IS IT TIME TO ADMIT THE FAILURE OF AN EMPLOYER-BASED PENSION SYSTEM?

by
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In her contribution to the Business Law Forum, Susan Stabile paints a pessimistic picture of the state of retirement security in the United States. She examines two aspects of the failure of an employer-based pension system, focusing first on the problems associated with defined contribution plans such as 401(k) plans, which have become the dominant means by which employers offer their employees pension coverage, and second, on the reality that millions of employees lack any pension coverage at all. She argues that the failures of the employer-based system can not be rectified by incremental changes and that serious consideration must be given to alternative models of providing Americans with retirement security. Although recognizing that neither of the models she discusses—i.e., the provision of a government pension for everyone and movement to a mandatory employment-based system with more stringent regulation than currently exists—would be politically easy to enact, she argues that some major overhaul is needed if we remain convinced that adequate retirement security is an important social goal.

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I. INTRODUCTION

Let me say from the outset that this Article presents a pessimistic picture. In brief, the first part of the story line goes like this: The era of the defined benefit plan is over. We increasingly live in a world of defined contribution plans, specifically a world in which 401(k) plans are the predominant vehicle for providing retirement income to American workers. The reasons propounded for the shift from a defined benefit plan universe to a defined contribution one are many and varied, but whatever else may be said about them, 401(k) plans decrease employer responsibility and increase employee risk. And they do so at a time when increased life expectancy means that retirees have to stretch their retirement savings to cover longer periods of retired life, and when the decrease in the number of active employees relative to retired ones puts increasing strain on the Social Security system. We will not see a return to a defined benefit world and there are fundamental flaws in the defined contribution plan that simply cannot be fixed.

The second part of the story line is even bleaker, although it can be stated more succinctly: Even if we can succeed in making defined contribution plans a little better than they are today for those workers who have them, those changes would do nothing for the millions of workers whose employers offer no pension coverage at all.

Thus, to answer the question posed in the title of this paper: Yes, it is time to admit the failure of an employer-based pension system,[1] that is, unless we are willing to change the terms on which we regulate such plans in ways much more profound than we have been willing to consider before.[2] The rest of this Article expounds on the story line.

[1] Whether we have the political will to act upon this truth is a different matter, one I speak to briefly in the concluding Part of this Article. But the fact that finding an alternative is not easy does not make the current system any less of a failure.

[2] At various points in this Article, I discuss various provisions of the recently enacted Pension Protection Act of 2006, which was signed by President Bush on August 17, 2006. Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006). Many of the provisions of the new law attempt to shore up funding of defined benefit plans. The Act does little to address the concerns raised in this Article and falls far short of the type of profound change that I believe is necessary to ensure adequate retirement security for all Americans.

II. THE MOVE TO DEFINED CONTRIBUTION PLANS

We have had an employment-based pension system in the United States since the early 1920s.[3] Until about twenty years ago, the dominant vehicle by which employers provided for the retirement security of their employees was the traditional defined benefit plan, a plan in which the employer promised to pay to the employee an annual pension, determined in accordance with a predetermined formula. However, over the last twenty years, the defined contribution plan has become the primary means of providing retirement income to employees.[4]

Between 1992 and 2001, "the share of households with pension coverage that relie[d] solely on a defined contribution plan increased from 37 percent to 58 percent . . . . At the same time, the share of households with only a defined benefit plan dropped from about 40 percent to 19 percent."[5] In 2004, "[t]hree-fourths of workers who participated in employer-sponsored retirement plans . . . were enrolled in defined contribution plans, such as 401(k) plans. Just 18.4% of workers participated in defined benefit pension plans, and only 7% of workers participated in both types of plan[s]."[6]

The number of defined benefit plans declined substantially between 1985 and 2004, from 114,000 in 1985 to 31,200 in 2004,[7] and the number of employees covered by defined benefit plans fell from 30.1 million in 1980 to

[3] Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 54 (2004). In 1921, the Internal Revenue Code first provided an exemption for contributions to employer-based pension plans. Jerry W. Markham, *Privatizing Social Security*, 38 SAN DIEGO L. REV. 747, 761 (2001); Mark J. Warshawsky et al., *Regulating Single Employer Defined Benefit Pension Plans: A Modern Approach* (Pension Research Council, Working Paper 2005-12, 2005), *available at* http://www.pensions-institute.org/workingpapers/WP2005-12.pdf. Katherine Stone does a wonderful job describing the origins of that system in her contribution to this symposium issue. *See* Katherine V.W. Stone, *A Fatal Mismatch: Employer-Centric Benefits in a Boundaryless World*, 11 LEWIS & CLARK L. REV. 451 (2007).

[4] The shift from defined benefit to defined contribution plans has been discussed extensively elsewhere by many commentators. *See, e.g.*, JOHN H. LANGBEIN, SUSAN J. STABILE & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 58–62 (4th ed. 2006); Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 613 (2000); Kaplan, *supra* note 3, at 61–62; Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 4 (2000); David Millon, *Worker Ownership Through 401(k) Retirement Plans: Enron's Cautionary Tale*, 76 ST. JOHN'S L. REV. 835, 838 (2002); Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 74–75 (2002).

[5] ALICIA H. MUNNELL & ANNIKA SUNDÉN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 21 (2004).

[6] PATRICK PURCELL, CONG. RESEARCH SERV., RETIREMENT SAVINGS AND HOUSEHOLD WEALTH: TRENDS FROM 2001 TO 2004, at 3 (2006).

[7] Gregory Crawford & Vineeta Anand, *The Looming Retirement Disaster*, PENSIONS & INVESTMENTS, Apr. 18, 2005, at 1. The Pension Benefit Guaranty Corporation (PBGC), which insures DB plans, covers less than 30,000 plans today, compared to over 110,000 in 1985. *Id.*

22.2 million in 2000.[8] Not only have many existing plans been terminated or closed to new employees, but employers are not creating new defined benefit plans.[9] As a result, "[b]y the end of 2004, 401(k) plans had assets of $2.1 trillion, while defined benefit plan assets were $1.8 trillion."[10]

The result is that defined contribution plans, once viewed as supplemental plans,[11] have become the primary retirement vehicle for a significant number of workers.[12] Many explanations for this change have been posited. Some have attributed the shift to the increasing mobility of workers, which makes the backloading of benefits inherent to final pay defined benefit pension plans unattractive,[13] while some have suggested the explanation lies in the shift in the

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[8] Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2004*, EBRI ISSUE BRIEF (Employee Benefit Research Institute, Washington, D.C.), Oct. 2005, at 5.

[9] Vineeta Anand, *More to Come: 1 in 5 Corporations Freeze DB Plans*, PENSIONS & INVESTMENTS, Apr. 5, 2004, at 3 (citing Aon Consulting survey finding that 21% of 1,000 large pension plans were frozen to newcomers between 2001 and 2003). Even cash balance plans, which have received such attention in recent years, are not being adopted as new plans. Rather, a number of traditional defined benefit plans have been converted to cash balance plans. Employers are neither adopting new cash balance plans where they previously did not offer a plan, nor converting defined contribution plans into cash balance plans.

[10] John A. MacDonald, *Retirement Income Security: A Look at Social Security, Employment-Based Retirement Plans, and Health Savings Accounts*, EBRI NOTES (Employee Benefit Research Inst., Washington, D.C.), Aug. 2005, at 2, 5, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=788071#PaperDownload. *See* James M. Poterba, *Individual Decision Making and Risk in Defined Contribution Plans*, 13 ELDER L.J. 285, 287 (2005) (total defined contribution plan assets totaled $2.6 trillion at the end of 2004, compared to $1.8 trillion in defined benefit plan assets).

[11] *See, e.g.*, Alicia H. Munnell & Annika Sundén, *401(K) Plans Are Still Coming Up Short*, ISSUE IN BRIEF (Ctr. for Retirement Research at Boston Coll., Chestnut Hill, Mass.), Mar. 2006, at 2, *available at* http://www.bc.edu/centers/crr/issues/ib_43b.pdf (observing that 401(k) plans were originally viewed as supplements to defined benefit and profit-sharing plans). As one commentator observed, "[w]hen 401(k)s were introduced in the early 1980s, they represented secondary retirement plans for many of the eligible workers. Most of the employers offering such plans also offered a defined benefit pension plan. Growing numbers of workers, however, are covered only by a 401(k) plan." Poterba, *supra* note 10, at 290–91.

[12] Copeland, *supra* note 8, at 5 (noting that "the percentage of families . . . with only a [defined contribution] plan increased from 37.6 percent in 1992 to 57.9 percent in 2001"); Jefferson, *supra* note 4, at 613 (noting that "[i]n recent years, there has been a discernable movement toward using defined contribution plans as primary retirement saving vehicles."); Jeff Manning, *Not All Got the Moral to Enron's Story*, OREGONIAN, May 28, 2006, at D1 (citing Hewitt Associates' report that "64 percent of companies and other plan sponsors consider their 401(k) to be their employees' primary retirement plan, compared with 35 percent in 1995").

[13] *See, e.g.*, Angela Boothe Noel, *The Future of Cash Balance Plans: Inherently Illegal or a Viable Pension Option?*, 56 ALA. L. REV. 899, 902 (2005) (suggesting that as workers became more mobile, employers decided that the portability of 401(k) plans was attractive to employees); Yun Zhang, *The Economic Growth and Tax Relief Reconciliation Act of 2001 and Private Pension System Reform*, 5 U. PA. J. LAB. & EMP. L. 629, 635 (2003) (citing mobility as a reason employees came to favor 401(k) plans). *But see* Stabile, *supra* note 4, at 75–76 (expressing skepticism that mobility is the reason for the shift).

labor force from good-producing to service-producing occupations.[14] Others have suggested that the extensive regulation of defined benefit plans makes them more costly to employers.[15] It has also been suggested that the Internal Revenue Code (the "Code"), which severely limits the benefits that can be provided to highly compensated corporate executives under qualified plans, makes defined benefit plans less attractive to employers.[16]

Whatever else can be said, it is undeniably the case that 401(k) plans are also more consistent with the individualist/consumer approach that has become so prevalent in so many areas of law and society. Employers argue that 401(k) plans give employees personal autonomy over their financial future and many have bought into this way of thinking.[17] Sold on 401(k) plans during a time of

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[14] *See, e.g.*, Stephanie L. Costo, *Trends in Retirement Plan Coverage Over the Last Decade*, MONTHLY LAB. REV., Feb. 2006, at 58, 59–60; Kaplan, *supra* note 3, at 63 (offering as one of the reasons for the shift "the structural transformation of the American economy from unionized manufacturing companies to service sector operations and high technology enterprises").

[15] Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration and Other Employee Benefits Woes—Evaluating ERISA at Age Thirty*, 53 BUFF. L. REV. 1193, 1202 (2005) (observing that "[o]ne view of this change is that plan sponsors, seeking a degree of protection from certain ERISA provisions, have abandoned defined benefit plans, and the insurance that accompanies them, in search of lower cost and less regulated options."); Jefferson, *supra* note 4, at 614–15 (explaining shift as result of onerous regulations that "have disproportionately affected defined benefit plans"); Kaplan, *supra* note 3, at 63 (suggesting burdensome regulations are one explanation for the shift); Noel, *supra* note 13, at 901–02 (discussing fact that ERISA places greater regulation on defined benefit plans than on defined contribution ones); Susan J. Stabile, *Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined Contribution Plan Participants?*, 5 EMP. RTS. & EMP. POL'Y J. 491, 496–97 (2001) (suggesting that cost and regulation are the more likely explanations of the shift).

[16] JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 279 (2004) ("The decline of qualified defined-benefit plans likely owes something to the fact that the corporate officers who select compensation programs do not stand to gain much from such a plan."); Alicia H. Munnell et al., *Why Are Healthy Employers Freezing Their Pensions?*, ISSUE IN BRIEF (Ctr. for Retirement Research at Boston Coll.), Mar. 2006, at 7–8, *available at* http://www.bc.edu/centers/crr/issues/ib_44.pdf (discussing two-tier pension system resulting from limits on benefits payable under defined benefit plans, which has led to "the emergence of non-qualified plans as the main form of pensions for upper management"). Although the Code's nondiscrimination rules also apply to defined contribution plans like 401(k) plans, the rules are less onerous as applied to those plans. *See* Michael J. Collins, *Reviving Defined Benefit Plans: Analysis and Suggestions for Reform*, 20 VA. TAX REV. 599, 609 (2001) (noting that the Code's nondiscrimination rules "are responsible for a significant portion of the costs of administering defined benefit plans").

[17] *See* Jefferson, *supra* note 4, at 616 (observing that participant involvement "is desirable because it allows employees to be more active in the management of their retirement assets," but noting the danger of giving this choice to employees lacking financial expertise). *See also* Janice Kay Lawrence, *Pension Reform in the Aftermath of Enron: Congress' Failure to Deliver the Promise of Secure Retirement to 401(k) Plan Participants*, 92 KY. L.J. 1, 42–43 (2003–2004) (discussing acceptance of the "personal responsibility/freedom of choice" model); Anna M. Rappaport, Mercer Human Res. Consulting, Exploding the Myth That Employees Always Prefer Defined Contribution Plans 9 (May 20, 2004), *available at* http://www.mercerhr.com/

stock market boom, employees became enamored of the ability to control their retirement destiny.[18]

Doubtless all of these factors have, in some measure, contributed to the shift. Whatever the cause, however, today's reality is that of defined contribution plans, specifically, 401(k) plans.

III. THE FOLLY OF RELYING ON 401(K) PLANS TO PROVIDE RETIREMENT SECURITY

A. *Major Problems Associated with 401(k)Plans*

The problems with using 401(k) plans as the sole or primary vehicle for providing retirement income are numerous and have been well-documented. The following briefly catalogues some of the major issues that elsewhere have been discussed extensively in my own writing and in the writings of others.[19]

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referencecontent.jhtml?idContent=1138485 (suggesting that employers believe employees prefer 401(k) plans, but not accepting that conclusion). That may simply be another way of saying that defined benefit plans cost an employer more in contributions than do defined contribution plans. *See* Jack VanDerhei, *Defined Benefit Plan Freezes: Who's Affected, How Much, and Replacing Lost Accruals*, EBRI ISSUE BRIEF (Employee Benefit Research Inst., Washington, D.C.), Mar. 2006, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-20063.pdf (citing findings that 35–45% of companies froze their defined benefit plans because of the amount of contributions required and their impact on corporate expense).

[18] *See, e.g.*, Debra A. Davis, *Do-It-Yourself Retirement: Allowing Employees to Direct the Investment of Their Retirement Savings*, 8 U. PA. J. LAB. & EMP. L. 353, 353 (2006) ("Americans pride themselves on being self-sufficient. From home improvement to health savings accounts, Americans are evidencing a preference for handling for themselves matters that were previously managed by professionals. This is particularly evident in the area of retirement investing."); *SAFECO to Offer New ShareBuilder(R) 401(k) Program*, PR NEWSWIRE, FINANCIAL NEWS, May 30, 2002, http://www.advisorpage.com/modules.php?name=News&file=article&sid=305 (noting that "more than ever, employees want to be in control of their [plan] investments"). *See also* Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(k) Plans*, 14 ELDER L.J. 1, 4 (2006) (citing Professor Roels' suggestion that "the United States's [sic] high score levels of individualism helped to explain its 401(k) plans, which provide individual employees with significant individual decision-making power"). I asked law students in my Pensions and Employee Benefits class at St. John's some years ago (before the market decline of recent years) whether they would rather have a plan managed by professional asset managers or direct the investment of their own 401(k) plan. Universally, they agreed they would rather manage their own plan, convinced they could do better for themselves than they would do with a defined benefit plan that promised only a fixed benefit. As I have argued elsewhere, participant control is in some sense illusory because of the "framing effect." Susan J. Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J. L. & PUB. POL'Y 361, 378–86 (2002).

[19] This is not meant to be an exhaustive list of the shortcomings of 401(k) plans. However, for this purpose, I am ignoring some problems with the way 401(k) plans are currently regulated and administered that I think are easier to solve. One example is the problem of leakage from 401(k) plans, which could be addressed by requiring rollovers when employees shift jobs. I discuss both the problem of leakage and the idea of imposing a mandatory rollover requirement in Stabile, *supra* note 4, at 95–98, 102–04. *See also* Craig Copeland, *Retirement Plan Participation and Retirees' Perception of Their Standard of Living*, EBRI ISSUE BRIEF (Employee Benefit Research Inst., Washington, D.C.), Jan. 2006,

1. *Failure of Employees to Participate*

A 401(k) plan puts the decision whether to participate in the plan in the hands of the employee. Studies consistently find that upwards of one-quarter of employees eligible to participate do not do so.[20] Not surprisingly, lower income employees—those least likely to have private sources of retirement savings—are less likely to participate in a 401(k) plan.[21] According to an analysis of actual tax return data, "persons earning less than $50,000 per year had the lowest rate of participation, while those earning between $50,000 and $90,000 annually had the highest [rate]."[22] Younger employees are also less likely to participate, meaning fewer years in which to accumulate retirement income.[23]

2. *Failure of Employees to Contribute Sufficient Assets*

Most workers who do participate in 401(k) plans fail to contribute enough to accumulate sufficient retirement savings. Only about ten percent of participants contribute the maximum amount permitted under the Code, and

at 20 (reporting that through 2003, less than half of those receiving lump sum distributions use at least some part of the distribution for tax-qualified retirement savings through a new employer plan, an IRA or an annuity; the remainder used the funds for other purposes); Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Debate*, 58 WASH. & LEE L. REV. 1369, 1402–09 (2001) (discussing leakage problem).

[20] *See, e.g.*, MUNNELL & SUNDÉN, *supra* note 5, at 56 (finding that in 2001, 26% of employees eligible to participate in 401(k) plans did not participate); *see also* U.S. Dep't of Labor, National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2005 (Aug. 2005), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0003.pdf (of the 53% of workers who had access to a defined contribution plan, only 42% participated); Amy B. Monahan, *Addressing the Problem of Impatients, Impulsives, and Other Imperfect Actors in 401(k) Plans*, 23 VA. TAX REV. 471, 485 (2004) (about 25% of eligible employees fail to elect to participate).

[21] MUNNELL & SUNDÉN, *supra* note 5, at 56–57 (observing that "[a]mong workers with earnings between $20,000 and $40,000, only about half are eligible to join the plan; among those eligible, 70 percent participate. Among workers earning more than $40,000, two out of three are eligible and 80 percent or more participate."); James M. Poterba, *supra* note 10, at 289 (citing findings that "the participation rate is greater than two-thirds for workers with earnings of more than $80,000 [but] only 40.1% for those with $20,000–39,999 in earnings, and it is below 15% for workers with lower earnings").

[22] Kaplan, *supra* note 3, at 65–66.

[23] *See* MUNNELL & SUNDÉN, *supra* note 5, at 57:

> Fewer than half of workers aged twenty to forty with earnings below $20,000 choose to participate in a 401(k) plan. Even for workers with salaries close to average ($20,000–$40,000), participation rates are low. It is not until workers approach age fifty that participation rates are similar to those for high-income workers. [A] worker who postpones participation until age fifty will have only 26 percent of the retirement wealth of a similar worker who participated since age thirty.

See also Kaplan, *supra* note 3, at 65 (observing that those in the 50–55 year age-bracket had the highest participation rate, while those aged 21–25 had the lowest participation rate); 401khelpcenter.com, Employees Sluggish in Interacting With 401k Plans (May 24, 2004), http://401khelpcenter.com/press_2004/pr_hewitt_052404.html (citing Hewitt findings that "on average, only 45% of workers ages 20–29 participated" in a 401(k) plan).

those who do are likely to be the highest income employees.[24] Only "one percent of workers earning under $60,000 made the maximum annual contribution to their defined contribution plan in 2004."[25]

According to one estimate, "a participant earning $50,000 per year and covered only by a defined contribution plan would need to save fifteen percent of income (including both employer and employee contributions) over thirty years to ensure adequate retirement savings."[26] Yet the average estimate is less than half of that rate.[27]

3. Participant Selection of Investment

401(k) plans, like all defined contributions plans, put the investment risk on the employee rather than the employer.[28] They do so while at the same time putting investment decisions in the hands of employees.[29] As one commentator aptly observed, "Instead of a small cadre of experts making investment decisions, the switch to 401(k) put millions of investment novices in charge of their own future. Folks who don't know asset allocation from Alsatian hunting dogs are expected to choose a proper mix of age- and risk-appropriate investments."[30]

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[24] *See* Munnell & Sundén, *supra* note 11, at 3; *see also Strengthening Pension Security for All Americans: Are Workers Prepared for a Safe and Secure Retirement? Hearing Before the H. Comm. on Education & the Workforce*, 108th Cong. 40 (2004) (statement of Peter R. Orszag, Joseph A. Pechman Senior Fellow, The Brookings Institution, Washington, D.C.) (reporting that only 5% contribute the maximum); John C. Goodman & Peter R. Orszag, Nat'l Ctr. for Policy Analysis, Retirement Savings Reforms on Which the Left and the Right Can Agree 1 (Dec. 1, 2004), http://www.ncpa.org/pub/ba/ba495/.

[25] Retirement Security Project, Fast Facts on Retirement Security (Sept. 13, 2006), http://www.retirementsecurityproject.org/pubs/File/FastWebFacts20060406.pdf; Munnell & Sundén, *supra* note 11, at 3. *See also* Monahan, *supra* note 20, at 486 ("[M]any who choose to participate in a 401(k) plan do so at a level which will not, by an objective analysis, provide adequate retirement income.").

[26] Monahan, *supra* note 20, at 486.

[27] *Id.*

[28] This is inherent to defined contribution plans since employers promise to pay employees only what is in their individual account at retirement, "which is not guaranteed to be a certain amount, but is instead determined by the investment performance of the account." Noel, *supra* note 13, at 901. *See generally* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455–57 (2004) (discussing characteristics of defined contribution plans in contrast to defined benefit plans).

[29] Although it is not inherent to the nature of defined contribution plans that employees direct the investment of their account balances, most 401(k) plans are participant-directed. *See, e.g.*, Medill, *supra* note 4, at 4 (using the term "individual responsibility model" to describe 401(k) plans because of the fact that employees are "responsible for funding and directing the investment" of their retirement savings); Millon, *supra* note 4, at 838 (observing that "[i]n most defined-contribution plans, the employees decide how their contributions should be invested"); Poterba, *supra* note 10, at 286 (observing that participants "usually control investment decisions and withdrawals" from defined contribution plan accounts). One commentator termed it "the fundamental premise of defined contribution plans generally" that "ordinary employees are the best managers of their retirement assets." Kaplan, *supra* note 3, at 83.

[30] Manning, *supra* note 12.

Many, if not most, employees lack the knowledge to make the necessary financial decisions. "The result appears to be that participants in general follow simple investment strategies and end up with either too much or too little stock in their portfolios."[31] Worse, having made an investment decision, most employees fail to ever change their plan investment allocations.[32]

The presence of an employer stock fund as a 401(k) plan investment option creates a particular risk, as employees offered the option of investing in company stock tend to over-invest in such stock.[33] I have explored the causes and problems associated with investments in company stock at length elsewhere, including the fact that the publicity associated with the disaster befalling participants in the 401(k) plans of companies like Enron and Global Crossing have not resulted in a significant decline in the amount of assets invested in employer securities.[34]

The result of participants' inability to make good investment decisions is predictable. The Employee Benefits Research Institute found that "401(k) account balances held by older workers lost about 5 percent of their value from

[31] MUNNELL & SUNDÉN, *supra* note 5, at 94. *See also* Davis, *supra* note 18, at 365 (citing findings of "[n]umerous studies" that "many participants are not adequately prepared to manage the investment of their retirement accounts"); Muir, *supra* note 18, at 14–19 (discussing problems with employee decision making).

[32] *See* MUNNELL & SUNDÉN, *supra* note 5, at 94; Olivia S. Mitchell et al., *The Inattentive Participant: Portfolio Trading Behavior in 401(k) Plans* (U. Mich. Retirement Research Ctr., Working Paper 2006-115, 2006), *available at* http://www.mrrc.isr.umich.edu/publications/Papers/pdf/wp115.pdf (finding that 80% of plan participants initiate no trades and an additional 11% initiate only one single trade in a two year period); Julie Agnew et al., *Portfolio Choice and Trading in a Large 401(k) Plan*, 93 AM. ECON. REV. 193, 194 (2003) (reporting study findings that at least 87% of participants make no changes to their portfolio over the course of a year).

[33] Sarah Holden & Jack VanDerhei, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2003*, EBRI ISSUE BRIEF (Employee Benefit Research Inst., Washington, D.C.), Aug. 2004, at 7, *available at* http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=3503 (approximately 13% of plan participants had more than 80% of their account balances invested in company stock); Agnew et al., *supra* note 32 (reporting study findings that 46% of participants hold more than 20% of their account in employer stock and one-sixth hold more than 80%). Lack of diversification is not only a problem with employer stock. *See* Kaplan, *supra* note 3, at 82 (citing an analysis showing that 97.5% of all 401(k) assets are invested in large-capitalization growth stocks).

[34] Kara M. Klaas, *Left in the Dark: Sarbanes-Oxley and Corporate Abuse of 401(k) Plan Blackout Periods*, 29 J. CORP. L. 801, 815 (2003–2004) (observing that despite passage of the Sarbanes-Oxley legislation and "the public warnings about over-investment in employer stock, many employees continue to over-invest in employer stock"); Susan J. Stabile, *Pension Plan Investments in Employer Securities: More Is Not Always Better*, 15 YALE J. ON REG. 61 (1998); Susan J. Stabile, *Another Look at 401(k) Plan Investments in Employer Securities*, 35 J. MARSHALL L. REV. 539 (2002). *See also* Monahan, *supra* note 20, at 489–91; Medill, *supra* note 4. There does appear to be some recent evidence that recently hired employees are contributing less to company stock funds than existing employees. *See 401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2005*, RESEARCH PERSPECTIVE (Investment Co. Inst., Washington, D.C.), Aug. 2006, at 12–13.

year-end 1999 to year-end 2004, even though workers kept contributing to their plans over those five years."[35]

Giving employees investment choice may have made sense when 401(k) plans were largely "supplements to employer-funded pension and profit-sharing plans . . . [and] 401(k) participants were presumed to have their basic retirement income security needs covered by an employer-funded plan and Social Security."[36] However, it makes less sense to do so when participants are relying on their 401(k) plans for their basic retirement income security needs.

4. Lack of Guarantee

Like all defined contribution plans, a 401(k) plan promises an employee only the value of her account balance at retirement.[37] While that means unlimited upside potential for employees, it also means no floor below which benefits cannot fall. In contrast, defined benefit plans enjoy the benefit of insurance under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA),[38] which assures that no matter what financial difficulties a plan suffers, participants will receive at least some level of pension security. ERISA does not extend that insurance protection to defined contribution plans.

5. Limited Redress Against Fiduciary Failures

However one wants to dress it up by focusing on employee autonomy, limited employer responsibility and liability is a key feature of 401(k) plans. Not only do 401(k) plans relieve employers of the funding liabilities associated with the traditional defined benefit pension plan, but the effect of ERISA section 404(c) and the Department of Labor's regulations adopted thereunder is to shield employers, in most circumstances, from liability for losses to participants' 401(k) accounts.[39] Thus, ERISA's fiduciary standards, which govern investments in defined benefit plans, largely do not operate with respect to 401(k) plans in which employees make investment decisions.

The result of problems such as those discussed in this section is predictable. While we may or may not be facing the "retirement crisis" that the public media often portrays, many people, particularly at the lower end of the income scale—those who benefited most from the promise afforded by the traditional defined benefit plan—will retire with inadequate 401(k) plan account balances to see them through their retirement years,[40] a concern

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[35] Jill Barshay, *Retirement Investors See Many Unhappy Returns*, CQ WEEKLY, July 31, 2006, at 2092, 2093 (also reporting IRS study showing that IRA values "declined precipitously" from the end of 1999 through 2000, "despite big increases in the amounts that people saved").

[36] Munnell & Sundén, *supra* note 11, at 2.

[37] *See supra* note 28.

[38] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000). ERISA is the primary federal statute regulating pension plans.

[39] *See* Lawrence, *supra* note 17, at 26–33; Stabile, *supra* note 18, at 373–76.

[40] *See* Daniel Halperin, *Employer-Based Retirement Income—The Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37, 38 (2003) (noting that "[t]he Enron debacle and the recent stock market decline have served as a wake-up call" that many employees will retire with savings inadequate to finance their retirement); Medill, *supra* note 4, at 14–17 (discussing

magnified by the fact that most 401(k) plans provide for a lump sum payout, creating concern about post-distribution conservation of savings.[41] The conclusion of some, that "on average" retirees of the boomer generation will be better off than those of the previous generation,[42] is no reason to celebrate given the vast inequalities in pension coverage and the prospect faced by lower-income employees.

Women are particularly at risk. Despite the fact that the majority of older Americans are women, insufficient attention has been given to the fact that many women will face difficulties in retirement.[43] Women tend to earn less than men,[44] the fact that their work lives are often interrupted mean they receive less Social Security than men, and those women that are covered by plans tend to contribute lower amounts than do men.[45] They also tend to invest their assets more conservatively, resulting in lower plan accumulations,[46] and are "more likely to take the money [in their 401(k)] out when they le[ave] a job

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risk participants will not accumulate adequate savings for retirement); Stabile, *supra* note 18, at 363 (discussing "enormous risk" that participants will retire with insufficient funds to support them through retirement).

[41] *See, e.g.*, Kaplan, *supra* note 3, at 85–86 (discussing difficulty for retirees of finding annuity providers). A survey by the Society of Actuaries reveals that most of those planning for retirement "are poorly prepared for the combination of retirement risks—living longer and investing their assets—being thrust upon them as their employers abandon traditional defined benefit pension plans." Soc'y of Actuaries, Longevity: The Underlying Driver of Retirement Risk—2005 Risks and Process of Retirement and Process of Retirement Survey Report 10 (July 2006), *available at* http://www.soa.org/ccm/cms-service/stream/asset/asset_id=23554090&g11n.

[42] *See, e.g.*, *Transitioning to Retirement: How Will Boomers Fare?*, at 2 (Pension Research Council, Working Paper 2006–7, 2006), *available at* http://rider.wharton.upenn.edu/%7Eprc/PRC/WP/PRC%20WP7-2006.pdf ("Boomers *on average* will head into retirement in better financial and physical health than prior generations of retirees.") (emphasis in original).

[43] One of the major findings of a collaborative study by the Harvard Generations Policy Program, the Harvard Generations Policy Journal, and the Global Generations Policy Institute was that, despite the fact that "[w]omen constitute a majority of the elderly, and their numbers will grow dramatically as the sizable boomer cohort ages, . . . [p]olicymakers have long ignored the plight of boomer women approaching retirement with insufficient resources." Anna M. Rappaport, *Easing the Strain on Boomer Women in Retirement: Why Efforts Must Begin Now*, *in* BABY BOOMER WOMEN: SECURE FUTURES OR NOT? 9 (Paul Hodge ed., 2006), *available at* http://www.genpolicy.com/2006_journal/index_articles.html.

[44] Professor Lorraine Schmall summarizes sobering statistics:

> A typical woman earns no more than four-fifths of what an average man makes for doing the same work and having the same qualifications. Women aged thirty-five and older earn about three-fourths as much as their male peers . . . . In 2003, 29.4% of women earned poverty-level wages or less, compared with 19.6% of men.

Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 162 (2006).

[45] *See generally* Lorraine Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673 (2002) (discussing reasons women have lower retirement income than men).

[46] *See* Jayne Elizabeth Zanglein, *Investment Without Education: The Disparate Impact on Women and Minorities in Self-Directed Defined Contribution Plans*, 5 EMP. RTS. & EMP. POL'Y J. 223, 226 (2001); Zhang, *supra* note 13, at 639.

and spend it on children or debt reduction."[47] Thus, they receive less income during retirement while living longer than men do.[48]

Minorities are also at greater risk with 401(k) plans. Hispanic workers participate at significantly lower rates than do White employees,[49] and Black employees invest their accounts in such a way that their account balances are likely to be significantly lower than those of White employees.[50]

Changing demographics serve to magnify the shortcomings of 401(k) plans. In the last fifty years or so, there has been both a decrease in birth rates and an increase in average life expectancy.[51] This has several important consequences. "Social Security benefits will have to be financed by a working population that is shrinking relative to the number of retirees and retirees will have to stretch their savings and other assets over longer periods of retirement than their parents and grandparents experienced."[52] In addition, some economists fear that massive selling of 401(k) plan assets as baby boomers retire, "will lead to a sharp fall in [share] prices, because there are too few people in the smaller generations that followed the boomers to buy all of those assets at today's prices."[53]

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[47] Cindy Hounsell, *"Out-of-Paycheck" Retirement Programs: Will They Crack the Nest Egg for Baby Boomer Women?*, *in* BABY BOOMER WOMEN: SECURE FUTURES OR NOT?, *supra* note 43, at 99.

[48] *See, e.g.*, *Managing Retirement Assets: Ensuring Seniors Don't Outlive Their Savings*: *Hearing Before the S. Special Comm. on Aging*, 109th Cong. 2 (2006) (statement of Sen. Smith, Chairman) (noting that women face greater risk in retirement because they live longer and have less retirement income).

[49] Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1533 (2004).

[50] *Id*. at 1536–38. Dorothy Brown's contribution to this symposium issue provides sobering empirical data regarding the effect of race on investment decisions. *See* Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007).

[51] PATRICK PURCELL & DEBRA B. WHITMAN, CONG. RESEARCH SERV., TOPICS IN AGING: INCOME OF AMERICANS AGE 65 AND OLDER, 1969 TO 2004, at 1 (2006).

[52] *Id*. The CRS report also observes that the

> increasing number of Americans living to age 80 and older is of particular importance to policymakers, because it is the very old who are most likely to need medical, social, and long-term care services, and who are at the greatest risk of depleting their financial resources and slipping into poverty.

Id. at 5. The percentage of the elderly (i.e. those 65 and older) who are age 80 and older was 26.2% in 2005, compared to 17% in 1970. *Id*. at 6. *See also* Copeland, *supra* note 8, at 4 ("The sharp rise in the percentage of the elderly population will make it much more difficult for active workers to support programs such as Medicare and Social Security."); Costo, *supra* note 14, at 58 ("As lifespans lengthen, retirement benefits have become a growing concern among both employees and employers."). It is also noteworthy that, in planning for their retirement, most employees underestimate average life expectancy. *See* Soc'y of Actuaries, *supra* note 41, at 3, 5 ("Far too many retirees grossly underappreciate the implications of longevity for their financial needs, especially if they should turn out to be among those surviving into their tenth decade.").

[53] *Baby Boom and Bust: Will Share Prices Crash as Baby Boomers Sell Their Assets to Pay for Retirement?*, ECONOMIST, May 13, 2006, *available at* http://www.economist.com/finance/displaystory.cfm?story_id=6914086. *See also* Copeland,

B. Attempts to Address 401(k) Plan Shortcomings

There have been some attempts made to address the problems associated with 401(k) plans, some of which have had some positive impact. However, while some of these attempts have achieved some marginal improvement, in my view none of them make 401(k) plans a sufficiently reliable vehicle for ensuring that retirees have adequate income to last through their retirement years.[54]

1. Approaches to Increasing Employee Participation and Contributions

For years, employers have included features in their 401(k) plans designed to encourage employee participation, such as matching contributions and loan features, each of which has had some effect in marginally improving participation rates.[55]

More recently, a number of employers have changed their 401(k) plans to provide for automatic enrollment of plan participants, an approach that has also had some success.[56] One study found that automatic enrollment increased

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supra note 8, at 4 ("This wave of adults born between 1946–1964 totals 77 million people, and as they reach their retirement years they will greatly change the demographics of the nation . . . ."). *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES—BABY BOOM GENERATION: RETIREMENT OF BABY BOOMERS IS UNLIKELY TO PRECIPITATE DRAMATIC DECLINE IN MARKET RETURNS, BUT BROADER RISKS THREATEN RETIREMENT SECURITY 2 (2006) (concluding that "baby boomers would be unlikely to sell enough financial assets in retirement to precipitate a market meltdown, or a sudden and sharp decline in asset prices").

[54] As Sam Estreicher's contribution to the symposium suggests, he is far more optimistic than I am about our ability to improve retirement security through incremental changes. *See* Samuel Estreicher & Laurence Gold, *The Shift From Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331 (2007).

[55] Regarding the effectiveness of loan provisions, see Jerry Geisel, *Loan Ban Sparks 401(k) Worries*, BUS. INS., Sept. 23, 2002, at 1 (elimination of loans hurts participation by employees, particularly rank-and-file employees); Lorraine Schmall, *Defined Contribution Plans After Enron*, 41 BRANDEIS L.J. 891, 903 (2003) (citing study results); Stabile, *supra* note 4, at 84–85 (citing findings on the effect of loan programs in 401(k) plans); Trevor Thomas, *When 401(k) Loans Make Sense*, NAT'L UNDERWRITER, Oct. 27, 2003, at 13 (availability of loan provision in 401(k) plan both increased participation of younger employees and increases average contribution rate). Regarding the effectiveness of matching contributions, see, *e.g.*, Esther Duflo et al., *Saving Incentives for Low- and Middle-Income Families: Evidence from a Field Experiment with H&R Block* (Nat'l Bureau of Econ. Research, Working Paper No. 11680, 2005). *But see* Poterba, *supra* note 10, at 290 (when employers match, some employees do contribute enough to earn the match, but no more; others "who are eligible for a matching contribution, and who could immediately withdraw the funds from their 401(k) after receiving the match, choose not to contribute"). *But see* 401khelpcenter.com, Company Efforts Positively Impact Employees' 401(k) Savings Habits (May 16, 2006), http://www.401khelpcenter.com/press_2006/pr_hewitt_051606.html (reporting Hewitt study finding that of employees who participate in a 401(k) plan, one in five do not contribute enough to obtain the full company match).

[56] *See* Press Release, Hewitt Assocs., Hewitt Study Shows More Companies Putting 401(k) Plans on Autopilot (June 14, 2005), *available at* http://www.hewittassociates.com/Intl/NA/en-S/AboutHewitt/Newsroom/PressReleaseDetail.aspx?cid=2026

participation by new hires from 49% to 86%.[57] The increases were particularly striking among those groups least likely to save—women, minorities, and lower-income employees.[58]

The newly enacted Pension Protection Act of 2006[59] encourages the adoption of automatic enrollment both by addressing through preemption the claim by some states that automatic enrollment violates local payroll withholding laws and by creating an optional nondiscrimination safe harbor for such plans.[60]

However, automatic enrollment is not a cure-all to nonparticipation. First, while it is true that many employees do not participate in 401(k) plans due to inertia, many do not because they "simply do not earn enough to pay for current needs and to save."[61] One survey found that nearly 40% of both women and men who did not participate in a 401(k) plan in which they were eligible did not do so because they could not afford to contribute.[62] Where nonparticipation is due to insufficient earnings, automatic enrollment is no help. Second, automatic enrollment is a two-edged sword. Evidence suggests that although participation increases, for many employees, account balances declines, since such plans tend to have a low default contribution rate and a conservative default investment option, and employees tend to remain with the default investment selections.[63]

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[57] Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149, 1158 (2001).

[58] *Id*. at 1160.

[59] H.R. 4, 109th Cong. §§ 902(f)(1), (e)(1) (2006).

[60] Under the new law, a plan satisfies the nondiscrimination rules if it has a specified contribution rate and a specified minimum matching contribution. H.R. 4, 109th Cong. § 902(a) (2006).

[61] Schmall, *supra* note 55, at 903 (quoting National Bureau of Economic Research findings). Professor Schmall also cites research findings that "[n]onparticipants of 401(k) plans primarily did not enroll in the plan for financial reasons. Nonparticipants tended to have fewer wage earners in their households and therefore typically have a lower household income than participants." *Id*. *See also* Copeland, *supra* note 19, at 5 (finding that the "predominant reason for not participating, other than ineligibility . . . was the inability to afford to contribute"); Kaplan, *supra* note 3, at 66–67 (noting that although inertia has some effect, "there can be little doubt that a major impediment [to 401(k) plan participation] is affordability").

[62] John Turner, *Designing 401(k) Plans That Encourage Retirement Savings: Lessons from Behavioral Finance*, AARP PUBLIC POLICY INSTITUTE, ISSUE BRIEF NO. 80, at 3 (Apr. 2006), *available at* http://www.aarp.org/research/financial/pensions/ib80_pension.html. Fifteen percent of those who did not participate "indicated that they did not want to tie up the money." *Id*.

[63] *See* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism*," 151 U. PA. L. REV. 1211, 1228 (2003) (citing findings that effect of participants retaining the default contribution rate and default investment choice is "decreased wealth accumulation resulting from lower contribution rates and more conservative asset allocations"); Poterba, *supra* note 10, at 292; Patrick J. Purcell, *Automatic Enrollment in 401(k) Plans*, J. PENSION PLAN. & COMPLIANCE, Summer 2005, at 54, 57; Stabile, *supra* note 4, at 82–83; *Legislative Update: PSCA Plan Gives Safe Harbor When Automatic Enrollment Used & Deferral Rates Rise*, DC PLAN INVESTING, Oct. 12, 2004, at 1, *available at* 2004 WLNR 2435295 ("[E]xperience has shown that while

One approach to the problem of insufficient contribution levels is to include an automatic escalation feature in a 401(k) plan. A plan with such a feature allows a participant to "choose to save a higher fraction of any raises than of their base pay, or they can commit to increase their contribution rate in future years without any further action on their part."[64] There is evidence suggesting that employers who have agreed to automatic escalation have larger contribution rates over time than those who have not.[65]

2. Approaches to Addressing Shortcomings Associated with Participant Investment

Many have suggested that more emphasis should be placed on participant education as a way to address failures of participants to invest their account balances wisely.[66] There is little to suggest that education would have very positive effects; employees simply do not seem to hear the messages education attempts to convey.[67] The fact that so many participants continue to remain heavily invested in employer stock, notwithstanding the public downfalls of Enron and others, suggests that education will do little.[68] I have argued elsewhere that education is unlikely to be effective in addressing the cognitive biases that influence participant investment decisions.[69]

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automatic enrollment gets more workers into 401(k) plans, it generally does little to generate sufficient retirement savings for them. That's because their contribution[] [rates] generally remain low, are in conservative investments, and are virtually never rebalanced.")

[64] Poterba, *supra* note 10, at 291.

[65] Richard Thaler & Shlomo Benartzi, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S184 (2004).

[66] *See, e.g.*, Poterba, *supra* note 10, at 299; Stabile, *supra* note 34, at 540 (discussing congressional focus on disclosure and education).

[67] Manning, *supra* note 12 (quoting Jack VanDerhei of EBRI: "You can talk about diversification until you're blue in the face . . . . But the message doesn't seem to get through."); Stabile, *supra* note 34, at 553–55.

[68] Suzanne Cosgrove, *An Unhealthy Slice of Company Stock: Despite the Lessons of Enron, Workers Continue to Pack their 401(k) Accounts with Shares of Their Own Employer*, CHI. TRIB., Mar. 26, 2006, at C5; Danielle Tozier, *Experts Analyze Employees' Exodus from Company Stock*, EMP. BENEFIT NEWS, June 1, 2006, at 23 (observing that employees do not extrapolate from experience of companies like Enron and Comcast, but instead view them as isolated situations that do not affect them); Manning, *supra* note 12 ("More than four years since Enron's collapse cost thousands of Americans about $1.3 billion in retirement savings . . . employees by the hundreds of thousands continue to hold nearly 40 percent of their 401(k) savings in their employer's stock."). Tozier cites some evidence suggesting that some employees are starting to get the idea that overinvestment in company stock is unwise. Tozier, *supra*, at 23. And there is some evidence that although employer stock "continued to remain the single largest holding for employees in 401(k) plans," there has been some decrease in the percentage of account balances invested in company stock. *See* 401khelpcenter.com, *supra* note 55 (reporting findings of Hewitt study). Congress has consistently rejected the idea of imposing limits on how much of their 401(k) plan assets employees can invest in company stock, although the Pension Protection Act of 2006 does limit the ability of employers to mandate participant investment in company stock.

[69] Stabile, *supra* note 18, at 399.

More useful to participants than education would be investment advice. However, if an employer provides such advice directly, it may face potential fiduciary liability for losses to participants' account balances resulting from that advice. Even if an employer hires an outside investment adviser for the benefit of its employees, it still has potential fiduciary liability for its selection and monitoring of the adviser.[70] A significant number of employers who do not provide investment advice to their employees cite fear of fiduciary liability as the primary reason for not providing such advice.[71]

Securing an outside investment adviser has also been a challenge. On the one side, securing the services of a non-interested adviser is not an easy task.[72] On the other, it has always been the case that investment advice cannot be provided by an interested advisor without running afoul of ERISA's prohibited transaction provisions.[73] The Pension Protection Act of 2006 addresses these concerns by allowing the provision of investment advice by interested parties.[74] However, allowing parties with a financial stake in a participant's investment choices runs the risk that advisers would give advice that is less-than-balanced, clearly tainting the advice.[75] Advisers will have every incentive to encourage participants to invest in funds that will generate the most fees. As one lawmaker observed, "Allowing conflicted advice would be a step back for employees and our pension laws."[76] Or, as another commentator more colorfully asked: "Are you letting the fox into the henhouse?"[77]

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[70] DOL regulations require that a plan fiduciary must "prudently monitor an appointed fiduciary at reasonable intervals in 'such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." Davis, *supra* note 18, at 372 (citing DOL regulations).

[71] *Id*.

[72] *See* Stefanie Kastrinsky, *ERISA Section 404(c) and Investment Advice: What is an Employer or Plan Sponsor to Do?*, 80 CHI.-KENT L. REV. 903, 918–21 (2005) (discussing difficulty with various models).

[73] *See, e.g.*, Kastrinsky, *supra* note 72, at 917 (discussing prohibited transaction and conflict of interest problems).

[74] *See* H.R. 4, 109th Cong. § 601(g)(1) (2006); James M. Amend, *Pension Reform Warrants Funds' Interest: Beyond Business Opportunities, More Regulation Ahead*, MONEY MGMT. EXECUTIVE, Apr. 3, 2006, at 1 (quoting Assistant Secretary Combs regarding proposals to allow interested parties to provide investment advice).

[75] *See, e.g.*, Salvatore J. Papa, *The Current Crisis of IRC 401(k): Is Providing Investment Advice The Proper Solution? The Misguided Focus on Investment Advice Instead of Investment Education*, 38 NEW ENG. L. REV. 371, 399–401 (2004) (discussing problems with allowing interested advice); Stabile, *supra* note 34, at 556–57.

[76] Jonathan Peterson, *Bill on 401(k)s Raises Worries*, L.A. TIMES, Mar. 31, 2006, at C1 (quoting statement of Sen. Grassley). The use of target-date retirement funds would simplify choices for participants and thus may improve the problem of participant-direction. However, they do that at the cost of potentially removing from employers the protection of section 404(c) of ERISA.

[77] Julie Tripp, *Retirement Plans Face a Major Upheaval Under New Law*, OREGONIAN, Aug. 27, 2006, at D1 (noting "several recent cases where brokerages have steered clients to invest in the funds that profit the brokerage the most").

3. Guarantee

Arguing that Congress intended to protect plan participants not only against fiduciary misconduct and mismanagement of pension assets, but also against pension default, Professor Regina Jefferson has argued for the establishment of a defined contribution plan insurance program.[78] She proposes that "participants of defined contribution plans . . . be insured against the risk of earning less than average investment returns, over their working lives."[79] Such an insurance system could be either voluntary, as Professor Jefferson proposed, or mandatory, as is insurance of defined benefit plans.

Such a system would at least insure that participants covered by the guarantee receive some minimum benefit, assuming the insurance system remained solvent.[80] However, insurance would not do anything to address the factors that contribute to the risk of account balances being insufficient. So while it puts defined contribution plans on par with defined benefit plans, it doesn't address the fundamental problems of participant direction of investments and responsibility over whether and how much to participate.

IV. THE COVERAGE (OR LACK OF COVERAGE) PROBLEM

As I suggested at the outset, the problems with defined contribution plans are only one part of the pessimistic picture. The even more sobering part of the picture has to do with lack of coverage.

Not only is the U.S. pension system employer-based, it is also voluntary. That is, nothing in the law requires an employer to offer any pension at all.[81] Although many employers may feel competitive pressures to offer some retirement vehicle for their employees, many do not. It has been reported that

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[78] *See* Jefferson, *supra* note 4, at 649–71.

[79] *Id*. at 651.

[80] The PBGC has had its share of problems given significant claims made against it in recent years. *See, e.g.*, Memorandum from U.S. Gov't Accountability Office to Representatives John Lewis & Earl Pomeroy, Private Pensions: Questions Concerning the Pension Benefit Guaranty Corporation's Practices Regarding Single-Employer Probable Claims 1 (Sept. 9, 2005) (noting that the result of unfavorable economic conditions and the collapse of some large plans in recent years has been that the PBGC's "financial condition has worsened significantly. From a $9.7 billion surplus at the end of fiscal year 2000, the program reported as $23.3 billion deficit as of September 2004, including a $12.1 billion loss for fiscal year 2004."); Alison Grant, *Pension Safety Net Is Getting Tattered: Federal Agency Could Run Out of Money as Bankruptcies Mount*, PLAIN DEALER, July 2, 2006, at A1 (citing concerns about PBCG deficit); Bill Leonard, *Views Differ on Pension Insurance Deficit*, HR MAG., Jan. 1, 2006, at 28 (discussing increase in PBGC deficit and citing report of one research institute that "a taxpayer bailout of the PBGC is inevitable"); *Federal Agency is Underfunded*, CQ TODAY, July 26, 2006 (PBGC had net income of $529 million in 2005, giving it total assets of $56.6 billion, compared with $79.2 billion in liabilities).

[81] "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996).

over 71 million of the 153 million working Americans—almost half—worked for an employer sponsoring no retirement plan.[82]

Not surprisingly, those who lack pension coverage tend to be lower-income employees. "Because the system is driven by tax benefits, employers whose workers are less well-paid, hence less tax-sensitive, tend not to offer pension plans."[83] Thus, whereas 78% of employees earning an average wage of $15 per hour or higher have access to some retirement plan, only 46% of those earning less than $15 per hour have such access; and whereas 70% of white-collar employees have access to some retirement plan, only 32% of those in service occupations have such access.[84]

Lack of coverage is particularly an issue for employees of small employers. "Most employers in the United States are small employers with fewer than 20 employees . . . [and m]ost small employers do not sponsor a retirement plan for their workers . . . ."[85] In 2004, 26.7% of employees whose employer had fewer than 100 employees participated in an employer-sponsored retirement plan, compared to 56.2% of employees whose employer had 100 or more employees; employees who worked for an employer with less than 20 employees had a significantly lower coverage level.[86]

Moreover, that an employer sponsors some pension plan does not mean that all employees of that employer have pension coverage. Employers are free to design their plans so as to exclude certain categories of employees, so long as the plan does not run afoul of the Code's prohibitions against discrimination in favor of highly-compensated employees,[87] and many do so.[88] Additionally,

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[82] Copeland, *supra* note 8, at 7; J. Mark Iwry & David C. John, *Making Retirement Savings Automatic*, FORT WORTH STAR-TELEGRAM, June 25, 2006, at E1 ("[H]alf the U.S. work force—more than 71 million moderate- and lower-income workers, employees of smaller businesses, and others—work for employers that don't offer a retirement plan."); Kaplan, *supra* note 3, at 60 ("The most comprehensive data available show that only 56% of full-time private sector employees participate in any sort of pension plan."). Kaplan notes that the participation rate for public employees is 87–88%. *Id*. at 60–61.

[83] LANGBEIN, STABILE & WOLK, *supra* note 4, at 25. In addition, it has been found that "[r]ace and ethnicity are also associated with a lack of pension coverage." Brown, *supra* note 49, at 1529.

[84] U.S. Dep't of Labor, *supra* note 20, at 5 tbl.1.

[85] Patrick J. Purcell, *Social Security Individual Accounts and Employer-Sponsored Pensions*, 31 J. PENSION PLAN. & COMPLIANCE, Summer 2005, at 15, 16 (emphasis omitted). *See* U.S. Dep't of Labor, *supra* note 20, at 5 tbl.1 (78% of employees working for an employer that employs 100 workers or more are covered by some pension plan, compared to 44% of those whose employer employs less than 100 workers).

[86] *Small Business Plans: How Can We Increase Worker Coverage? Hearing Before the Subcomm. on Long-Term Growth and Debt Reduction of the S. Comm. on Finance*, 109th Cong. 2 (2006) (statement of Craig Copeland, Senior Research Associate, EBRI), *available at* http://www.senate.gov/~finance/hearings/testimony/2005test/062906testcc.pdf.

[87] I.R.C. § 401(a)(4) (West 2002). *See* Collins, *supra* note 16, at 613 (observing that apart from the nondiscrimination rules, "ERISA and the Code permit employers to design plans to cover who they choose"); Lisa Horwedel Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as They Relate to Employee Benefit Plans,* 29 CAP. U. L. REV. 1079, 1090–93 (2002) (observing that ERISA does not require that every employee be permitted to participate in a plan and that the

employers are able to effectively exclude part-time employees by virtue of their ability to exclude from plan participation employees who do not work 1000 hours in a year[89] and many have, in fact, increased the number of part-time employees,[90] reducing their benefit costs. Finally, a number of employers have also effectively excluded workers from coverage by having certain work performed by independent contractors. Since independent contractors are, by definition, not employees, they do not receive the benefit of any protection from ERISA.[91]

The result of a lack of pension coverage is predictable. "Those who lacked pension income were more likely to be poor. About 21% of retired persons without pension income had incomes below the federal poverty threshold, compared with only 3% with pension income."[92] This should not be surprising: Social Security benefits, which were never intended to provide total income replacement, are fairly low[93] (and are likely to provide even less in the future[94])

Code's nondiscrimination rules can be satisfied without covering an employer's entire workforce); Halperin, *supra* note 40, at 43 (noting employer's ability to exclude workers based on job classification, age, or length of service).

[88] *See* Copeland, *supra* note 19, at 8 fig.2 (showing percentage of workers in various categories who did not participate because no one in their job type was eligible for participation).

[89] *See* I.R.C. § 410(a)(3) (West 2002); Brown, *supra* note 49, at 1510–11 (noting that the "minimum hours worked requirement permits employers to exclude part-time workers from their pension plans because they do not work 1000 hours per year"); David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 783 (2001) (observing that the current rules effectively "permit the permanent exclusion of part-time employees"). *See also* Brown, *supra* note 49, at 1527 (citing fact that 79% of those who worked part-time or part of the year lack pension coverage).

[90] *See* Costo, *supra* note 14, at 60 (citing increase in part-time employment from 20% of all workers in 1992–93 to 23% in 2005).

[91] ERISA plans, by definition, cover "employees." 29 U.S.C. § 1002(1) (2000). Katherine Stone talks in her paper in more detail about the changes in the nature of the workforce that aggravate coverage problems. *See* Stone, *supra* note 3.

[92] Brown, *supra* note 49, at 1526–27.

[93] Social Security benefits "are limited by that program's benefit calculation methodology, which is intentionally down-weighted. As a result, the average retirement benefit is fairly low." Kaplan, *supra* note 3, at 60. *See also* LANGBEIN, STABILE & WOLK, *supra* note 4, at 37 (showing Social Security replacement rates); Lawrence H. Thompson, *Social Security Reform and Benefit Adequacy*, URBAN INSTITUTE, THE RETIREMENT PROJECT BRIEF SERIES NO. 17, at 1 (Mar. 2004), *available at* http://www.urban.org/uploadedPDF/311038_retirement_no17.pdf (noting that the average Social Security retirement benefit is "quite a bit lower than the hypothetical benefit illustrations used in most discussions of Social Security").

[94] *See* Munnell & Sundén, *supra* note 11, at 1. Munnell and Sundén provide three reasons why "Social Security will provide less in the future than it does today." First, the increase in the Social Security normal retirement age from 65 to 67 will mean that those who retire at 62 and 65 will receive lower monthly benefits. Second, Medicare Part B premiums are scheduled to increase to a higher percent of the average Social Security benefit, resulting in a net decline in Social Security benefits. Third, a higher amount of Social Security benefits will be taxed because the threshold for taxable benefits is not indexed. As a result of these three factors, "the first leg of the retirement income stool is getting relatively smaller." *Id*.

and most Americans (especially those at the lower end of the income scale who are most likely to lack an employer-sponsored pension) do not have significant private savings.[95]

V. WHERE DO WE GO FROM HERE

There is no magic happy ending to the story of employment-based pension plans. I think it is fair to say that there will be no return to the traditional defined benefit plan that provided benefits to many of our grandfathers.[96] While cash balance plans have sometimes been touted by some as an approach that marries the best of defined contribution and defined benefit plans,[97] they represent more of a transitional phenomenon than a long-term solution. I say that because employers have not been adopting new cash balance plans or moving from defined contribution plans to cash balance plans. Rather, cash balance plans uniformly result from conversions of existing defined benefit plans, and it is not clear such conversions have operated to the benefit of employees.[98]

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[95] *See, e.g.*, Ruth Helman et al., *Will More of Us Be Working Forever? The 2006 Retirement Confidence Survey*, EBRI ISSUE BRIEF (Employee Benefit Research Inst., Washington, D.C.), April 2006, at 4 ("the large majority of workers who have not put money aside for retirement have little in savings at all: Three-quarters of these workers say their assets total less then $10,000."); Statement of Sen. Smith before the Special Comm. on Aging, *supra* note 48, at 1 (statement of Sen. Smith) ("The personal savings rate in the U.S. has declined dramatically over the last two decades, reaching minus 1.6 percent in April. This is the 11th consecutive month that the savings rate has been negative.").

[96] I don't mean to suggest that defined benefit plans are not without their own problems. We have witnessed vast insecurity over such plans resulting from plan underfunding, in part because of structural weaknesses in ERISA's funding rules. *See, e.g.*, Charles J. Ford et al., *Weaknesses in Defined Benefit Pension Funding Rules: A Look at the Largest Plans, 1995–2002*, 44 BRANDEIS L.J. 351 (2006) (demonstrating that ERISA funding rules allow for vast plan underfunding); Jerry Geisel, *Pension Plan Funding Reform Takes Tortuous Path*, BUS. INS., Dec. 26, 2005, at 14 (observing that the "law was riddled with loopholes that allowed employers to legally underfund their plans"). Moreover, while such plans enjoy the benefit of being insured by the Pension Benefit Guaranty Corporation (the PBGC), the PBGC has been running a significant deficit and has insufficient assets to meet its potential liabilities. *See* Government Accountability Office, *supra* note 79.

[97] Cash balance plans are defined benefit plans that accrue benefits in a way more similar to a defined contribution plan than to a traditional defined benefit plan. For a detailed discussion of the operation of cash balance plans, see Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance*, 37 J. MARSHALL L. REV. 753 (2004); Regina T. Jefferson, *Striking a Balance in the Cash Balance Debate*, 49 BUFF. L. REV. 513 (2001).

[98] For a discussion of the problems that cash balance plans potentially create for older employees, *see, e.g.*, Kozak, *supra* note 97; Jefferson, *supra* note 97, at 538–40, 545–49; Craig C. Martin & Amanda S. Amert, *Cash Balance Plans Reassessed in Light of Discrimination and Funding Litigation*, 59 BUS. LAW. 453 (2004).

The recently enacted Pension Protection Act of 2006 protects cash balance plans against age discrimination claims so long as certain specified standards are met. *See* H.R. 4, 109th Cong. (2006). The Act also attempts to address the problem of "wearaway" of previously accrued benefits following the conversion of a traditional defined benefit plan into a cash balance plan. H.R. 4, 109th Cong. § 701(b)(5)(B)(ii) (2006).

That means that the reality of the pension landscape is defined contribution plans, specifically 401(k) plans. The discussion in Part III.B. demonstrates that while we can do some things to make 401(k) plans operate better than they currently do, they only marginally improve the situation. And Congress has thus far resisted major moves to improve problems with 401(k) plans, such as imposing a cap on investments in employer securities.[99] Thus, 401(k) plans will never be able to provide the security that a well-funded defined benefit plan does.

This reality has prompted one commentator to suggest that an employer "should be required to establish a separate pension plan . . . before it may sponsor a 401(k) plan."[100] Professor John Langbein noted more bluntly that "[t]he very term 'pension plan' is increasingly a misnomer for defined contribution plans. They are in truth multipurpose savings, investment, and wealth transmission vehicles for the tax-sensitive classes."[101]

Finally, no matter how much we do to improve the operations of 401(k) plans—and the discussion in Part III.B. suggests there are marginal improvements that can be made—so long as we operate within the voluntary employment-based framework, the reality is a complete lack of coverage for a significant number of American workers.

These conclusions mean that we have no choice but to give serious consideration to alternative models of providing citizens with retirement benefits. I believe there are really only two possible models. The first is to jettison the employer-based system entirely and provide a government pension for everyone. The second is to retain the employment-based system but move to a mandatory system with more stringent regulation of defined contribution plans than currently exists. This section offers some brief thoughts on each of the two models.

A. Moving to a Non-Employment-Based System

One alternative is to replace Social Security with a government provided pension that provides a livable pension for all elderly Americans.

Currently, Social Security is employment-linked both in that benefits are linked to employment income (albeit not in a linear fashion) and that financing comes from a payroll tax keyed to an employee's income (subject to a maximum income subject to the Social Security tax). It is also funded on a pay-

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[99] *See, e.g.*, Lawrence, *supra* note 17, at 42 (noting "the Bush Administration's acceptance of arguments against overall limitations on 401(k) plan investment in company stock"); Kaplan, *supra* note 3, at 79 (discussing failure of proposal to limit 401(k) plan investments in company stock).

[100] Kaplan, *supra* note 3, at 69–70.

[101] John H. Langbein, *Social Security and the Private Pension System*, *in* IN SEARCH OF RETIREMENT SECURITY 109, 113 (Teresa Ghilarducci et al. eds., 2005).

as-you-go basis, that is, current workers effectively pay the benefits paid to current retirees.[102]

Other countries have experimented with different forms of a governmental pension system that vary in terms of funding (pay-as-you-go vs. advance funding), the extent to which benefits are based on an individual's contribution history, and whether the system is supplemented by a private pension system.[103]

If the United States were to give serious consideration to adopting a national governmental pension system, various design features would need to be considered, including how to determine benefit levels, whether the system would be a defined benefit or a defined contribution system, and how a government pension should be funded. However, the experience of Social Security and 401(k) plans in this country and the governmental pension systems in other countries suggest a couple of things that would be important in designing such a system.

First, a governmental pension should not be funded on a pay-as-you-go basis, but requires funding that is not dependent on current workers financing the benefits of current retirees. Other countries, such as Canada, have already discovered that demographic changes make a pay-as-you-go system untenable and have shifted to some advance funding of government pensions.[104]

Second, the experience of 401(k) plans suggests the danger of including privatization as any significant part of a public pension regime.[105] Other countries that have introduced systems similar to the Bush proposal for privatization of Social Security have found that retirees are worse off than they were before.[106] This does not mean the system cannot be partially contributory,[107] just that individuals should not be given responsibility to direct investments.

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[102] The need for reform of the Social Security system is discussed in Kathy Moore's contribution to this symposium issue. *See* Kathryn L. Moore, *Social Security Reform: Fundamental Restructuring or Incremental Change*, 11 LEWIS & CLARK L. REV. 341 (2007).

[103] For a discussion of governmental pension approaches see, e.g., Gregory N. Filosa, *International Pension Reform: Lessons for the United States*, 19 TEMP. INT'L & COMP. L.J. 133 (2005); Kathryn L. Moore, *Lessons from the French Funding Debate*, 65 OHIO ST. L.J. 5 (2004); Michael K. Stransky, *Mailing It In: European Union Efforts at Pension Reform*, 2 CHI. J. INT'L L. 315 (2001); Elizabeth D. Tedrow, *Social Security Privatization in Other Countries—What Lessons Can Be Learned for the United States?*, 14 ELDER L.J. 35 (2006); John Turner, *Individual Pension Accounts: The Innovative Swedish Reform*, 65 OHIO ST. L.J. 27 (2004); R. Kent Weaver, *Pension Reform in Canada: Lessons for the United States*, 65 OHIO ST. L.J. 45 (2004).

[104] *See* Weaver, *supra* note 103, at 45; Moore, *supra* note 103, at 6 (discussing French funding problems with pay-as-you-go and their consideration of shifting to pre-funding).

[105] *See, e.g.*, Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 WASH. & LEE L. REV. 1287 (2001); Kaplan, *supra* note 3, at 81–90.

[106] *See* Tedrow, *supra* note 103, at 49–50.

[107] Sweden, for example, has a mandatory individual account into which each worker must contribute, although it constitutes only a small part of its pension system. *See* Turner, *supra* note 103, at 29.

To be sure, the cost of a government-provided pension for all retirees would be enormous. However, the current system of employment-based pensions is not a costless one. The federal government today foregoes significant tax revenue as a result of the tax subsidy given for qualified pension plans.[108] The 2004 "loss in tax revenue as a result of all qualified employer-provided pension plans" was estimated to be $94.7 billion.[109] The estimate for the 2002 through 2006 fiscal years of "revenue loss attributable to the net exclusion of pension contributions and earnings under employer plans [is] $445 billion."[110] That, of course, does not include the societal and governmental costs of caring for retirees with inadequate incomes. If we are willing to "spend" that much money for a system that provides inadequate coverage for only a portion of the workforce, we should perhaps be more willing to give serious consideration to spending directly—via a payroll tax or otherwise—to provide coverage for all retirees, eliminating the subsidy for employer plans and having the government provide retirement benefits directly.[111]

B. A Mandatory Employment-Based System

The voluntary nature of the U.S. employment-based pension system puts a severe constraint on regulation of pension plans. The fact that the decision whether to offer or retain a pension plan is solely within the hands of the employer means that whenever meaningful pension reform legislation is discussed, the concern is raised that employers will respond to increased regulation by not sponsoring new plans or by eliminating existing plans.[112]

Thus, a desire to achieve serious pension reform requires that we reconsider the voluntary nature of the employment-based pension system. The

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[108] For a discussion of the tax subsidy provided to private pension plans, see, e.g., LANGBEIN, STABILE & WOLK, *supra* note 4, at 329–30; Stein & Dilley, *supra* note 19, at 1372–76; Peter M. van Zante, *Mandated Vesting: Suppression of Voluntary Retirement Benefits*, 75 NOTRE DAME L. REV. 125, 138–42 (1999).

[109] Brown, *supra* note 49, at 1506 (citing Joint Committee on Taxation estimate). *See also* Ken McDonnell, *Tax Expenditures and Employee Benefits: Estimates from the FY 2007 Budget*, EBRI NOTES 8 (Apr. 2006), *available at* http://www.ebri.org/publications/notes/index.cfm?fa=notesDisp&content_id=3632 (projected 2007 tax expenditure for employment based retirement plans is $92.270 billion).

[110] Lawrence, *supra* note 17, at 48 (citing Joint Committee on Taxation estimate). The estimate for the 2003 through 2007 fiscal year is $615 billion. *See id.* (citing estimate of Office of Management and Budget).

[111] For a different take on why benefits like pensions should not be employer-based, see Malcolm Gladwell, *The Risk Pool*, NEW YORKER, Aug. 28, 2006, at 30, 34 (describing "the absurdity of a system in which individual employers are responsible for providing their own employee benefits," and arguing that such a system "penalizes companies for doing what they *ought* to do") (emphasis added).

[112] The latter is a fear because not only the decision to adopt a plan, but "[t]he revision, continuation, and termination of a retirement plan are also voluntary; if the sponsoring employer or the participating employees decide that the plan no longer adds value, the plan can be revised or terminated by action of the sponsoring employer." *See* van Zante, *supra* note 108, at 131–32.

reaction to the 1993 Clinton health proposal that included a mandate that employers provide medical coverage to their employees[113] suggests that a mandatory employment-based system would face serious opposition.

A mandatory system could perhaps be made more palatable by introducing an element of choice. Let me offer two possibilities. The first would be to adopt a proposal that has been made by Iwry and John to allow for automatic IRAs. They propose offering employees not covered by an employer-sponsored plan the opportunity to have regular payroll deductions from their paychecks deposited into an IRA.[114] Although proposed as a voluntary mechanism,[115] providing a tax credit to employers who offered such payroll deduction savings, an alternative would be to tell employers they must either sponsor a plan or provide for automatic IRA deductions for their employees.

There are shortcomings to this approach, which retains a defined contribution plan structure. First, it would suffer from the same shortcomings as automatic enrollment in 401(k) plans, including the failure to address the fact that many employees simply cannot afford to make contributions. Second, the approach does nothing to address problems with employee direction of investments. The approach thus helps with the coverage problem, but it is not a cure-all.

A second possibility would be to require employers to either offer a retirement plan or to contribute into a fund that would be used by the government to provide benefits to employees. This is not dissimilar from the approach some states have recently attempted as a means of health care reform: so called "pay or play" statutes. Such state health care or pension efforts are vulnerable to attack from ERISA's preemption of state law; a federal district court recently ruled that Maryland's "pay or play" statute is preempted.[116] However, a federal statute mandating this kind of employer choice would not

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[113] *See, e.g.*, Adam Clymer et al., *For Health Care, Time Was a Killer*, N.Y. TIMES, Aug. 29, 1994, at A1.

[114] J. Mark Iwry & David C. John, *Pursuing Universal Retirement Security Through Automatic IRAs* (Heritage Foundation, Working Draft of Feb. 12, 2006), *available at* http://www.heritage.org/Research/SocialSecurity/wp20060212.cfm; Albert B. Crenshaw, *Automatic IRAs—A Quick Fix for Workers Without Pensions?*, WASH. POST, Feb. 19, 2006, at F8 (discussing Iwry proposal for automatic IRA); *Small Business Pension Plans: How Can We Increase Worker Coverage?: Hearing Before the Subcomm. on Long-Term Growth and Debt Reduction of the S. Comm. on Finance*, 109th Cong. 61 (2006) (joint written statement of David C. John, Senior Research Fellow for Retirement Secuirty and Financial Institutions, the Heritage Foundation, and J. Mark Iwry, Senior Advisor, the Retirement Security Project, explaining that automatic IRAs "would provide a relatively simple, cost-effective way to increase retirement security for the estimated 71 million workers whose employers (usually smaller businesses) do not sponsor plans"), *available at* http://www.senate.gov/~finance/hearings/32520.pdf.

[115] *See* Iwry & John, *supra* note 114.

[116] Retail Industry Leaders Ass'n v. Fielder, 435 F. Supp. 2d 481, 494 (D. Md. 2006). Maryland's Fair Share Health Act requires employers of more than 10,000 people in the state to pay at least 8% of its payroll on worker health care, or pay the difference into a state fund designed to expand health care access. MD. CODE ANN. LAB. & EMPL. §§ 8.5-101 to 8.5-107 (Supp. 2006).

face the same problem, as ERISA preempts only state law, and not other federal laws.[117]

Both of these proposals still work within an employment framework, so they would still require some expansion of Social Security or some other government pension system to provide coverage for those who are unemployed or not in the workforce for sufficient time to accumulate a significant employer pension. But since a mandatory system could operate without the tax subsidy that currently exists as an inducement to employers to provide pensions, those savings could be used to fund any necessary government expenditures.

VI. CONCLUSION

We have a retirement system that does not work, with the result that many workers are forced to either retire with inadequate income to support them during their retirement years or to remain in the workforce long past retirement age.[118] Moreover, we are foregoing billions of dollars of tax revenue to support this employment-based system that does not achieve its goal of securing adequate retirement security for American workers.

It would not be easy to move to one of the two models described in the previous section, each of which would be a drastic change in its own way. Nonetheless, I present them as alternatives that I believe must be seriously debated in the absence of a different model that addresses not only the shortcomings of 401(k) plans, but also the problem of lack of coverage.[119] Equally, I present them to highlight the fact that the time for adopting minor modifications that skirt the fundamental problems of a voluntary employment-based system is past. We must seriously consider a major overhaul of our system of providing pension coverage—either through one of these two mechanisms or through some other creative approach—if we remain convinced that adequate retirement security is an important social goal.

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[117] 29 U.S.C. § 1144 (2000).

[118] Some (generally professionals) may suggest that forcing people to work longer and forego retirement is not such a bad thing. That may be true for those for whom this is not a real issue (i.e., professionals). However, many workers toil for years at difficult, wearing, boring jobs with the expectation that they will have some years of leisure at the end of their working lives. It enacts a tremendous personal and psychic cost to tell such people that they must simply keep on working. Moreover, the suggestion ignores both the fact that many employers don't want older employees to stay on and that when older employees fail to retire, young employees are prevented from securing employment.

[119] Although lower-income employees are hardest hit by some of the shortcomings of the present system, the problems are not simply ones for lower-income workers. Not only do many middle income workers work for employers with no pension plan, but problems like poor investment choices are not limited to the lowest paid.