalized the federal student loan program.¹¹ After 2010 all federal student loans are issued directly by the Education Department, rather than by subsidized private lenders. Pre-2010 Stafford loans were still essentially government loans, but this expansion of the Direct Loan program made explicit that the funds to pay for tuition are coming straight from the federal government — just as they would if the federal government simply paid the schools directly.

While the less generous Old IBR applies to all borrowers, the New IBR applies only to people who are new borrowers after July 1, 2014.¹² But the Obama administration decided to accelerate things. Using its authority under the older ICR program, the Education Department issued regulations creating yet another program — Pay As You Earn (PAYE) — and made it available to those who were new borrowers as of October 1, 2007, provided they received a loan disbursement after October 1, 2011.¹³ PAYE roughly mimicked New IBR — payment of 10 percent of discretionary income, forgiveness after 20 years — but was available by 2012 rather than 2014. One big difference, however, is in the treatment of unpaid interest. PAYE is much more generous to borrowers than IBR because it caps any capitalized interest at 10 percent of the original loan balance.¹⁴ In confusing Education Department-speak, unpaid interest would continue to *accrue* after that point, but it would not be *capitalized*, meaning that the borrower is not charged interest on any unpaid interest beyond that

10 percent. That's a substantial benefit over a 20-year period because loan interest rates can be 5 percent or higher.

IBR and PAYE faced some criticism, however, especially for being too generous to borrowers for graduate school and for allowing married couples who filed taxes separately to calculate payments based on their individual, rather than combined, incomes.¹⁵ I address some of these criticisms below when I discuss why these programs should be thought of like tax programs. But the Obama administration responded to these criticisms by adding yet another to the alphabet soup of student loan programs — the Revised Pay As You Earn (REPAYE) program — which came into effect in 2015.¹⁶

The key differences between PAYE and REPAYE are that REPAYE is available to borrowers with debt from before 2007;¹⁷ combines income for married couples filing taxes separately;¹⁸ has even more generous treatment of interest;¹⁹ extends the repayment period from 20 to 25 years for anyone with graduate school debt;²⁰ and — this is key — requires payment of 10 percent of discretionary income *no matter how high the borrower's income*.²¹ This is in contrast to the other programs, which cap payments at the standard 10-year loan service payment once a borrower's income gets sufficiently high.²² Removing that cap makes REPAYE progressive in the same way that our tax system is, at least on paper. For example, suppose a lawyer enters REPAYE while working as a government lawyer but then later joins a New York law firm as a partner making \$500,000 annually. In her first year in the new job, she could owe as much as \$48,000.²³ That would be a remarkable event, although as I discuss below, I have some doubts about whether this will actually happen. But the design choice is nonetheless revealing — requiring that level of payment dramatically distinguishes REPAYE from a typical loan.

⁹College Cost Reduction and Access Act, P.L. 110-84, section 203, 121 Stat. 784, 792-795 (2007); 20 U.S.C. section 1098e; and 34 C.F.R. section 685.221(b).

¹⁰See P.L. 111-152, section 2213, 124 Stat. 1029, 1081 (2010); 20 U.S.C. section 1098e(e); and 34 C.F.R. section 685.221(b) (regarding “new borrowers”).

¹¹See Health Care and Education Reconciliation Act of 2010, sections 2201-2213, 124 Stat. at 1074-1081.

¹²See 20 U.S.C. section 1098e(e).

¹³See 34 C.F.R. section 685.209(a)(1)(iii).

¹⁴*Id.* at sections 685.221(b)(4) (IBR interest rules) and 685.209(a)(2)(iv) (PAYE interest rules). Under both IBR and PAYE, unpaid interest on subsidized loans is not charged for the first three years. *See id.* at sections 685.209(a)(2)(iii) (IBR) and 685.221(b)(3) (PAYE).

¹⁵See, e.g., Jason Delisle and Alex Holt, “Safety Net or Windfall?: Examining Changes to Income-Based Repayment for Federal Student Loans,” New American Foundation (2012), at 11-12.

¹⁶See 34 C.F.R. section 685.209(c).

¹⁷*Id.* at section 685.209(c)(1)(ii).

¹⁸*Id.* at section 685.209(c)(1)(i).

¹⁹If the borrower's monthly payment is not sufficient to cover the accrued interest, only half of the otherwise due interest payment is charged. *Id.* at section 685.209(c)(2)(iii).

²⁰*Id.* at section 685.209(c)(5)(ii).

²¹*Id.* at section 685.209(c)(2)(i).

²²See *id.* at sections 685.209(a)(4)(i) (cap for PAYE) and 685.221(d)(1)(i) (cap for IBR).

²³This is assuming AGI of \$500,000 and using the 2015 poverty level for a single-person household of \$11,770. It is also assuming that she has outstanding debt of at least \$48,000, because she would not pay any more than what she owed.

Two final points to add. First, those programs are available to *any* borrower, regardless of career. That is in contrast to Public Service Loan Forgiveness (PSLF), which is available only to borrowers working in government or public services.²⁴ PSLF offers the same income-driven payment schedule but forgives outstanding debt after only 10 years, rather than 20 or 25 years. Second, the loan forgiveness under IBR, PAYE, etc., creates discharge of indebtedness income for tax purposes, at least as of now.²⁵ That is in contrast to PSLF, for which there is an exclusion from income under section 108.²⁶ The tax inclusion essentially means that not all of the debt is forgiven. The White House has repeatedly called on Congress to provide an exclusion.²⁷

Loans as Taxes

We can all agree (I hope) that whether or not something is named a “tax” is not the end of the story. After all, tax expenditure analysis relies on the idea that specific tax provisions are not really tax provisions at all but are actually spending provisions. If we extend that logic, there are likely many things that operate like taxes but fall under a different name. A simple example would be the penalty for failure to purchase health insurance under the Affordable Care Act. While deliberately not labeled as a “tax,” the Supreme Court nonetheless found that it was, at least for purposes of the congressional power to enact the penalty.²⁸

My claim here is that, at least as a first approximation, income-driven repayment of federal student loans looks a lot like an income tax to fund government spending.²⁹ Government money pays a portion of the cost of educating students (in the form of a loan disbursement), and the money to pay for it is raised from a levy on graduates’ income (in the form of an income-driven payment). Whether we call the levy a loan service payment or a tax doesn’t change the fact that a percentage of individuals’ income is being used to fund a government benefit (federal loans being essentially available to anyone). Moreover, the combination of the income-

driven payment, the forgiveness schedule, and the interest forbearance generate a degree of progressivity in the program — full payers are subsidizing those in partial financial hardship, especially if some loan balances are forgiven. While perhaps not as progressive as the income tax, we still end up with a form of progressive and collective payment for some higher education costs.

Just to underscore this point, Australia has a very similar program to finance tuition costs, and it collects the loan payments through the tax system — the loan payment is essentially another line on a tax return.³⁰

That said, there are obviously some key differences between what we could call a true “graduate tax” and income-driven repayment of a student loan. First, for all of the programs except REPAYE, the borrowers do not pay a percentage of income at all income levels. The payments are capped at the standard 10-year loan service payment, so once a borrower’s income gets high enough, she goes back to just paying a flat loan payment. Thus, the payment schedule is progressive for lower income levels but then regressive for higher income levels.³¹ REPAYE, by contrast, removes that cap and has borrowers pay 10 percent of income at all levels.

Second, borrowers pay only until the loan balance is paid off (or until the loan is forgiven after 20 or 25 years, or 10 years for those in PSLF). A true tax would presumably be due for life. As I discuss below, that complicates the administration’s desire to have high-income graduates pay more under REPAYE.

Third, a tax-financed system would be funded by all taxpayers. Student loans, by contrast, are disproportionately funded by former students. High-income graduates will pay their full costs and then some, because of relatively high interest rates, and the excess will partly fund the forbearance and forgiveness for low-income graduates. However, some of the funds will also come from taxpayers generally. Right now, the government estimates that taxpayers will end up paying about \$22 billion to cover forgiveness on outstanding loans.³² That sounds like a lot, but that’s about one year’s worth of Pell grants to cover several years’ worth of loans.³³

²⁴See Public Service Loan Forgiveness Program, 34 C.F.R. section 685.219(c).

²⁵See, e.g., Ron Lieber, “For Student Borrowers, Relief Now May Mean a Big Tax Bill Later,” *The New York Times*, Dec. 14, 2012.

²⁶Section 108(f).

²⁷See, e.g., Office of Management and Budget, “Budget of the United States Government, Fiscal Year 2014” (Apr. 2013), at 209; OMB, “Budget of the United States Government, Fiscal Year 2015” (Mar. 2014), at 190; and OMB, “Budget of the United States Government, Fiscal Year 2016” (Feb. 2015), at 53.

²⁸See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2595-2597 (2012).

²⁹I elaborate on this point and discuss it more fully in John R. Brooks, “Income-Driven Repayment and the Public Financing of Higher Education,” 104 *Geo. L.J.* 229 (2016).

³⁰See *id.* at 275-277.

³¹See *id.* at 260-261.

³²See Education Department, “Student Loans Overview, Fiscal Year 2016 Budget Proposal” (2015), at R-10 to R-12.

³³See Congressional Budget Office, “Program Costs Assuming a Maximum Discretionary Award Level of \$4,860 in the Federal Pell Grant Program — CBO’s April 2014 Baseline” (2014) (projecting outlays of \$26.4 billion for Pell Grants in 2014).

These are important caveats, to be sure. But if we can't call income-driven repayment a pure tax, we certainly can't call it a pure loan either. The combination of income-based repayment and loan forgiveness means that for many students, the nominal debt amount and nominal interest rates are irrelevant — all that matters is their income. It's hard to think of that as actually a loan.

Reforms to the Income-Driven Repayment

Framing PAYE, REPAYE, and the rest as tax-like programs suggests some problems and reforms that don't usually come up in discussions about student loans. This is largely because the current debate still sees the loans as fundamentally *loans*. But my claim here is that a loan that requires payment only as a function of income, includes substantial interest relief, and can be ultimately forgiven in total, isn't much of a loan anymore — or is at least different enough that the usual criticisms don't apply.

For example, one typical criticism of student loans is that interest rates are too high. High interest is said to be a burden on low-income graduates and also gives the appearance of the government profiting off of debt-ridden students. Leaving aside whether the interest rates are fair in risk-adjusted terms, if we see the loan payments more like taxes, the problem is actually that the interest rates are *too low*. With income-driven payments, interest relief, and potential forgiveness, the only people who should care about the nominal interest rates are relatively-high-income graduates — but, under this model, they are precisely the ones who should be paying to support the low-income graduates, who in turn shouldn't really care that much about the nominal interest rate. If high-income graduates aren't asked to pay more, the costs instead land on taxpayers in general, and it's not clear that that would be fairer. After all, high-income graduates are the ones getting a huge benefit from the education the loan paid for.

Another typical criticism is that students are taking on too much debt. But if a federal student loan is just an accounting device to manage a tax-financed government benefit, the bigger program is that the loans are *too small*, at least for undergraduate education.³⁴ The income-driven repayment model is available only for federal Direct Loans to students. But undergraduates can borrow a maximum of only \$57,000, and most can borrow only \$27,000 — that's the total for four years of school for a dependent student.³⁵ In-state public

university tuition, room, and board averages \$14,120 per year, net of all other grants and tax credits,³⁶ so federal loans can cover only about half of average out-of-pocket costs.

To make up the gap, a student might be forced to take out private loans, which have high interest, no income-based payments, and no forgiveness (and are not dischargeable in bankruptcy). So the relatively low cap on federal student loans may force some students to take on more of exactly the kind of debt that student loan critics hate. In contrast, raising the cap will allow students to take greater advantage of the generous benefits of income-driven repayment.

A tax frame also helps to see that the administration's laudable goal of having high-income graduates pay more — by asking all borrowers to pay 10 percent of their income under REPAYE, no matter their income level — will actually be counterproductive as currently structured. I support a progressive system of higher education funding, including one that asks high-income graduates to pay more, but as long as borrowers pay only until the loan balance is paid off (or is forgiven), higher monthly payment simply accelerate payments rather than increase them over the life cycle. And with loan interest rates higher than the risk-free rate, that could mean that high-income taxpayers actually end up paying *less* in present value terms than they would with more level payments.

The only students who end up paying more under REPAYE's payment schedule are those who would otherwise have had some loan forgiveness. Consider our lawyer from the earlier example, who has low income for the first 10 years of loan repayment, and thus pays relatively little under REPAYE, but then has high income for the next 10 years. If that person just made the standard loan service payment for those second 10 years, it's possible that there would still be a loan balance after 20 years, which would be forgiven. But with payments of \$48,000 per year or higher, she would likely end up paying off the full balance instead. In that case, accelerating payments would actually increase the total paid. That would be a worthwhile goal. The catch, however, is that it's also relatively easy to switch out of REPAYE entirely and back to the standard repayment plan.³⁷ So even those borrowers probably won't be hit by the higher payments.

³⁶See College Board, "Trends in College Pricing 2015" (2015), at 23.

³⁷See 34 C.F.R. section 685.209(c)(2)(vi) ("A borrower who no longer wishes to repay under the REPAYE plan may change to a different repayment plan in accordance with section 687.210(b).").

³⁴See Brooks and Jonathan D. Glater, "Raise the Cap on Federal Student Loans," *Los Angeles Times*, Aug. 3, 2015.

³⁵See Federal Student Aid, "Federal Student Aid, Subsidized and Unsubsidized Loans," Department of Education (2016).

For this to work — to make student debt payments progressive at all income levels over the life cycle — the government would probably have to lift the lifetime payment cap. That is, high-income borrowers would have to pay more than the nominal amount borrowed plus interest, such as 10 percent of discretionary income for a minimum number of years or based on some other factor. Then requiring higher monthly payments wouldn't just accelerate payment but would actually increase it.

Asking high-income graduates to pay more than they borrowed plus interest may sound unfair — but it is no less fair than asking high-income individuals to pay more in income taxes than they receive in benefits. But it could raise adverse selection, moral hazard, and other design issues. Yale University tried a similar program for a few years in the 1970s, called the Tuition Postponement Option (TPO). Under that program, borrowers were asked to pay a percentage of their income until all of a given class's debt was paid, or for 35 years, whichever occurred first.³⁸ TPO didn't work out so well, however. By 1999 no class had fully paid off its debt, and Yale, under pressure from alumni, canceled the remaining debt.³⁹

Purdue University has recently instituted a similar program, although payments are for a fixed number of years without connection to a class's overall debt,⁴⁰ and Oregon and several other states have proposed programs.⁴¹ While potentially promising, school- and state-based programs could face major moral hazard (especially from out-migration) and adverse selection (if those anticipating high income can opt out) problems. Just as with an income tax, there are good fiscal federalism arguments for this sort of policy instrument to be implemented at the national, rather than state, level.

Another odd difference between PAYE and REPAYE is the treatment of graduate school debt. Early criticism of IBR focused on how it could be particularly generous to borrowers for graduate degrees, especially professional degrees like law and medicine, and thus could end up having a

regressive effect.⁴² So REPAYE extends the repayment period for anyone with graduate debt from 20 years to 25 years. From a design standpoint, that's an unfortunate cliff: taking on even \$1 of debt for graduate school means five more years of payment for *all* debt, including undergraduate debt. That could cause people to delay graduate school or even forgo it entirely.

But it's also not clear that the payment schedule is the problem. The relative generosity for graduate students comes from the fact that a graduate student can borrow up to the full cost of attendance using debt eligible for income-driven repayment,⁴³ while an undergraduate can borrow at most \$57,000 over all school years, and most will be able to borrow only \$27,000.⁴⁴ So, for example, a dependent undergraduate can borrow from the federal government at most \$7,500 for his third or fourth year of college.⁴⁵ However, a student at, say, Harvard Law School, could borrow up to \$88,700 per year in federal loans eligible for income-driven repayment.⁴⁶ Therefore, it shouldn't be a surprise that the loan benefits are skewed toward graduate students. As noted above, the caps on undergraduate debt should be raised, but we should also remember that undergraduates get other forms of aid — like institutional grants, Pell grants, and the like. Just singling out the benefits to graduate students under income-driven repayment ignores the bigger picture of all federal aid.

Conclusion

Reforms to the federal student loan program have been a major policy innovation of the Obama administration. Unlike healthcare and financial reform, however, they have been somewhat under the radar. More students are starting to learn about the benefits of income-driven repayment, but the programs are still often thought of as incremental reforms to ease the burden of repayment, rather than as a dramatic change to the financing of higher education.

However, if widely adopted, the income-driven repayment programs like IBR, PAYE, and REPAYE could move tuition spending from being largely

³⁸See Brooks, *supra* note 29, at 274-275; and William E. Curran, "Yale's Tuition Postponement Option," 2 *J.L. & Educ.* 283, 285 (1973).

³⁹"Yale to Erase Alumni Debts in 2 Loan Plans," *The New York Times*, Apr. 13, 1999.

⁴⁰See Stacy Cowley, "Getting a Student Loan With Collateral From a Future Job," *The New York Times*, Apr. 8, 2016.

⁴¹See Brooks, *supra* note 29, at 277-279; Steven Dubois, "Plan Would Make Tuition Free at Ore. Colleges," Yahoo! News, July 4, 2013; and Julia Lawrence, "First Oregon, Now Ohio Looking at 'Pay It Forward' Tuition Plan," *Education News*, July 22, 2013.

⁴²See *supra* note 15.

⁴³Graduate students can take out Direct PLUS loans for the full cost of attendance, 34 C.F.R. section 685.203(f)-(g), and these loans are eligible for the various income-driven repayment programs, 34 C.F.R. section 685.209(a)(1)(ii) (limiting the exclusion of Direct PLUS loans only to those made to a parent, not a student directly). See also Federal Student Aid, "PLUS Loans," Education Department.

⁴⁴See *supra* note 35.

⁴⁵*Id.*

⁴⁶See Harvard Law School, "Cost of Attendance" (2016).

debt-financed private spending toward being progressive and collective public spending, akin to a tax-financed government spending program. That is a dramatic change for a big sector of our economy and a big piece of household spending.

But to truly work as a progressive and collective method of financing higher education, several reforms would be necessary. The borrowing cap for undergraduates would have to increase and likely the lifetime payment cap as well. To deal with adverse selection and arbitrage between different payment programs (and complexity in general), the government should also institute a single income-driven repayment plan and consider making it mandatory for all borrowers.⁴⁷ While reforms like these won't solve every problem with higher education funding — and could introduce new challenges — they would go a long way toward true federal public funding of higher education.

⁴⁷For more, see Brooks, *supra* note 29, at 279-286.

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