

REHABILITATING FRANKENSTEIN'S MONSTER: REPAIRING  
THE PUBLIC POLICY OF THE ROTH IRA

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*“Did I request thee, Maker, from my clay  
To mould me man? Did I solicit thee  
From darkness to promote me?”<sup>1</sup>*

INTRODUCTION

A 2011 *Los Angeles Times* op-ed warned that Roth Individual Retirement Accounts (“Roth IRAs”) are a dangerous “fiscal Frankenstein.”<sup>2</sup> The author declared: “[T]here’s little doubt that Roths are wrong for America. They’re Frankensteins, fated to wreak havoc. It’s time to retire Roth IRAs.”<sup>3</sup> Likewise, since the federal government enacted the Roth IRA in 1997,<sup>4</sup> other detractors have sharply criticized the accounts. Even early on, one skeptic

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<sup>1</sup> MARY SHELLY, FRANKENSTEIN 15 (Michael Pastore ed., Zorba Press 2002) (1831) (borrowing from John Milton’s epic poem, *Paradise Lost*, capturing Milton’s imagined lament of the biblical Adam, banished from the Garden of Eden, Paradise, despite never being asked to be given life in the first place); see JOHN MILTON, PARADISE LOST 349 (William Kerrigan et al. eds., 2008) (1667).

<sup>2</sup> Gerald E. Scorse, Op-Ed, *Roth IRAs: A Real Fiscal Frankenstein*, L.A. TIMES (Apr. 10, 2011), <http://articles.latimes.com/2011/apr/10/opinion/la-oe-scorse-roth-iras-20110410>.

<sup>3</sup> *Id.*

<sup>4</sup> Congress enacted the Roth IRA as part of the Taxpayer Relief Act of 1997, signed by President Clinton. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 302, 111 Stat. 788, 825 (codified as amended at I.R.C. § 408A (2012)); Kelly Phillips, *A Quick Look at Roth IRAs, Roth 401(k)s & the Man Responsible for Both*, FORBES (July 22, 2016), <http://www.forbes.com/sites/kellyphillipsrb/2016/07/22/a-quick-look-at-roth-iras-roth-401ks-the-man-responsible-for-both/2/#fd9ae37f2094>.

called the Roth IRA the “ultimate budget gimmick.”<sup>5</sup>

Are the condemnations correct? Before answering that question, which is the heart of this article, the following is a quick explanation of the Roth IRA. The Roth IRA is simply a personal retirement savings account where the owner prepays the tax.<sup>6</sup>

Operationally, the Roth IRA functions as the mirror image of its older sibling, the traditional IRA, which Congress created in 1974.<sup>7</sup> The timing of the income tax liability is the main difference between the two types of retirement accounts.<sup>8</sup> As noted, Roth IRA owners owe income tax for the initial year of contribution or conversion.<sup>9</sup> The principal and earnings are then forevermore income tax free.<sup>10</sup> Because of that timing—owing the tax upfront—the nomenclature calls the Roth IRA an “after-tax account.”<sup>11</sup> Traditional IRA owners, on the other hand, generally receive a deduction in the initial year for contributions.<sup>12</sup> They then owe income tax on the principal and earnings only later in their retirement years when they take distributions.<sup>13</sup> Consequently, the vernacular identifies the traditional IRA as a “pre-tax investment” because the growth occurs before the taxpayer owes the tax.<sup>14</sup>

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<sup>5</sup> Paul Blustein, *Critics Call New IRA Plan a Budget Gimmick*, WASH. POST (Oct. 21, 1989), <https://www.washingtonpost.com/archive/business/1989/10/21/critics-call-new-ira-plan-a-budget-gimmick/264862ce-fe8f-49d5-bb64-3194765e196c/>.

<sup>6</sup> See Phillips, *supra* note 4. The Roth IRA derived its name from former U.S. Senator William V. Roth, Jr., now deceased, who championed the account’s legislative enactment. See *id.*

<sup>7</sup> Compare Taxpayer Relief Act of 1997 § 302, with Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958–71 (codified as amended in scattered sections of I.R.C. (2012)). The Employee Retirement Income Security Act of 1974 was signed by President Ford. See *President Ford Signing ERISA of 1974*, PENSION BENEFIT GUAR. CORP. (Sept. 2, 1974), <http://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974.html>. The traditional IRA is the counterpart for individuals to employer-based pre-tax traditional 401(k) retirement plans. See Employee Retirement Income Security Act of 1974 § 2002; Revenue Act of 1978, Pub. L. No. 95-600, § 132, 92 Stat. 2763, 2782–83 (codified as amended in scattered sections of I.R.C. (2012)) (creating the traditional 401(k)); see also Kristin McFarland, *Should You Use a Roth 401(k) or a Traditional 401(k)?*, U.S. NEWS (June 3, 2016), <http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2016-06-03/should-you-use-a-roth-401-k-or-a-traditional-401-k> (discussing the traditional 401(k)). The Revenue Act of 1978 was signed by President Carter. See *Highlights of the Tax Law Signed by President Carter*, N.Y. TIMES (Nov. 9, 1978), <http://www.nytimes.com/1978/11/09/archives/highlights-of-the-tax-law-signed-by-president-carter-individual.html>.

<sup>8</sup> See Kelly Spors, *Traditional IRA vs. Roth IRA*, ROTHIRA.COM, <http://www.rothira.com/traditional-ira-vs-roth-ira> (last visited Nov. 13, 2016).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See Erik Carter, *Why the Pre-Tax v. Roth Decision is More Complex than It Seems*,

As far as proportion, Roth IRAs are a relatively small slice of the retirement pie. At the end of 2015, Americans owned \$24 *trillion* in retirement assets.<sup>15</sup> Of that amount, Roth IRAs totaled \$660 *billion*, or a little under three percent of the total.<sup>16</sup>

Notwithstanding its comparatively small size, good reasons exist to examine the Roth IRA. One reason is the criticisms noted above. Are Roth IRAs really a fiendish federal fiscal fraud? Another reason is that two-thirds of a trillion dollars is not a trivial number. Additionally, during the past decade, the rate of growth in Roth IRAs has been nearly three times faster than the growth of traditional IRAs.<sup>17</sup>

Further, many financial commentators in the popular press have praised the Roth IRA. For example, in 2014, a writer from *Kiplinger's Personal Finance* magazine concluded that nearly all individuals, regardless of their age, could benefit from the Roth bargain: paying a little tax now in return for a larger tax-free account in the future.<sup>18</sup> Even early on, a 1998 article in *Forbes* thanked Congress for the Roth IRA for serving as a terrific estate planning tool.<sup>19</sup> Moreover, Presidents Clinton, Bush, and Obama

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FORBES (Sept. 12, 2012), <http://www.forbes.com/sites/financialfinesse/2012/09/12/why-the-pre-tax-v-roth-decision-is-more-complex-than-it-seems/#333c978a2c91>.

<sup>15</sup> See INV. CO. INST., THE U.S. RETIREMENT MARKET: FOURTH QUARTER 2015, tbl. 1 (2015). The composition of that 2015 year-end total was as follows: IRAs, \$7.3 trillion; defined contribution plans, \$6.7 trillion; private defined benefit plans, \$2.9 trillion; state and local government pension plans, \$3.6 trillion; federal pension plans, \$1.5 trillion; and annuities \$1.9 trillion. *Id.*

<sup>16</sup> See *id.* at tbl.8.

<sup>17</sup> See *id.* From 2006 through 2015, traditional IRAs grew from \$3,722 billion to \$6,254 billion, an average annual growth rate of 6.6%. See *id.* In comparison, over that same period, Roth IRAs grew from \$196 billion to \$660 billion, an average annual growth rate of 23.7%. See *id.*

<sup>18</sup> See Sandra Block, *Invest in a Roth 401(k) if you Can*, KIPLINGER'S PERS. FIN., May 2014, <http://www.kiplinger.com/article/investing/T001-C000-S002-invest-in-a-roth-401k-if-you-can.html> (discussing the advantages of the then newly extended Roth treatment to employer-based 401(k) plans). The *Kiplinger* author's subtitle of the article reinforces her position: "Workers of all ages can benefit from stashing away after-tax money now in exchange for tax-free withdrawals in the future." *Id.*

<sup>19</sup> See Laura Saunders, *King Lear, Updated*, FORBES (Mar. 9, 1998), <http://www.forbes.com/forbes/1998/0309/6105216a.html>. The *Forbes* article explained that the Roth IRA provides a solution to the King Lear dilemma. Envisioning a happy, family-centric retirement, King Lear foolishly transferred his kingdom to two of his three daughters, who promptly turned against him. See *id.* The Roth IRA could have cured this problem by maintaining or increasing the amount of a family's intergenerational net wealth without relinquishing control of the assets during the owner's lifetime, which would have been indispensable to King Lear. See *id.* Similarly, a 2014 article in the *Wall Street Journal*, "The Most Valuable Assets to Leave for Your Heirs," described the Roth IRA as one of the best, if not the best, asset for beneficiaries to inherit. See Andrea Coombes, *The Most Valuable Assets to Leave for Your Heirs*, WALL STREET J. (June 2, 2014), <http://www.wsj.com/articles/the-most-valuable-assets-to-leave-for-your-heirs-1401726302>. Coombes, quoting Aaron Thiel,

have each signed off on legislation enacting or expanding Roth IRA eligibility.<sup>20</sup>

Consequently, the goal of this article is to determine whether the critics or the advocates are correct with respect to the wisdom of the Roth IRA as a public policy. The article determines that in many ways, the Roth IRA is indeed akin to the Frankenstein trope, but not in the purely negative cliché the creature has come to symbolize. Dr. Frankenstein had originally created his creature with positive virtues.<sup>21</sup> Dr. Frankenstein, however, immediately abandoned his creation<sup>22</sup> because the creature, in response to rejection by other humans, did act monstrously.<sup>23</sup> The article therefore concludes that the government should not abandon the Roth IRA, but instead, Congress should enact sensible restrictions to minimize the harmful effects.

Section I explains the main differences between a traditional IRA

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a wealth planner, concludes: “The Roth IRA is pretty much the Cadillac of accounts for [heirs] to inherit.” *Id.*

<sup>20</sup> See Gerald E. Scorse, Op-Ed., *The Roth Blunder Barrels On*, TRUTHOUT (Nov. 14, 2014), <http://www.truth-out.org/opinion/item/27418-the-roth-blunder-barrels-on>. As this article details later, viewing the backdrop more broadly than the Roth IRA, the history of federal government encouraging personal retirement savings goes back even further. See *infra* Section II(C). For instance, in 1974, President Ford signed legislation enacting traditional IRAs for individuals. See *infra* note 113 and accompanying text. In 1978, President Carter signed legislation enacting the traditional 401(k), the now widely adopted employer-based retirement plan that mimics the pre-tax methodology of the traditional IRA. See *infra* note 89.

<sup>21</sup> See SHELLEY, *supra* note 1, at 56 (“His limbs were in proportion, and I had selected his features as beautiful. Beautiful! Great God!”). In chapter seven, the creature, when asking Dr. Frankenstein to create a wife, states:

Remember that I am thy creature; I ought to be thy Adam, but I am rather the fallen angel, whom thou drivest from joy for no misdeed. Everywhere I see bliss, from which I alone am irrevocably excluded. I was benevolent and good; misery made me a fiend. Make me happy, and I shall again be virtuous.

*Id.* at 90.

<sup>22</sup> See *id.* at 56–57 (“I had worked hard for nearly two years, for the sole purpose of infusing life into an inanimate body. For this I had deprived myself of rest and health. I had desired it with an ardour that far exceeded moderation; but now that I had finished, the beauty of the dream vanished, and breathless horror and disgust filled my heart. Unable to endure the aspect of the being I had created, I rushed out of the room and continued a long time traversing my bed-chamber, unable to compose my mind to sleep. . . . I beheld the wretch—the miserable monster whom I had created. He held up the curtain of the bed; and his eyes, if eyes they may be called, were fixed on me. His jaws opened, and he muttered some inarticulate sounds, while a grin wrinkled his cheeks. He might have spoken, but I did not hear; one hand was stretched out, seemingly to detain me, but I escaped and rushed downstairs. I took refuge in the courtyard belonging to the house which I inhabited, where I remained during the rest of the night, walking up and down in the greatest agitation, listening attentively, catching and fearing each sound as if it were to announce the approach of the demoniacal corpse to which I had so miserably given life.”)

<sup>23</sup> See, e.g., *id.* at 124, 150, 166 (murdering Dr. Frankenstein’s young brother William Frankenstein, friend Henry Clerval, and bride Elizabeth Lavenza).

and a Roth IRA. Section II provides the historical background to current U.S. retirement policy. Section III describes the need for personal retirement savings. Section IV details the legislative development and expansion of the Roth IRA. Section V analyzes the criticisms of the Roth IRA. Section VI offers recommendations to Congress. In the end, the article's goal is to offer recommendations by which the Roth IRA monster can become a benevolent humanitarian.

## I. THE DIFFERENCES BETWEEN A TRADITIONAL IRA AND A ROTH IRA

The Roth IRA is simply an after-tax approach to retirement savings that is opposite in tax payment timing from the previously enacted pre-tax traditional IRA.<sup>24</sup> Below are examples illustrating the difference in the methodologies between the traditional IRA and the Roth IRA.

### A. *The Traditional IRA*

Contributions to a traditional IRA usually reduce the taxpayer's gross income.<sup>25</sup> For example, suppose a taxpayer age thirty-six received a salary of \$95,000 in the current year. If the taxpayer made a \$5,000 contribution to a traditional IRA, the taxpayer would owe federal income tax on the reduced income figure of \$90,000. Assuming a thirty-five percent combined federal and state marginal income tax rate, the taxpayer would have saved \$1,750 in income tax for that initial year.

Now suppose thirty years goes by at which time the taxpayer, now age sixty-six, retires and takes a full distribution. Assume the \$5,000 had grown to \$50,000 from dividends, interest, and appreciation. The taxpayer would have owed no tax on the growth and earnings during the thirty year interim period.<sup>26</sup> The taxpayer, however, would have to include the entire \$50,000 in gross income for the year of distribution.<sup>27</sup> If after inclusion the taxpayer had a

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<sup>24</sup> See *supra* notes 7–14 and accompanying text.

<sup>25</sup> See I.R.C. § 219(a) (2012) (“In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified retirement contributions of the individual for the taxable year.”).

<sup>26</sup> See Treas. Reg. § 1.408-1(b) (2016) (“The individual retirement account or individual retirement annuity is exempt from all taxes under subtitle A of the Code other than the taxes imposed under section 511, relating to tax on unrelated business income of charitable, etc., organizations.”).

<sup>27</sup> See I.R.C. § 408(d)(1) (“Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the

combined federal and state marginal income tax rate of twenty-five percent, the taxpayer would owe income tax of \$12,500 on the distribution. Therefore, to summarize the traditional IRA arrangement, the taxpayer would have saved \$1,750 in income tax upfront but thirty years later would have owed income tax of \$12,500 on the distribution.

### *B. The Roth IRA*

As noted, the Roth IRA functions in the reverse manner of a traditional IRA. To begin, this section uses figures similar to the above traditional IRA example. Assume a taxpayer age thirty-six with a \$95,000 salary makes a \$5,000 contribution to a Roth IRA. Initially, for that first year, the taxpayer would be relatively worse off with a Roth IRA because he or she would owe federal income tax on the entire unreduced \$95,000 of gross income. That is because Roth IRA owners do not receive a tax deduction for their contribution.<sup>28</sup> Therefore, a taxpayer in the thirty-five percent combined federal and state income tax bracket would have an opportunity loss of \$1,750 by forgoing the \$5,000 income tax deduction.

Conversions to a Roth IRA work in a similar manner. Suppose the above taxpayer had taxable income of \$90,000 and from a previous year already owned an existing traditional IRA with a balance of \$5,000. If that taxpayer were to convert that \$5,000 traditional IRA to a Roth IRA, the taxpayer would have to include the conversion amount in gross income.<sup>29</sup> In this example, that would result in a total gross income of \$95,000 for the year of conversion. In other words, the taxpayer would owe income tax on the \$5,000 at the above hypothetical combined marginal income tax rate of thirty-five percent, or \$1,750.

For both cases—the Roth IRA contribution and the Roth IRA conversion—assume that thirty years later the \$5,000 Roth IRA account had again grown to the same amount as above, \$50,000. As

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payee or distributee, as the case may be, in the manner provided under section 72.”).

<sup>28</sup> See *id.* § 408A(c)(1) (“No deduction shall be allowed under section 219 for a contribution to a Roth IRA.”).

<sup>29</sup> See *id.* § 408A(d)(3)(C) (“The conversion of an individual retirement plan (other than a Roth IRA) to a Roth IRA shall be treated for purposes of this paragraph as a distribution to which this paragraph applies.”); see also Treas. Reg. § 1.408A-4, Q&A (1)(c) (“Any converted amount is treated as a distribution from the traditional IRA and a qualified rollover contribution to the Roth IRA for purposes of section 408 and section 408A, even if the conversion is accomplished by means of a trustee-to-trustee transfer or a transfer between IRAs of the same trustee.”).

before, the taxpayer would have owed no tax during the thirty years of growth and appreciation.<sup>30</sup> Continuing, assume that this taxpayer likewise retired and took a distribution of the entire \$50,000. Different from the traditional IRA, the Roth IRA owner would owe no income tax on the distribution because the Internal Revenue Code excludes the entire Roth distribution, here \$50,000, from the taxpayer's gross income.<sup>31</sup> If, as before, the taxpayer were in a twenty-five percent income tax bracket in the year of retirement, the taxpayer would have, but not owe, the \$12,500 income tax on the \$50,000 distribution. Thus, opposite to the traditional IRA, the Roth IRA owner effectively or actually paid \$1,750 upfront for a tax savings thirty years later of \$12,500.

*C. Other Significant Differences between a Traditional IRA and a Roth IRA*

A major impact of the above timing difference is that Roth IRAs generate immediate tax receipts for the federal government and for state governments that piggyback on federal inclusion.<sup>32</sup> Conversely, traditional IRAs delay government tax receipts until the ultimate distribution date.<sup>33</sup>

Traditional IRAs and Roth IRAs have other significant differences. One of the main ones involves the mandatory distribution rules.<sup>34</sup> To prevent traditional IRA owners from receiving an unending income tax deferral, Congress requires owners of traditional IRA accounts to start taking compulsory distributions beginning no later than April 1st following the calendar year in which the owner turns age seventy and one-half.<sup>35</sup>

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<sup>30</sup> See Treas. Reg. § 1.408A-1, Q&A (1)(b) ("Further, income earned on funds held in a Roth IRA is generally not taxable.").

<sup>31</sup> See I.R.C. § 408A(d)(1) ("Any qualified distribution from a Roth IRA shall not be includible in gross income.").

<sup>32</sup> See STAFF OF THE JOINT COMM. ON TAXATION, 110TH CONG., JCX-53-08, PRESENT LAW AND ANALYSIS RELATING TO INDIVIDUAL RETIREMENT ARRANGEMENTS 8 (Comm. Print 2008).

<sup>33</sup> See *id.*

<sup>34</sup> Compare Treas. Reg. § 1.408-8, Q&A (1)(a) ("[A]n IRA is subject to the required minimum distribution rules provided in section 401(a)(9)."), with I.R.C. § 408A(c)(5) ("[T]he following provisions shall not apply to any Roth IRA: . . . [s]ection 401(a)(9)(A)."); see also I.R.C. § 409(a)(9) (describing mandatory distribution provisions for qualified pension, profit-sharing, and stock bonus plans).

<sup>35</sup> See Treas. Reg. § 1.408-8, Q&A (1) (stating that traditional IRAs must follow the distribution requirements for employer-sponsored retirement plans); see also I.R.C. § 401(a)(9)(C) ("For purposes of this paragraph[,], entitled, 'Required Beginning Date,' . . . [t]he term 'required beginning date' means April 1 of the calendar year following the later of . . . the calendar year in which the employee attains age 70½, or . . . the calendar year in which the employee retires.").

Congress did not apply the mandatory required distribution rules to owners of Roth IRAs because, as noted above, the owners have already paid the income tax upfront.<sup>36</sup> In other words, Roth IRA owners have no required distribution date because the government has no future income tax to collect.<sup>37</sup> Consequently, the Roth IRA tax-free distributions may occur twenty, forty, or any number of years in the taxpayer's future.<sup>38</sup> Further, unlike traditional IRAs, individuals may contribute to a Roth IRA after age seventy and one-half.<sup>39</sup> Thus, Roth IRAs provide an alternative for individuals to choose the best way to structure their future finances.

Moreover, the Roth IRA tax-free growth can continue beyond the taxpayer's lifetime.<sup>40</sup> Roth IRA owners, as can traditional IRA owners, can transfer their accounts via bequest to their children or, through generation-skipping transfers, to their grandchildren.<sup>41</sup> Under current law, once a beneficiary inherits an IRA, the beneficiary can generally take distributions over the beneficiary's expected lifetime;<sup>42</sup> a "stretch IRA" is the name for this life expectancy extension.<sup>43</sup> Thus, under certain circumstances, Roth IRAs can provide individuals with a means to grow the accounts tax-free for decades and for generations.

## II. HISTORICAL BACKGROUND TO CURRENT U.S. RETIREMENT POLICY

A preliminary question is how the Roth IRA became an instrument of federal public policy. This section therefore takes a step back to review the broader history of public policy toward retirement funding.

The need to save for the future rises from deep-seated concerns. The individual might fear outliving his or her resources or becoming

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<sup>36</sup> See I.R.C. § 408A(c)(5) ("[T]he following provisions shall not apply to any Roth IRA: . . . [s]ection 401(a)(9)(A).").

<sup>37</sup> See *id.*; STAFF OF THE JOINT COMM. ON TAXATION, 110TH CONG., *supra* note 32, at 8.

<sup>38</sup> See I.R.C. § 408A(c)(5).

<sup>39</sup> See *id.* § 408A(c)(4) ("Contributions to a Roth IRA may be made even after the individual for whom the account is maintained has attained age 70½.").

<sup>40</sup> See Treas. Reg. § 1.408-2(b)(7)(ii).

<sup>41</sup> See I.R.C. §§ 2611, 2612, 2613.

<sup>42</sup> See Treas. Reg. § 1.408-8, Q&A (1). Withdrawals from inherited IRAs follow the rules for defined contribution plans. See *id.* § 1.401(a)(9)-5, Q&A (5). The stretch period also applies to inherited Roth IRAs. See *id.* § 1.408A-6, Q&A (15).

<sup>43</sup> See *Who Will Inherit Your IRA?*, MORGAN STANLEY: KNOWLEDGE CENTER, [www.morganstanley.com/spc/knowledge/managing-wealth/stock-participants/who-will-inherit-your-ira.html](http://www.morganstanley.com/spc/knowledge/managing-wealth/stock-participants/who-will-inherit-your-ira.html) (last visited Jan. 5, 2017).

unable to care for herself or himself in old age.<sup>44</sup> The fear might compound if a person is financially responsible for others.<sup>45</sup> Societies, ancient and modern, have reacted in different ways to address the plight. Ultimately, the United States has adopted a three-tier mix of government, employer, and private savings.<sup>46</sup> Within that environment, shortfalls in employer coverage and private savings, along with increasing lifespans, have forced the U.S. government to grasp for ways to encourage individuals to save on their own.<sup>47</sup>

### A. Pensions Historically

Until the modern state, most pensions, if they existed at all, were irregular grants by governing authorities limited to veterans, civil servants, and certain selected individuals.<sup>48</sup> Non-systematic charitable relief also helped where possible, and a few private organizations, perhaps akin to today's unions, provided limited relief to their members.<sup>49</sup>

In a typical early example, in the Greek and Roman eras, the state provided pensions mainly to well-connected individuals and to former soldiers.<sup>50</sup> Private burial societies also provided pensions for dues-paying members for certain occupations and among non-governmental veterans' organizations.<sup>51</sup>

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<sup>44</sup> See C.G. LEWIN, *PENSIONS AND INSURANCE BEFORE 1800: A SOCIAL HISTORY*, at xi (2003).

<sup>45</sup> See *id.*

<sup>46</sup> See Larry DeWitt, *Agency History: Origins of the Three-Legged Stool Metaphor for Social Security*, SOC. SECURITY ADMIN. (May 1996), <http://www.ssa.gov/history/stool.html>. In summary, Americans rely on a "three-legged stool" to provide for their retirement years. The three pillars are: (1) federal government-administered old age, survivor, and disability insurance, commonly called "Social Security;" (2) employer-based retirement plans; and (3) family or personal savings, including investments, housing equity, and individual retirement accounts. See Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 252, 279 (2004).

<sup>47</sup> See Dilley, *supra* note 46, at 284, 325.

<sup>48</sup> See LEWIN, *supra* note 44, at 21.

<sup>49</sup> See *id.* at 22.

<sup>50</sup> See *id.* at 6. According to Lewin, the first recorded pension appears to have occurred almost three thousand years ago in approximately 562 B.C. See *id.* The biblical episode relates that after the death of the Babylonian ruler Nebuchadnezzar, his son, Evil-merodach, the new king of Babylon, released Jehoiachin, a former ruler of the vanquished kingdom of Judah, after thirty-six years in prison in Babylon. See LEWIN, *supra* note 44, at 6; 2 *Kings* 25:27–30. Evil-merodach treated Jehoiachin kindly, providing Jehoiachin with a daily allowance of food and/or cash (depending on the translation), for the rest of Jehoiachin's life. See LEWIN, *supra* note 44, at 6; 2 *Kings* 25:27–30. In other words, a form of a pension.

<sup>51</sup> See LEWIN, *supra* note 44, at 7–8.

In England during the Middle Ages, although no formal pension system existed, the Crown haphazardly granted pensions for certain occupations, including payments to military personnel, poets and other writers, and civil servants.<sup>52</sup> Likewise, the Church, one of the largest organizations of the time, tried to provide former clergy, other individuals, and the poor with a pension, food, or a room at a monastery.<sup>53</sup> Notwithstanding, most people worked “until they were no longer capable of work[ing].”<sup>54</sup> Afterward, the indigent often had “to beg in the street.”<sup>55</sup>

Beginning in the sixteenth century, the Reformation reduced the power of the Church.<sup>56</sup> In the early 1500s, the city of London attempted a system of pensions for the local poor.<sup>57</sup> Through the eighteenth century, other city councils, the Crown, guilds, and still the Church likewise awarded pensions to former employees, members, civil servants, soldiers and seaman, as well as to widows and orphans.<sup>58</sup>

### *B. Current European Retirement System*

Old age assistance continued in a makeshift manner until 1889, when Germany adopted the modern era’s first national social security program.<sup>59</sup> Germany’s goals were to provide a social safety net for workers while also avoiding social turmoil.<sup>60</sup>

With respect to current times, there may be a stereotypical perception that European states provide a uniform cradle-to-grave social protection.<sup>61</sup> The reality instead is that European retirement

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<sup>52</sup> See *id.* at 21.

<sup>53</sup> See *id.* at 22, 25, 26.

<sup>54</sup> *Id.* at 21–22.

<sup>55</sup> *Id.* at 22.

<sup>56</sup> See *id.* at 175.

<sup>57</sup> See *id.* at 183–85. The city set up collection boxes inside inns and required households to complete a form detailing a weekly contribution amount. See *id.* at 183. Beggars, however, rushed in from other areas, overwhelming the system. See *id.* at 183–84; see also *Historical Background and Development of Social Security: Pre-Social Security Period*, SOC. SECURITY ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last visited Jan. 5, 2017) [hereinafter *Historical Background*] (discussing a similar law, the English Poor Law of 1601, which sought to help the ‘undeserving’ poor).

<sup>58</sup> See LEWIN, *supra* note 44, at 184, 186–88, 189, 190, 191.

<sup>59</sup> See *Social Security History: Otto von Bismarck*, SOC. SECURITY ADMIN., <https://www.ssa.gov/history/ottob.html> (last visited Jan. 5, 2017) [hereinafter *Otto Von Bismarck*].

<sup>60</sup> See *id.* In comparison, Russia, for instance, experienced an initial revolution in 1905 and then the Bolshevik Revolution in 1917. See *Russian Revolution*, HISTORY, <http://www.history.com/topics/russian-revolution> (last visited Jan. 5, 2017). Germany initially set age seventy as the age to begin receiving old age benefits. See *Otto Von Bismarck*, *supra* note 59.

<sup>61</sup> See Yves Stevens, *European and American Issues in Employee Benefits Law Compared*,

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benefits are a hodgepodge of funding laws across countries.<sup>62</sup> Nonetheless, in the broad view, Europe's retirement system differs fundamentally from the U.S. system.<sup>63</sup> In the United States, other than Social Security, retirement plan participation is voluntary by the employer and by the employee.<sup>64</sup> The European system, on the other hand, generally requires employers and/or employees to make mandatory retirement contributions to an employer plan.<sup>65</sup>

### C. History of U.S. Government Retirement Assistance

On the U.S. side, old age assistance from the government also followed a fitful journey. In 1636, early American settlers from Europe appear to have started the first formal pension with a provision for maimed soldiers.<sup>66</sup> Likewise, before and after the Revolutionary War, the colonial states provided pensions to their militia, army, and navy personnel.<sup>67</sup> Similarly, following the Civil War and World War I, the federal government continued to enact pensions primarily for commissioned officers, disabled veterans, and their widows.<sup>68</sup>

In the 1850s, governments of large U.S. cities began providing pensions to police, firefighters, teachers, and other employees.<sup>69</sup> Smaller cities, towns, and rural governments did not provide pensions until the twentieth century.<sup>70</sup> In 1911, Massachusetts established the first pension for state workers.<sup>71</sup>

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41 J. MARSHALL L. REV. 1189, 1191 (2008).

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* at 1190.

<sup>64</sup> *Id.* at 1214.

<sup>65</sup> *Id.* at 1218.

<sup>66</sup> *See* WILLIAM HENRY GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES 12 (1900). In 1636, the Pilgrim colony at Plymouth, Massachusetts, enacted a pension law for its wounded soldiers. *See id.*

<sup>67</sup> *See* ROBERT L. CLARK ET AL., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 2 (2003).

<sup>68</sup> *See* CLARK ET AL., *supra* note 67, at 14–15 (providing information regarding the Revolutionary War); Joanna Short, *Economic History of Retirement in the United States*, EH.NET (Sept. 30, 2002), <https://eh.net/encyclopedia/economic-history-of-retirement-in-the-united-states/> (providing information regarding the Civil War and World War I); *see also* SOC. SEC. ADMIN., HISTORICAL DEVELOPMENT 2, <http://www.ssa.gov/history/pdf/histdev.pdf> (last visited Feb. 10, 2017) (discussing benefits and pensions following World War I); James Ridgeway, *Who Shredded Our Safety Net?*, MOTHER JONES (May/June 2009), <http://www.motherjones.com/print/22949> (discussing the implementation of pensions following the Civil War and their expansion following World War II).

<sup>69</sup> *See* CLARK ET AL., *supra* note 67, at 4. The workers' own contributions, however, were the main sources of funding for the plans. *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

In 1920, the federal government enacted the Civil Service Retirement Act, which provided the first widespread pension coverage for federal civil servants under a program called the Civil Service Retirement System (“CSRS”).<sup>72</sup>

A major turning point occurred on August 14, 1935, when President Roosevelt signed the Social Security Act.<sup>73</sup> Similar to the German and Russian experiences, social turmoil that the industrial revolution wrought was a prime factor in motivating the government’s adoption of Social Security.<sup>74</sup> Additionally, the stock market crash of 1929, the Great Depression of the early 1930s, and the advocacy of populists and muckrakers led to urgent calls to action.<sup>75</sup>

While Social Security fills an important role, the program provides only a limited safety net. This situation has led to increased reliance on the other two pillars of retirement support: employer-based retirement plans and individual savings.<sup>76</sup> As

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<sup>72</sup> See *id.* at 5; see also Civil Service Retirement Act, Pub. L. No. 66-215, 41 Stat. 614 (1920) (codified as amended at 5 U.S.C. §§ 8331–8351 (2012)) (providing the enactment of the CSRS). The CSRS lasted for decades but similar to employer-based pensions described below, ultimately proved unsustainable. See, e.g., Complaint at 23, *Gibson v. State Governments of All Fifty States*, No. 4:12CV758(HEA), 2012 U.S. Dist. LEXIS 62198 (E.D. Mo. May 2, 2012). Beginning in 1987, the retirement system for new federal employees switched from the CSRS to the Federal Employees’ Retirement System (“FERS”). See Wilmer L. Kerns, *Federal Employees’ Retirement System Act of 1986*, 49 SOC. SECURITY BULL., no. 11, 1986, at 5, 5, <https://www.ssa.gov/policy/docs/ssb/v49n11/v49n11p5.pdf>. FERS was/is a combination of Social Security, a defined contribution plan (“Thrift Savings Plan”), and a partially employee-funded pension pursuant to the Federal Employees’ Retirement System Act of 1986, signed by President Reagan. See Federal Employees’ Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (codified as amended in scattered sections of U.S.C.); Kerns, *supra*, at 6.

<sup>73</sup> See *Historical Background*, *supra* note 57. Currently, Social Security operates by both the employer and the employee each contributing usually 6.2% of the employee’s paycheck, for a total of 12.4%, to the federally administered retirement system. See *OASDI and SSI Program Rates and Limits, 2017*, SOC. SECURITY ADMIN. (Oct. 2016), [https://www.ssa.gov/policy/docs/quickfacts/prog\\_highlights/index.html](https://www.ssa.gov/policy/docs/quickfacts/prog_highlights/index.html).

<sup>74</sup> See *Historical Background*, *supra* note 57. Four main repercussions from the Industrial Revolution were major factors in the creation of Social Security: (1) the transformation of society from self-employed agrarian workers who could usually provide at least their own food to wage earners who were suddenly subjected to gale force economic circumstances including job termination, bankruptcy, and other life changing events out of their control; (2) the associated urbanization of the population that caused Americans to move from rural farms to industrial jobs concentrated in large cities; (3) the breakdown of the extended family, hastened by the move of the hardest family members to the city, leaving no one to care for grandma back home, so to speak; and (4) the rapid increase in life expectancy due to improved public health, education, and sanitation. See Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SECURITY BULL., no. 3, 2010, at 1, 2, <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p1.pdf>.

<sup>75</sup> See *Historical Background*, *supra* note 57.

<sup>76</sup> See Jerry W. Markham, *Privatizing Social Security*, 38 SAN DIEGO L. REV. 747, 754 (2001); Dana M. Muir, *From YUPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation*, 34 GA. L. REV. 195, 199 (1999).

noted below, this reliance has led to uneven results.

*D. History of Employer-Based Retirement Plans in America*

On the employer side, the U.S. worker's private sector experience has likewise been a tumultuous story. In 1875, American Express Corporation created the first private sector employer-provided pension plan.<sup>77</sup> Other major U.S. corporations began to adopt pensions,<sup>78</sup> and by 1940, employer pension plans covered fifteen percent of all private sector workers.<sup>79</sup>

Decisive events over the next three to four decades led businesses to first widely adopt and then mostly reject pensions.<sup>80</sup> A first major event occurred in 1950, when General Motors ("GM") introduced a pension plan that was self-funded rather than worker-funded.<sup>81</sup> GM accomplished this feat by funding its pension plan with investments in the stock market, which had been rising rapidly from the pent-up demand of post-World War II America and from the rebuilding of Germany, Europe, and Japan.<sup>82</sup> By 1960, employer pension plans covered forty-one percent of all private sector workers.<sup>83</sup>

The growth in the too-good-to-be-true pension benefit promises, however, led to unfulfillable commitments. A prime example was the 1963 bankruptcy of the Studebaker-Packard car corporation.<sup>84</sup>

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<sup>77</sup> See *History of PBGC*, PENSION BENEFIT GUAR. CORP., <http://www.pbgc.gov/about/who-we-are/pg/history-of-pbgc.html> (last visited Jan. 5, 2017). Similarly, in 1882, the Alfred Dolge Company, a piano maker, implemented a pension for its employees. See *Historical Background*, *supra* note 57. By 1900, only five to twelve American private employers provided a pension. See CLARK ET AL., *supra* note 67, at 5 (claiming only twelve private businesses offered a pension in 1900).

<sup>78</sup> See *History of Pension Plans*, EMP. BENEFIT RES. INST., <https://www.ebri.org/publications/facts/index.cfm?fa=0398afact> (last visited Jan. 5, 2017). Other early adopting corporations included Standard Oil of New Jersey in 1903, General Electric in 1912, and Bethlehem Steel in 1923. *Id.*

<sup>79</sup> *Id.* In addition, in 1947, the Taft-Hartley Act extended pensions to unions in single-employer and multi-employer plans. *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> See James A. Wooten, "The Most Glorious Story of Failure in the Business": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683–84 (2001). In the early 1950s, the Studebaker and Packard car companies followed GM's lead by adopting pension plans modeled on GM's stock market investment strategy. *Id.* at 691. In December 1963, however, the then merged and nearly bankrupt corporation, Studebaker-Packard, shut down its sole remaining manufacturing facility in South Bend, Indiana. *See id.* at 683–84. Retirees and retirement-eligible employees received a full pension, but the larger group of younger employees received either very little or no pension because of the underfunded pension obligation. *See id.*

The bankruptcy left thousands of unemployed former employees receiving either pennies on the dollar or nothing at all from the company's hollow pension plan.<sup>85</sup>

In addition, the U.S. stock market plunged nearly fifty percent from 1973 to 1974.<sup>86</sup> The Studebaker-Packard debacle, bear market, and faltering pension system led Congress to enact the Employee Retirement Income Security Act of 1974 ("ERISA"), which President Ford signed into law fittingly on Labor Day, September 2, 1974.<sup>87</sup> ERISA tightened the law on employers with respect to pensions: the vesting, reporting, and funding requirements became more stringent. The act also stiffened the fiduciary standards for pension plan sponsors.<sup>88</sup>

In 1978, President Carter signed legislation enacting the traditional 401(k).<sup>89</sup> The traditional 401(k), which is a defined contribution plan, is now the prevalent type of employer-based retirement plan.<sup>90</sup> Tellingly, none of these U.S. statutes required

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<sup>85</sup> See *id.*

<sup>86</sup> See MICHAEL HARTNETT ET AL., *THE LONGEST PICTURES: A PICTURE GUIDE TO FINANCIAL MARKETS SINCE 1800*, at 57 (2012) (demonstrating a forty-eight percent peak to trough decline in the Standard & Poor's 500 for the twenty-one month bear market from January 11, 1973, to October 3, 1974); see also *11 Historic Bear Markets*, NBCNEWS: STOCKS & ECONOMY, [http://www.nbcnews.com/id/37740147/ns/business-stocks\\_and\\_economy/t/historic-bear-market-s/](http://www.nbcnews.com/id/37740147/ns/business-stocks_and_economy/t/historic-bear-market-s/) (last visited Jan. 5, 2017) (explaining factors that caused the particular bear market, including the 1973 Arab oil embargo in response to the Yom Kippur War with Israel, and President Nixon's resignation).

<sup>87</sup> See Wooten, *supra* note 84, at 739; see also Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of I.R.C. (2012)) (providing the enactment of ERISA).

<sup>88</sup> See *Retirement Plans and ERISA FAQs*, EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer> (last visited Jan. 5, 2017); see also *infra* text accompanying note 114 (describing the traditional IRA).

<sup>89</sup> See Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (codified as amended in scattered sections of I.R.C.).

<sup>90</sup> See Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 911 (2013). A brief explanation is necessary here. Pensions are a retirement arrangement known as a defined benefit ("DB") plan. See *id.* The DB name arises because the employer agrees to provide the employee a formulaic retirement benefit usually based on the employee's years of service and final earnings level. See *id.* at 922. In stark contrast, 401(k) plans (for businesses), as well as the similar 403(b) plans (for nonprofit organizations such as public schools, universities, and hospitals) and 457(b) plans (for state and local governments) are defined contribution ("DC") plans that function similar in pre-tax savings methodology to a traditional IRA. See INV. CO. INST., 2016 INVESTMENT COMPANY FACT BOOK 141 (56th ed. 2016) [hereinafter 2016 FACT BOOK], [https://www.ici.org/pdf/2016\\_factbook.pdf](https://www.ici.org/pdf/2016_factbook.pdf). For a DC plan, the employer and/or the employee, contributes an amount, typically a percentage of the employee's salary, to a retirement account. See Gelter, *supra*, at 923. Then the employee, not the employer, is responsible for the growth or loss in the account to fund the employee's retirement. See *id.* In summary, the crucial difference between a DB plan and a DC plan is that under a DC plan, after the employer and/or the employee makes a contribution to the plan, the employer has essentially ended its funding responsibility. See

employers to offer a retirement plan.<sup>91</sup> In contrast to Europe, the U.S. employer-based retirement system relies on the voluntary adoption of plans by employers and usually depends on voluntary contributions by individuals.<sup>92</sup>

In response to the above developments, private employers, as quickly as legally possible, made a broad-based switch from offering defined benefit plans to offering 401(k)-style defined contribution plans.<sup>93</sup> The move critically altered the employer-based retirement dynamic by shifting the burden of retirement savings from the employer to the worker.<sup>94</sup> Thus, as detailed below, the third leg of the retirement triad, the public's personal retirement savings, became even more important.

### III. THE NEED FOR PERSONAL RETIREMENT SAVINGS

Scholars and politicians generally agree that most people need help funding their retirement years.<sup>95</sup> In 2015, speaking generally to the urgent need for greater retirement savings, President Obama touched on themes central to this article<sup>96</sup>:

Well, it's pretty straightforward. It used to be that most people had a pension through their employers and then they also had Social Security and then they might have some savings in the bank. But basically that three-legged stool is what assured you that you had a good retirement. Most employers have now moved off of what we call a defined benefit plan, a plan where you were guaranteed a certain amount of money, and now you've got a 401(k) plan. And Social Security is still there. It's still strong. But people are

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*id.* at 942. Therefore, the employer generally has no further financial obligation to the employee's retirement, but still, as before, must maintain fiduciary standards with respect to the plan. *See id.* at 915–17.

<sup>91</sup> *See Stevens, supra* note 61, at 1214.

<sup>92</sup> *See id.* at 1215.

<sup>93</sup> *See Gelter, supra* note 90, at 930–31 (explaining that from 1988 to 2015, the share of employees in DC instead of DB plans rose sharply from fifteen percent to eighty-six percent of employer retirement plan participants).

<sup>94</sup> *See Stevens, supra* note 61, at 1217.

<sup>95</sup> *See, e.g., G. A. Mackenzie & Jonathan Barry Forman, Reforming the Second Tier of the U.S. Pension System: Tabula Rasa or Step By Step?*, 46 J. MARSHALL L. REV. 631, 659 (2013) (finding that the U.S. retirement structure has grave defects). Interestingly, the study observed that Social Security provides substantial replacement income for lower wage earners, but relatively less replacement for people who earned more. *See id.*

<sup>96</sup> *See Associated Press, Obama Urges Greater Care for Aging Americans*, COURIER NEWS (July 14, 2015), [http://www.couriernews.com/view/full\\_story/26751521/article-Obama-urges-greater-care-for-aging-Americans](http://www.couriernews.com/view/full_story/26751521/article-Obama-urges-greater-care-for-aging-Americans).

having to make more decisions now about their individual savings. Do they put it in a 401(k)? Do they maybe get their own IRA?<sup>97</sup>

Additional omens are manifest. People are living longer, personal savings rates have plunged, housing wealth has suffered wild swings, and participation in the economy has been uneven.<sup>98</sup> One observer cautioned that the United States has already entered a historically grim retirement situation.<sup>99</sup> That writer warned that millions of aging baby boomers face near certain poverty because they lack resources to retire but are too old to work, lack employment opportunities to go back to work, and/or are suffering declining health that prevents them from continuing to work.<sup>100</sup>

The following data buttresses the above retirement concerns: nearly ten thousand baby boomers retire every day;<sup>101</sup> the average monthly Social Security benefit for retired workers as of October 2015 was \$1,335;<sup>102</sup> those Social Security payments represented more than one-half of the income for fifty-three percent of older married persons and for seventy-four percent of older unmarried persons;<sup>103</sup> the federal government expects America's elderly population to increase from forty-eight million in 2015 to seventy-nine million in 2035;<sup>104</sup> and the percentage of private-sector retirement plan participants who were able to rely solely on an employer-provided defined benefit plan, which is a pension based on length of service and level of wages, plunged from sixty-two percent in 1979 to seven percent in 2011.<sup>105</sup>

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<sup>97</sup> Interview by Robert Love, Editor-in-Chief, AARP Publ'ns, with United States President Barack Obama (Feb. 23, 2015), <http://www.aarp.org/money/investing/info-2015/president-obama-interview-transcript.html>.

<sup>98</sup> See David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1091–92 (2008) (providing a more extensive discussion of the difficulties facing today's and tomorrow's retirees).

<sup>99</sup> See Edward Siedle, *The Greatest Retirement Crisis in American History*, FORBES (Mar. 20, 2013), <http://www.forbes.com/sites/edwardsiedle/2013/03/20/the-greatest-retirement-crisis-in-american-history>.

<sup>100</sup> See *id.*

<sup>101</sup> Associated Press, *supra* note 96.

<sup>102</sup> CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: TOP TEN FACTS ABOUT SOCIAL SECURITY 4 (2015), [http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics\\_SocSec-TopTen.pdf](http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics_SocSec-TopTen.pdf).

<sup>103</sup> Jeff Schlegel, *Social Security: A Planning Paradox*, FIN. ADVISOR (Aug. 1, 2016), <http://www.fa-mag.com/news/social-security-a-planning-paradox-28195.html?print>.

<sup>104</sup> *Id.*

<sup>105</sup> Christopher W. Peifer, *Adjusting for Underfunded Pension and Postretirement Liabilities*, WILLAMETTE MGMT. ASSOCIATES: INSIGHTS, Summer 2015, at 67. A defined benefit plan is usually a more lucrative, and safer, retirement plan for the employee than a defined contribution plan. See Mitch Tuchman, *Pension Plans Beat 401(k) Savers Silly—*

Similarly alarming is the fact that experts predict the number of people in the United States age one hundred or older will grow from seventy-two thousand now to more than one million over the next thirty-four years.<sup>106</sup> Additional population studies suggest that one-half of American children born in 2007 can expect to live to be 104 years old.<sup>107</sup> The following are two final stark indicators: nearly half of Americans die with less than \$10,000 in assets,<sup>108</sup> and moreover, thirty-one percent of pre-retirement age adults report having no retirement savings at all.<sup>109</sup>

In response to the above financial crisis, the government created the traditional IRA and then the Roth IRA.<sup>110</sup> These accounts are meant to incentivize individuals to save for their retirement on their own, outside of any retirement plan the employer may or may not provide.<sup>111</sup>

#### IV. LEGISLATIVE DEVELOPMENT AND EXPANSION OF THE ROTH IRA

Nearly every president since Gerald Ford in 1974 has signed off on legislation trying to enact, protect, or expand retirement savings.<sup>112</sup> The following all are attempts to address the demographic demons described above: inadequate personal retirement savings in the midst of disappearing private employer-based pensions and lengthening lifespans.

As mentioned above, in 1974, President Ford signed ERISA into

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*Here's Why*, FORBES (June 4, 2013), <http://www.forbes.com/sites/mitchelltuchman/2013/06/04/pension-plans-beat-401k-savers-silly-heres-why/#286e70ab1d3c>. For a defined contribution plan, the employer simply makes a contribution and then the employee bears all the risk of achieving a retirement goal. *See id.*

<sup>106</sup> Lynda Gratton & Andrew Scott, *How Work Will Change When Most of Us Live to 100*, HARV. BUS. REV. (June 27, 2016), <https://hbr.org/2016/06/how-work-will-change-when-most-of-us-live-to-100>.

<sup>107</sup> *Id.*

<sup>108</sup> Peter Dizikes, *The Economics of Retirement*, MIT TECH. REV. (Feb. 18, 2015), <https://www.technologyreview.com/s/534646/the-economics-of-retirement/> (stating that research from James M. Poterba, Steven F. Venti, and David A. Wise, found that forty-six percent of Americans have less than \$10,000 in assets when they die).

<sup>109</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, at 2–3, 59–60 (2016), <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

<sup>110</sup> *See* Scorse, *supra* note 2 (describing Congress's passage of the Roth IRA, and comparing the Roth IRA to traditional IRAs).

<sup>111</sup> *See* Kelly Phillips, *Deduct This: History of the IRA Deduction*, FORBES (June 27, 2011), <http://www.forbes.com/sites/kellyphillipserb/2011/06/27/deduct-this-history-of-the-ira-deduction/#1e213461738f>.

<sup>112</sup> *See* WORKPLACE FLEXIBILITY 2010, GEORGETOWN LAW, A TIMELINE OF THE EVOLUTION OF RETIREMENT IN THE UNITED STATES 3–10 (2010), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1049&context=legal>.

law.<sup>113</sup> Among numerous provisions to bolster the security of employees' stakes in their employer's pension, ERISA also created traditional IRAs for taxpayers that did not have an employer-based retirement plan.<sup>114</sup> For the traditional IRA, ERISA set a maximum deductible contribution limit of a constant \$1,500 per year.<sup>115</sup> Additionally, ERISA expanded retirement options for self-employed persons and for 403(b) plan participants.<sup>116</sup>

In 1978, President Carter signed the Revenue Act of 1978 ("RA of 1978").<sup>117</sup> The RA of 1978 allowed employers to provide 401(k) defined contribution retirement plans at work, which functioned similar to a traditional IRA in providing a pre-tax income deduction and a tax deferral of earnings.<sup>118</sup>

In 1981, President Reagan signed the Economic Recovery Tax Act of 1981 ("ERTA").<sup>119</sup> ERTA increased the annual IRA deduction limit to \$2,000.<sup>120</sup> ERTA also expanded eligibility for the traditional IRA's deduction to all taxpayers, including those already covered by

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<sup>113</sup> See *id.* at 3–4.

<sup>114</sup> See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958–59 (codified as amended at I.R.C. §§ 219, 408 (2012)). Per the Investment Company Institute's *2016 Investment Company Fact Book*, traditional IRAs fulfill two roles: (1) providing workers with a tax-advantaged method to save for retirement, and (2) extending the life of employer-provided retirement plan assets by allowing the employee to transfer the assets into an IRA upon a change in employer or upon retirement. See 2016 FACT BOOK, *supra* note 90, at 150.

<sup>115</sup> See Employee Retirement Income Security Act § 2002(b) (setting the maximum deduction amount allowable to not exceed fifteen percent of annual gross income or \$1,500, whichever is less).

<sup>116</sup> See *id.* § 2001 (increasing the deductible limit for retirement plans of self-employed people, commonly called "Keogh plans," from the lesser of \$2,500 or ten percent of earned income to the new limit of the lesser of \$7,500 or fifteen percent of earned income); see also *id.* § 1022(e) (allowing 403(b) participants to invest in mutual funds, awkwardly named here as "custodial accounts"); Revenue Act of 1961, Pub. L. No. 87-370, § 3, 75 Stat. 796, 801 (codified as amended at I.R.C. § 403(b)) (allowing but limiting the tax deferred investments of 403(b) participants to annuities).

<sup>117</sup> See Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (codified as amended in scattered sections of I.R.C.); *Highlights of the Tax Law Signed by President Carter*, *supra* note 7.

<sup>118</sup> See Revenue Act of 1978 § 132.

<sup>119</sup> See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 274 (codified as amended in scattered sections of I.R.C.); *August 13, 1981: Reagan Signs Economic Recovery Tax Act (ERTA)*, HISTORY, <http://www.history.com/this-day-in-history/reagan-signs-economic-recovery-tax-act-erta/print> (last visited Nov. 18, 2016) [hereinafter *Reagan Signs ERTA*]. ERTA was also known colloquially as the "Kemp-Roth plan" for its legislative proponents, Jack F. Kemp and William V. Roth, Jr. See *Reagan Signs ERTA*, *supra*.

<sup>120</sup> See Economic Recovery Tax Act of 1981 § 311(a). The \$2,000 contribution limit did not change for another twenty years. See G.E. Miller, *2016 & 2017 Maximum IRA Contribution Limits*, 20 SOMETHING FIN., <https://20somethingfinance.com/maximum-ira-contribution-limits/> (last updated Oct. 27, 2016).

an employer-provided plan.<sup>121</sup>

Five years later, in 1986, President Reagan signed the second of his two major bills, the Tax Reform Act of 1986 (“TRA of 1986”).<sup>122</sup> The TRA of 1986 reduced the traditional IRA deduction benefit created earlier by ERTA in 1981.<sup>123</sup> In particular, the TRA of 1986 phased out the IRA deduction for “single” and “married filing joint” taxpayers beginning at adjusted gross incomes of \$25,000 and \$40,000, respectively, for taxpayers who were active participants in an employer-sponsored retirement plan.<sup>124</sup>

In 1997, President Clinton signed the Taxpayer Relief Act of 1997 (“TRA of 1997”).<sup>125</sup> The TRA of 1997 is the statute that enacted the Roth IRA.<sup>126</sup> The act set an adjusted gross income limit for contributions and conversions to Roth IRAs at \$100,000 for “single” individuals and \$150,000 for “married filing joint” taxpayers.<sup>127</sup> In addition, for participants in employer-sponsored retirement plans, the TRA of 1997 increased over eight years the adjusted gross income dollar limit to \$50,000 for “single” and \$80,000 for “married filing joint” taxpayers to make deductible contributions to

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<sup>121</sup> See Economic Recovery Tax Act of 1981 § 311(a). Per the Joint Committee on Taxation, the primary reason for the expansions was Congress’ worry that personal savings rates had fallen, forcing Americans to confront retirement with insufficient assets. See STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., JCS-71-81, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 199 (Comm. Print 1981).

<sup>122</sup> See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of I.R.C.); Adam Radman & Brendan Walsh, *This Day in History: President Ronald Reagan Signs the Tax Reform Act of 1986*, AMS. FOR TAX REFORM (Oct. 22, 2013), <https://www.atr.org/history-president-ronald-reagan-signs-tax-a7946>. The TRA of 1986 reorganized the then existing federal tax laws into the Internal Revenue Code of 1986, which as amended remains to date the tax law of the land. See Bernie Kent, *Was the 1986 Tax Reform Really Simplification? Was it Fair?*, FORBES (Oct. 21, 2011), <http://www.forbes.com/sites/berniekent/2011/10/21/was-the-1986-tax-reform-really-simplification-was-it-fair/print/>.

<sup>123</sup> See Phillips, *supra* note 111.

<sup>124</sup> See Tax Reform Act of 1986 § 1101(a); STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., JCS-10-87, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 626–27 (Comm. Print 1987). Per the Joint Committee on Taxation report, Congress wanted to: (1) maintain the IRA deduction for lower income taxpayers as an incentive to improve their generally low participation rates; and (2) eliminate the deduction for higher income taxpayers who had access to employer-based retirement plans, and who therefore probably would have saved anyway. See STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., *supra*, at 626. Higher income people also benefited from the lower top income tax rates that the 1986 TRA enacted. See *id.*

<sup>125</sup> See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 787 (codified as amended in scattered sections of I.R.C.); William J. Clinton: *Statement on Signing the Taxpayer Relief Act of 1997*, AM. PRESIDENCY PROJECT (Aug. 5, 1997), <http://www.presidency.ucsb.edu/ws/index.php?pid=54507> [hereinafter *William J. Clinton*]. On the same day, President Clinton also signed the Balanced Budget Act of 1997. See *William J. Clinton, supra*.

<sup>126</sup> See Taxpayer Relief Act of 1997 § 302; see also *supra* note 90 (explaining DC plans).

<sup>127</sup> See Taxpayer Relief Act of 1997 § 302.

traditional IRAs.<sup>128</sup>

In 2001, President George W. Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”), the first of two major tax acts during his administration.<sup>129</sup> The EGTRRA raised, in steps to 2008, the annual allowable contribution amounts for traditional IRAs and Roth IRAs to \$5,000 per person, and then afterwards indexed to inflation.<sup>130</sup> In two steps to 2006, EGTRRA also allowed additional so-called “catch-up contributions,” of \$1,000 per year for taxpayers age fifty or older.<sup>131</sup> On the employer side, beginning in 2006, EGTRRA also allowed employers to amend their 401(k) and 403(b) retirement plans to allow Roth accounts.<sup>132</sup> Further, EGTRRA raised to \$15,000 in 2006 and indexed to inflation thereafter the maximum amount that employees could contribute to an employer-provided retirement plan, with a catch-up annual amount of \$5,000 for employees age fifty or over.<sup>133</sup>

In 2006, President Bush signed the second major tax act of his term, the Tax Increase Prevention and Reconciliation Act of 2005 (“TIPRA”).<sup>134</sup> Effective after December 31, 2009, TIPRA repealed the income limitations on taxpayers who wanted to convert their pre-tax retirement assets to Roth IRAs.<sup>135</sup>

In 2006, President Bush also signed the Pension Protection Act of 2006 (“PPA of 2006”).<sup>136</sup> In main part, the PPA of 2006 updated

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<sup>128</sup> See *id.* § 301. Section 301 further increased the limit to \$150,000 for married taxpayers who did not participate in an employer retirement plan but whose spouse did participate in an employer plan. See *id.* Per the Senate report, the impetus for the policy change was that “[t]he Committee [wa]s concerned about the national savings rate, and believe[d] that individuals should be encouraged to save.” S. REP. NO. 105-33, at 29 (1997). In particular, related to the Roth IRA, “the Committee believe[d] that some individuals would be more likely to save if funds set aside in a tax-favored account could be withdrawn without tax after a reasonable holding period for retirement . . . .” *Id.*

<sup>129</sup> See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of I.R.C.).

<sup>130</sup> See *id.* § 601.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* § 617.

<sup>133</sup> See *id.* §§ 611(d), 631. As before, Congress expanded the IRA availability out of concern that the public’s low rate of savings would leave them inadequate resources for retirement. See STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., JCS-1-03, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 88 (Comm. Print 2003). Similarly, Congress had noted that 401(k)-style defined contribution plans had become widespread, causing the legislature to conclude that allowing employees to increase their retirement savings at work was important for better retirement savings in general. See *id.*

<sup>134</sup> See Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (2006) (codified as amended in scattered sections of I.R.C.).

<sup>135</sup> See *id.* § 512.

<sup>136</sup> See Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of I.R.C.).

ERISA of 1974 by adding additional reporting requirements, funding standards, and additional pension rules.<sup>137</sup> As pertinent here, the PPA of 2006 also made permanent many of the EGTRRA provisions related to IRAs that were due to expire in 2010.<sup>138</sup> Further, beginning in 2008, the PPA of 2006 allowed workers to transfer their pre-tax employer-based retirement accounts directly to a Roth IRA instead of rolling the funds first through a traditional IRA.<sup>139</sup>

Two pieces of legislation during President Obama's eight-year term allowed employer-based retirement plans to function in a manner equivalent to Roth IRAs. The first codification occurred through the Small Business Jobs Act of 2010 ("SBJA").<sup>140</sup> The SBJA permitted employers to amend their 401(k), 403(b), or 457(b) plan to permit in-plan conversions.<sup>141</sup> That meant that employees could transform their pre-tax account to a designated Roth account within the plan.<sup>142</sup> A critical restriction, however, was that to qualify for the conversion, the employee had to be eligible under the plan for a distribution, such as being age fifty-nine and one-half or older.<sup>143</sup> The restrictions limited the availability of the new conversion to Roth option for many employees.<sup>144</sup>

Near the beginning of 2013, President Obama signed the American Taxpayer Relief Act of 2012 ("ATRA").<sup>145</sup> The ATRA eliminated, effective after December 31, 2012, the limitation on in-plan conversions that the SBJA had imposed.<sup>146</sup> The result was

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<sup>137</sup> See, e.g., *id.* §§ 101–116. These additional requirements, while they may shore up existing pension plans, are likely to incentivize more employers to switch to defined benefit plans where possible. See *id.* § 101. The PPA of 2006 also boosted the funding of the Pension Benefit Guaranty Corporation ("PBGC"), which was facing growing financial stress. See *id.* §§ 401–412. Further, the PPA of 2006 made significant 401(k) changes to encourage greater worker savings by, for example, allowing employers to adopt automatic enrollment of employees, incorporating a default investment of diversified "life-cycle" funds, and periodic escalation of worker contributions. See *id.* §§ 901–906.

<sup>138</sup> *Id.* §§ 811–812. For instance, the PPA of 2006 made permanent the higher contribution limits for IRAs and Roth IRAs, e.g., \$5,000 in 2008 and indexed thereafter, as well as making permanent the Roth 401(k) and Roth 403(b). See *id.* § 811; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 601, 115 Stat. 38, 94 (codified as amended at I.R.C. § 219).

<sup>139</sup> See Pension Protection Act of 2006 § 824.

<sup>140</sup> See Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (codified as amended in scattered sections of I.R.C.).

<sup>141</sup> See *id.* § 2112.

<sup>142</sup> See *id.*

<sup>143</sup> See I.R.C. § 408A(d)(2)(A); Small Business Jobs Act of 2010 § 2112.

<sup>144</sup> See I.R.C. § 408A(d)(2)(A).

<sup>145</sup> See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (codified as amended in scattered sections of I.R.C.).

<sup>146</sup> See *id.* § 902.

that, as long as an employer plan permitted a conversion, employees at their discretion could execute an in-plan conversion to a designated Roth 401(k), Roth 403(b), and Roth 457(b) account.<sup>147</sup>

Returning to the individual Roth IRA, on January 29, 2014, President Obama again expanded Roth IRA availability by signing an executive order.<sup>148</sup> The order instructed the U.S. Department of Treasury to create a “starter” Roth IRA called the “my Retirement Account” (“myRA”).<sup>149</sup> After a pilot phase, on November 4, 2015, the U.S. Treasury officially made the myRA available to the entire nation.<sup>150</sup> Fundamentally, the myRA is a federal government-administered Roth IRA for moderate to low income workers who do not have access to an employer-sponsored retirement plan.<sup>151</sup> Once a myRA account balances reaches a total of \$15,000, the owner or the government will transfer the account to a private-sector Roth IRA.<sup>152</sup>

In summary, for more than forty years since the beginning of the collapse of employer-based pension plans, nearly every presidential administration has tried to act creatively to incentivize private retirement savings. Unsurprisingly, somewhat unconventional vehicles, such as the Roth IRA, have come about because the government has not been fully successful in its efforts. The result has been a confusing, complicated, and unrestricted patchwork of retirement vehicles ripe for abuse.

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<sup>147</sup> See *id.*; STAFF OF THE JOINT COMM. ON TAXATION, 112TH CONG., JCS-2-13, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 112TH CONGRESS 227–28 (Comm. Print 2013). Per the Joint Committee on Taxation, Congress’ intent was to enable employees to convert their pre-tax employer retirement plan dollars to after-tax Roth status without needing to transfer the funds out of their employer plan to a Roth IRA. See STAFF OF THE JOINT COMM. ON TAXATION, 112TH CONG., *supra*, at 227–28.

<sup>148</sup> See Anthony Reyes, *President Obama Signs Presidential Memorandum Directing Treasury to Create myRA*, U.S. DEP’T TREASURY: TREASURY NOTES BLOG (Jan. 29, 2016), <https://www.treasury.gov/connect/blog/Pages/Obama-Signs-Presidential-Memorandum-Directing-Treasury-to-Create-myRA.aspx>.

<sup>149</sup> See *id.*

<sup>150</sup> See Press Release, U.S. Dep’t of the Treasury, U.S. Treasury Launches myRA (my Retirement Account) to Help Bridge America’s Retirement Savings Gap (Nov. 4, 2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl0250.aspx>.

<sup>151</sup> See *About myRA, myRA*, <https://myra.gov/about/> (last visited Jan. 5, 2017). A few of the key features to the myRA are as follows: the federal government guarantees myRA owners will not suffer principal loss; the accounts earn the same interest rate as in the Government Securities Investment Fund; workers can contribute as little as two dollars per paycheck; and per the myRA website, the administration’s purpose in creating the myRA was to give underserved people a simple method to start saving for their retirement because statistics showed millions of Americans were unprepared for retirement. See *id.*

<sup>152</sup> See *id.*

## V. CRITIQUES OF THE ROTH IRA

The criticisms of Roth IRAs fall into two broad categories. One is a rebuke that the Roth IRA has served as a budgetary con game. The second criticism is that Roth IRA accounts exacerbate income inequality. Below is an analysis of both criticisms.

A. *Budget Gimmick*

For decades, tax observers have warned that the Roth IRA is a dangerous public policy.<sup>153</sup> A main charge is that politicians cynically use the projected initial tax receipts from Roth IRA contributions and conversions to fund partisan budget priorities such as a cut to the capital gains tax rate.<sup>154</sup> In other words, Congress and presidents duplicitously used the early projected revenue gains from Roth IRA expansions to avoid budget restrictions on other revenue losses that the pay-as-you-go (“PAYGO”) and the Byrd Rule ten-year window constraints imposed.<sup>155</sup> Then, once enacted, Roth IRAs insidiously caused the Treasury’s later loss of billions in tax revenue from the tax-free compound growth of Roth IRAs, which dwarfed the meager upfront

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<sup>153</sup> See, e.g., LEONARD E. BURMAN & JOEL SLEMROD, TAXES IN AMERICA: WHAT EVERYONE NEEDS TO KNOW 114 (2013); JOEL FRIEDMAN & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, JOINT TAX COMMITTEE ESTIMATE SHOWS THAT TAX GIMMICK BEING DESIGNED TO EVADE SENATE BUDGET RULES WOULD INCREASE LONG-TERM DEFICITS 2 (2006), <http://www.cbpp.org/cms/index.cfm?fa=view&id=220>; WILLIAM G. GALE & PETER R. ORSZAG, CTR. ON BUDGET & POLICY PRIORITIES, AN UNWISE DEAL: WHY ELIMINATING THE INCOME LIMIT ON ROTH IRAS IS TOO STEEP A PRICE TO PAY FOR A REFUNDABLE SAVER’S CREDIT 1–3 (2004), <http://www.cbpp.org/6-4-04tax.pdf>; PETER R. ORSZAG, CTR. ON BUDGET & POLICY PRIORITIES, RAISING THE AMOUNTS THAT CAN BE CONTRIBUTED TO ROTH IRAS: THE DANGERS IN THE SHORT RUN AND THE LONG RUN 1 (2000), <http://www.cbpp.org/archives/6-21-00tax.htm>; Leonard E. Burman, *Roth Conversions as Revenue Raisers: Smoke and Mirrors*, TAX NOTES, May 22, 2006, at 953, 953–54, [http://www.taxpolicycenter.org/UploadedPDF/1000990\\_Tax\\_Break\\_05-22-06.pdf](http://www.taxpolicycenter.org/UploadedPDF/1000990_Tax_Break_05-22-06.pdf); Leonard E. Burman et al., *The Administration’s Savings Proposals: Preliminary Analysis*, TAX NOTES, Mar. 3, 2003, at 1423, 1434, <http://www.taxpolicycenter.org/publications>; Blustein, *supra* note 5.

<sup>154</sup> See Burman, *supra* note 153, at 953.

<sup>155</sup> See *id.* (describing the Senate’s budget rules regarding the ten-year budget window); see also George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 215–23, 226–32 (2009) (describing in more detail the Senate’s budget rules regarding the ten-year budget window). The Byrd Rule requires at least a three-fifths majority of a Senate vote to approve proposed legislation that causes a budget deficit beyond a ten-year horizon. See Yin, *supra*, at 215. Therefore, to allow an easier-to-obtain simple majority Senate vote for passage, proposed tax cut or tax expenditure legislation can avoid the Byrd Rule by including offsetting revenue raisers, such as the Roth IRA, and/or by including a sunset provision for the deficit-causing provisions. See *id.* at 215, 221. PAYGO works in a similar manner. See *id.* at 227. To approve a tax cut, Congress must include an offsetting tax increase or a cut in tax expenditures. See *id.*

income tax receipts.<sup>156</sup>

From the analysis standpoint, the true underlying motives for political action are unknowable. Congress and presidents could have been crassly grabbing quick cash to mask future revenue losses, similar to payday loans, to further their political goals.<sup>157</sup> On the other hand, similar to the magic beans in *Jack and the Beanstalk*, on the political level perhaps the tradeoff was in the public's interest. Resolving the question of political motivations is beyond the ken of this article, though.

Even if the theory of political gamesmanship is correct, however, a number of considerations temper the revenue loss critiques. The foremost factor is the fundamental economic principle that when tax rates are the same at contribution as at distribution, then the after-tax returns are essentially identical for the Roth IRA as for the traditional IRAs.<sup>158</sup> The equivalency is simply a restatement of the well-known E. Carey Brown's 1948 economic theorem that holds that pre-tax and after-tax cash flow alternatives yield indistinguishable returns on investment.<sup>159</sup>

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<sup>156</sup> See Burman, *supra* note 153, at 953–55 (examining the TIPRA Tax Act of 2005, which eliminated income restrictions on taxpayers who wanted to convert pre-tax retirement funds to Roth IRAs). Tax policy expert Leonard Burman estimated that in present value terms, TIPRA's expansion would ultimately cost the U.S. Treasury \$14.4 billion despite an initial ten-year projection of a \$6.4 revenue gain. Gerald Scorse, who frequently writes about taxes, in his titular op-ed entitled, "Roth IRAs: A Real 'Fiscal Frankenstein,'" similarly warned against the dangerous siren song that Roth accounts could, over the long-term, ultimately cost the Treasury \$100 billion. See Scorse, *supra* note 2. Scorse was warning against what became the provision in the ATRA of 2012 that eliminated the restrictions within employer plans from employees making in-plan conversions to a designated Roth 401(k), Roth 403(b), or Roth 457(b) account. See *id.*

<sup>157</sup> "Laws are like sausages, it is better not to see them being made," is a quotation attributed to Otto von Bismarck (1815 to 1898), the prominent German political leader. Steven Luxenberg, *A Likely Story . . . And That's Precisely the Problem*, WASH. POST. (Apr. 17, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/16/AR2005041600154.html>.

<sup>158</sup> See STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., JCS-5-97, DESCRIPTION AND ANALYSIS OF TAX PROPOSALS RELATING TO SAVINGS AND INVESTMENT (CAPITAL GAINS, IRAS, AND ESTATE AND GIFT TAX) 12 (Comm. Print 1997) (describing the parity in returns); see also THOMAS L. HUNGERFORD & JANE G. GRAVELLE, CONG. RESEARCH SERV., INDIVIDUAL RETIREMENT ACCOUNTS (IRAS): ISSUES AND PROPOSED EXPANSION 4–5 (2012) (providing a numerical example and explaining in words as to why the after-tax returns are equivalent); Alicia H. Munnell, *A Primer on IRAs*, CTR. FOR RETIREMENT RES.: JUST FACTS ON RETIREMENT ISSUES, no. 7, Mar. 2003, at 1, 1, [http://crr.bc.edu/wp-content/uploads/2003/03/jtf\\_7.pdf](http://crr.bc.edu/wp-content/uploads/2003/03/jtf_7.pdf) (providing a mathematical equation to illustrate the uniformity in returns).

<sup>159</sup> See David Elkins & Christopher H. Hanna, *Taxation of Supernormal Returns*, 62 TAX LAW. 93, 96 (2008) (providing a sample application of the Carey Brown theorem); see also Karen C. Burke & Grayson M.P. McCouch, *Lipstick, Light Beer, and Back-Loaded Savings Accounts*, 25 VA. TAX REV. 1101, 1111–12 (2006) (discussing the equivalency concept); Reuven S. Avi-Yonah, *Déjà Vu All over Again? Reflections on Auerbach's 'Modern Corporate Tax' 2* (Univ. of Mich. Law Sch. Law & Econ. Working Papers, Paper No. 29, 2010) (discussing,

The difference in the findings between the critics and the revenue-neutral analysts is that the revenue-neutral analysts point out that Roth IRA accounts begin with less cash because of the owner's need to pay for the upfront income tax burden.<sup>160</sup> Put differently, a Roth IRA investor would have to pay the tax liability for a Roth at the beginning of the investment by either: (1) reducing the initial amount in her or his Roth account; or by (2) using other savings, which could have appreciated in their own right.<sup>161</sup>

The better performer therefore depends mainly on the change, if any, in income tax rates.<sup>162</sup> The traditional IRA is superior if the owner's income tax rate decreases from the time of the IRA owner's initial investment to the date of the owner's distribution.<sup>163</sup> The Roth IRA is better if the taxpayer's income tax rate does not change significantly from contribution to distribution.<sup>164</sup> Therefore, if a taxpayer can accurately predict her or his future income tax rates, then yes, an individual could choose the best IRA, which could cause a net revenue loss to the federal government.<sup>165</sup>

Diminishing the revenue loss budgetary argument, however, is the reality that tax rates are notoriously difficult to predict. From the taxpayer's side, unexpected events, such as divorce, illness, accident, or good fortune may cause an unexpected swing in tax rates.<sup>166</sup> Likewise, government actions can unpredictably up-end the best of plans. For instance, subsequent legislators might adopt a consumption or other taxes and concurrently lower individual income tax rates.<sup>167</sup> Moreover, a simple change in philosophy or political power in Washington, D.C., can lower or raise income tax rates.<sup>168</sup> For example, in relatively recent times, the highest

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briefly, the Carey Brown theorem).

<sup>160</sup> See Munnell, *supra* note 158, at 2.

<sup>161</sup> See *id.*

<sup>162</sup> See HUNGERFORD & GRAVELLE, *supra* note 158, at 5; STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., *supra* note 158, at 12; Munnell, *supra* note 158, at 2.

<sup>163</sup> See HUNGERFORD & GRAVELLE, *supra* note 158, at 5; STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., *supra* note 158, at 12; Munnell, *supra* note 158, at 2.

<sup>164</sup> See Munnell, *supra* note 158, at 2.

<sup>165</sup> See HUNGERFORD & GRAVELLE, *supra* note 158, at 5; STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., *supra* note 158, at 13; Munnell, *supra* note 158, at 2.

<sup>166</sup> See, e.g., *Publication 504*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p504/ar02.html> (last visited Jan. 5, 2017) (discussing the tax consequences for people whose status is "divorced").

<sup>167</sup> See Daniel N. Shaviro, *Replacing the Income Tax with a Progressive Consumption Tax*, TAX NOTES, Apr. 5, 2004, at 91, 92, <https://www.americantaxpolicyinstitute.org/s/pdf/ShaviroPCT.pdf>.

<sup>168</sup> See Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1391–92 (2002) (reviewing DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH (Joel B. Slemrod ed., 2000)).

marginal rate has ranged from ninety-one percent under President Eisenhower, to twenty-eight percent under President Reagan, to 39.6% under President Obama.<sup>169</sup>

Roth accounts also suffer from another political risk. A future Congress and president might decide to include distributions from Roth IRAs as part of a modified adjustment gross income computation for determining certain income tax computations.<sup>170</sup> Recall that in 1969 President Nixon signed into law the Alternative Minimum Tax (“AMT”) to impose an income tax on previously allowed tax preferences.<sup>171</sup> Similarly, in 1993 President Clinton signed into law the Omnibus Budget Reconciliation Act (“OBRA”) that raised the taxable inclusion rate of Social Security benefits for moderate to higher earners from fifty percent to eighty-five percent.<sup>172</sup>

In summary, the revenue loss budgetary criticisms of the Roth IRA seem less worrisome than the critics warn. That does not mean, however, that these accounts are free from harm, especially regarding serious income inequality issues.

### *B. Income Inequality*

The second main critique of the Roth IRA is that the accounts exacerbate income inequality.<sup>173</sup> This charge has merit. Despite all of the government efforts to expand retirement account availability, the evidence is inconclusive whether the accounts actually increase retirement savings or merely reallocate existing funds.<sup>174</sup> What is clear, however, is that the highest income taxpayers are the people who most use IRAs.<sup>175</sup>

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<sup>169</sup> See *id.* at 1392.

<sup>170</sup> See Ron Lieber, *Converting an I.R.A. Into a Roth? How's Your Crystal Ball?*, N.Y. TIMES (July 17, 2009), <http://www.nytimes.com/2009/07/18/your-money/individual-retirement-account-iras/18money.html>.

<sup>171</sup> See GREG LEISERSON & JEFFREY ROHALY, TAX POLICY CTR., THE INDIVIDUAL ALTERNATIVE MINIMUM TAX: HISTORICAL DATA AND PROJECTIONS 1, 2 (2008), [http://webarchive.urban.org/UploadedPDF/411703\\_individual\\_amt.pdf](http://webarchive.urban.org/UploadedPDF/411703_individual_amt.pdf). The AMT makes adjustments to income for otherwise allowable deductions, for example, personal exemptions and the standard deduction, MACRS depreciation, and net operating losses. See *id.* at 2.

<sup>172</sup> See *Myths and Misinformation about Social Security—Part 2*, SOC. SECURITY ADMIN., <https://www.ssa.gov/history/InternetMyths2.html> (last visited Jan. 5, 2017).

<sup>173</sup> See HUNGERFORD & GRAVELLE, *supra* note 158, at 12–13 (discussing the fact that those eligible for the benefits of back-loaded Roth IRAs typically have high incomes, and that back-loaded Roth IRAs may decrease savings, as well as the fact that IRAs generally benefit and are owned by those with higher incomes).

<sup>174</sup> See *id.* at 11–13.

<sup>175</sup> See *id.* at 13.

Examples of vertical inequity include the following data with respect to IRAs. A 2014 report from the United States Government Accountability Office (“GAO”) estimated that as of the end of 2011, more than nine thousand people had IRAs worth at least \$5 million, including at least three hundred people with IRA balances of at least \$25 million.<sup>176</sup> Similarly, the 2012 United States presidential campaign famously revealed that candidate Mitt Romney had built an IRA worth \$102 million.<sup>177</sup> Likewise, also in 2012, a tax commentator called for curbs on Roth IRAs after noting that at least one person, Max. R. Levchin, co-founder of PayPal, had purportedly built a Roth IRA worth at least \$95 million.<sup>178</sup>

The jumbo accounts are troublesome from a public policy standpoint. One issue is the sheer inequity of such concentrated accumulations.<sup>179</sup> That issue, however, is a topic unto itself and is therefore outside of the scope of this article.

Notwithstanding, three other crucial sub-issues arise from the large accounts that are within the bounds of this article, as follows: (1) unequal access; (2) the quid pro quo of the Roth bargain; and (3) the longevity of the accounts. Below is a discussion of those three matters.

Before discussing the issues, however, one must first understand how an individual can build an IRA account worth \$10 million or

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<sup>176</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-16, INDIVIDUAL RETIREMENT ACCOUNTS: IRS COULD BOLSTER ENFORCEMENT ON MULTIMILLION DOLLAR ACCOUNTS, BUT MORE DIRECTION FROM CONGRESS IS NEEDED 17 (2014) [hereinafter GAO-15-16, INDIVIDUAL RETIREMENT ACCOUNTS]; see also U.S. GOV’T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF GAO-15-16, A REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, UNITED STATES SENATE (2014), <http://www.gao.gov/assets/670/666594.pdf> (estimating that in aggregate, forty-three million taxpayers owned IRA accounts with a combined fair market value of \$5.2 trillion). The IRS data on which the GAO report relied did not separate the supersize accounts between Traditional IRAs and Roth IRAs. See GAO-15-16, INDIVIDUAL RETIREMENT ACCOUNTS, *supra*, at 4. The GAO report also provided three recommendations to Congress, including limiting the balances in IRA and employer-based retirement accounts. See *id.* at 56.

<sup>177</sup> See William D. Cohan, *What’s Really Going on With Mitt Romney’s \$102 Million IRA*, ATLANTIC (Sept. 10, 2012), <http://www.theatlantic.com/politics/archive/2012/09/whats-really-going-on-with-mitt-romneys-102-million-ira/261500/>.

<sup>178</sup> See Deborah L. Jacobs, *Why—and How—Congress Should Curb Roth IRAs*, FORBES (Mar. 26, 2012), <http://www.forbes.com/sites/deborahljacobs/2012/03/26/why-and-how-congress-should-curb-roth-iras/#35d2f5ad577a> (naming Max. R. Levchin, co-founder of PayPal and former Yelp Chairman, as the Roth IRA plutocrat).

<sup>179</sup> The discussion of what is the “fair share” of the wealthy is a loaded one that is beyond the scope of this article. Compare, e.g., David Elkins, *Taxation and the Terms of Justice*, 41 U. TOL. L. REV. 73, 84 (2009) (discussing the dangers of distributive tax systems oppressing the already unequal), with N. Gregory Mankiw, *Defending the One Percent*, 27 J. ECON. PERSP. 21, 22 (2013) (noting a history of economic inequality developing over the past few decades), and Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%*, VANITY FAIR: HIVE (May 2011), <http://www.vanityfair.com/news/2011/05/top-one-percent-201105> (discussing the current economic gridlock that favors the wealthy).

more when the Code limits contributions currently to \$6,500 per year.<sup>180</sup> The following is an explanation of one technique that the owners of large accounts may have used to build up such concentrated wealth.<sup>181</sup>

Certain Roth IRA investors convert or contribute stock, such as pre-IPO or at a pre-turn-around price, at a price as low as \$0.000001 per share.<sup>182</sup> After the IPO or the restructuring, the share price then shoots through the roof as the investment skyrockets in value.<sup>183</sup> This arrangement generates thousands or millions of multiples in wealth into the Roth account.<sup>184</sup>

Only a limited number of people, however, such as founders of high-tech businesses and venture capitalists, have access to those types of non-publicly traded investments.<sup>185</sup> Most investors have access to only publicly traded equities and debt instruments.<sup>186</sup>

The second sub-issue relates to the first: the above technique violates the quid pro quo of the Roth bargain. Normally, Roth IRA owners pay the tax upfront and then reap the non-tax benefits later. In the supercharged investments described above, the government would have collected tax on less than pennies per dollar.<sup>187</sup> If the taxpayer had instead purchased the stock outright, not in a Roth IRA, then the taxpayer would have owed income tax upon sale at the appreciated price.<sup>188</sup> Even at a tax-favored federal capital gains rate of currently twenty percent, the income tax the government would collect is far above the near zero amount that the Roth IRA would generate.<sup>189</sup>

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<sup>180</sup> See GAO-15-16, INDIVIDUAL RETIREMENT ACCOUNTS, *supra* note 176, at 7. The maximum inflation-adjusted contribution for 2016 was \$5,500 plus another \$1,000 for taxpayers age fifty or higher, for a combined maximum of \$6,500. *Id.*

<sup>181</sup> See *id.* at 3. The GAO was not privy to information on individual taxpayers. See *id.* Instead, the GAO made inferences based on interviews with industry experts and from reviewing reports that individuals from closely held businesses made to the Department of Labor and to the Securities and Exchange Commission. See *id.*

<sup>182</sup> See *id.* at 26–27.

<sup>183</sup> See *id.* at 30–32 (showing a four-panel illustration of the intricate capital maneuver and explaining that IRS audits for undervaluation may have difficulty when these investors buy pools of stock, which might approximate in aggregate the pool's value).

<sup>184</sup> See *id.* at 31–32 (explaining how similar supersonic wealth accumulation can also occur using carried interest for key individuals at private equity firms and at hedge funds).

<sup>185</sup> See *id.* at 27–28.

<sup>186</sup> See *id.* at 26–28.

<sup>187</sup> See, e.g., *id.* at 29 n.59.

<sup>188</sup> See, e.g., Bloomberg News, *IRS Losing the Battle Over Mega-IRAs as Company Founders Fill Retirement Accounts with Nonpublic Stock*, INVESTMENTNEWS (Nov. 20, 2014), <http://www.investmentnews.com/article/20141120/FREE/141129998/irs-losing-the-battle-over-mega-iras-as-company-founders-fill>.

<sup>189</sup> See *id.*

The third sub-issue then arises when owners of massive Roth accounts want to prolong their tax-free period. As stated above, Roth IRAs are forevermore income tax free to their owners and are potentially income tax free through the lifetimes of their children or the lives of their grandchildren.<sup>190</sup> That's because current law, depending on certain factors, generally allows a non-spouse beneficiary of an inherited Roth IRA to stretch the benefit by withdrawing the funds ratably over her or his expected lifetime.<sup>191</sup> This stretch perpetuates the advantage to future generations and thereby raises similar anti-dynastic concerns observers voiced regarding the repeal of the estate tax.<sup>192</sup>

Worsening the inequity situation is the circumstance that the wealthiest individuals are better able to afford top tax advice and to have discretionary resources to take maximum advantage of Roth IRAs.<sup>193</sup> In summary, Roth IRAs have the potential to build wealth that pays de minimis tax but which lasts, earnings free, for generations.

Mitigating somewhat the inequity described above, America's progressive tax structure forces higher income earners to pay more income tax on the amount they contribute or convert to Roth IRAs.<sup>194</sup> For example, a \$100 conversion at a forty percent income tax rate yields a \$40 tax. That is a significant larger payment than a \$100 conversion at a ten percent rate yielding a \$10 tax. In short, progressive taxation can cause the government to receive more revenue from higher income Americans when investing in Roth IRAs.<sup>195</sup> This in turn provides funds to help lower- and middle-income Americans, even if those individuals cannot afford a

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<sup>190</sup> See Kevin J. Sigler, *Distributions from Stretch IRAs*, 23 J. COMPENSATION & BENEFITS (2007); Steven M. Weiser, *Stretching Tax-Deferred Retirement Benefits Using Separate Accounts and Trusts as Beneficiaries*, 36 COLO. LAW. 59, 59 (2007); see also GAO-15-16, INDIVIDUAL RETIREMENT ACCOUNTS, *supra* note 176, at 43 (discussing intergenerational transfers).

<sup>191</sup> See Alica Lerud, *Looking to the Past in Planning for the Future: Does the Modern Estate Tax Fit Within the Ideals of the Founding Fathers?*, 6 NEV. L.J. 516, 516 (2005/2006); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 825 (2001).

<sup>192</sup> See Repetti, *supra* note 191, at 851.

<sup>193</sup> See, e.g., Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, N.Y. TIMES (Dec. 29, 2015), <http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html>.

<sup>194</sup> See, e.g., EMMANUEL SAEZ, TAXING THE RICH MORE: PRELIMINARY EVIDENCE FROM THE 2013 TAX INCREASE 11 (2016), <http://www.nber.org/chapters/c13868.pdf>; SIGNATUREFD, ROTH IRA CONVERSIONS 1, 4 (2012), <http://www.signaturefd.com/wp-content/uploads/2012/09/Roth-IRA-Conversions.pdf>.

<sup>195</sup> See, e.g., Drew Desilver, *High-income Americans Pay Most Income Taxes, but Enough to be 'Fair'?*, PEW RES. CTR. (Apr. 13, 2016), <http://www.pewresearch.org/fact-tank/2016/04/13/high-income-americans-pay-most-income-taxes-but-enough-to-be-fair/>.

retirement account.<sup>196</sup> Most tax expenditures operate in the opposite manner, allowing the wealthiest taxpayers to receive the largest benefit.<sup>197</sup>

Further, unless Congress repeals the estate tax entirely, holders of the largest retirement account balances will be subject to the federal estate tax.<sup>198</sup> On the basis of historical patterns, however, the federal estate tax applies to only the richest one or two percent of Americans and at fairly steep rates.<sup>199</sup>

A final benefit of Roth IRAs is progressive government spending on Social Security benefits. For example, in 2008, the federal government spent a total of \$516.2 billion on Old Age and Survivors Insurance (“OASI”).<sup>200</sup> By applying a fixed rate to payroll earnings, up to a limit, the government collects more Social Security dollars from higher earners and their businesses.<sup>201</sup>

## VI. RECOMMENDATIONS TO CONGRESS

To address the income inequality concerns, this article details below two recommendations for Congressional action. One is to limit the size of an individual’s aggregate Roth IRA accounts. The other is to shorten the stretch period for non-spousal beneficiaries.

### A. *Ceiling on Roth IRA Balances*

Existing law does not limit accumulations in Roth IRA accounts.<sup>202</sup> One recommendation therefore to prevent misuse of

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<sup>196</sup> See EXEC. OFFICE OF THE PRESIDENT & U.S. TREASURY DEP’T, THE PRESIDENT’S PLAN TO HELP MIDDLE-CLASS AND WORKING FAMILIES GET AHEAD 7 (2015), [https://www.whitehouse.gov/sites/default/files/docs/middle\\_class\\_and\\_working\\_families\\_tax\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/middle_class_and_working_families_tax_report.pdf); see also AARP, THE POLICY BOOK: AARP PUBLIC POLICIES 2-16 (2007), [http://assets.aarp.org/www.aarp.org/\\_articles/legpolicy/2\\_tax07.pdf](http://assets.aarp.org/www.aarp.org/_articles/legpolicy/2_tax07.pdf) (discussing tax credits for qualified plan contributions).

<sup>197</sup> See, e.g., CHUCK MARR ET AL., CTR. ON BUDGET & POLICY PRIORITIES, TAX EXPENDITURE REFORM: AN ESSENTIAL INGREDIENT OF NEEDED DEFICIT REDUCTION 1 (2013), <http://www.cbpp.org/sites/default/files/atoms/files/2-27-13tax.pdf>.

<sup>198</sup> See, e.g., Repetti, *supra* note 191, at 856.

<sup>199</sup> See CHYE-CHING HUANG & CHLOE CHO, CTR. ON BUDGET & POLICY PRIORITIES, TEN FACTS YOU SHOULD KNOW ABOUT THE FEDERAL ESTATE TAX 1, 2 (2016), <http://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax>; Dan Caplinger, *2017 Estate Tax Rates*, NASDAQ (Nov. 11, 2016), <http://www.nasdaq.com/article/2017-estate-tax-rates-cm708034>.

<sup>200</sup> See SOC. SEC. ADMIN., FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2009, at 3 (2009), [https://www.ssa.gov/policy/docs/chartbooks/fast\\_facts/2009/fast\\_facts09.pdf](https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2009/fast_facts09.pdf).

<sup>201</sup> See Sean Williams, *Here’s Why the Rich are about to Pay More Into Social Security*, MOTLEY FOOL (Oct. 30, 2016), <https://www.fool.com/retirement/2016/10/30/heres-why-the-rich-are-about-to-pay-more-into-soci.aspx>.

<sup>202</sup> See David Weliver, *The Roth IRA: What It Is, How It Works, And Why You (Definitely)*

Roth IRAs is for Congress to enact a limitation that would require owners to keep the aggregate balance of their Roth IRA accounts below a certain level.

This idea is not new. In his 2016 budget proposal, President Obama recommended a cap of \$3.4 million on the aggregate value of all of a taxpayer's IRA balances.<sup>203</sup> Under the proposal, once a taxpayer reached the cap, measured at December 31st each year, the limitation would not allow the owner to make further contributions.<sup>204</sup>

Earlier, a 2012 article in *Forbes* had a similar recommendation. Author Deborah L. Jacobs, after surveying the massive Roth IRAs that certain tech titans had created, proposed a cap of \$10 million on each owner's aggregate Roth IRA balance.<sup>205</sup> Under Jacobs's plan, the owner would then have to withdraw annually any excess above the cap, and pay income tax at ordinary income rates on the withdrawn amount.<sup>206</sup>

President Obama's proposal, while correct in overall concept, had flaws. The design made no distinction between traditional IRAs and Roth IRAs.<sup>207</sup> As noted, traditional IRAs are self-correcting because the Code requires minimum distributions.<sup>208</sup> Likewise, the government shares in a traditional IRA's growth by taxing the distributions.<sup>209</sup> Another issue with the proposal was that a ceiling of \$3.4 million is too low. Using a three percent withdrawal rate,

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*Need One*, MONEY UNDER 30 (Dec. 1, 2014), <http://www.moneyunder30.com/roth-ira>.

<sup>203</sup> See U.S. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE U.S. GOVERNMENT 55 (2016), <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf>; see also DEPT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 168–69 (2015), <https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf> [hereinafter GENERAL EXPLANATIONS] (detailing President Obama's IRA proposals). President Obama's proposal used circumlocutions math to determine the cap. See GENERAL EXPLANATIONS, *supra*, at 168–69. The proposal computed the limit by using the expected payout for an individual age sixty-two receiving a one hundred percent joint and survivor annuity under the then I.R.C. § 415(b) maximum qualified defined benefit annual payment of \$210,000. See *id.* at 168. The \$3.4 million figure seems to be part of President Obama's larger effort to bring the federal estate tax deduction from the then current 2015 level of \$5.43 million to the 2009 level of \$3.5 million, along with the administration's desire for reinstating the higher 2009 top estate tax rate. See *id.* at 193, 194.

<sup>204</sup> See GENERAL EXPLANATIONS, *supra* note 203, at 168.

<sup>205</sup> See Jacobs, *supra* note 178.

<sup>206</sup> See *id.*

<sup>207</sup> See generally GENERAL EXPLANATIONS, *supra* note 203, at 167 (making no facial distinction between Roth IRAs and other forms of retirement benefits).

<sup>208</sup> See Treas. Reg. § 1.408-8, Q&A (1) (2016).

<sup>209</sup> See Emily Brandon, *How to Pay Less Taxes on Retirement Account Withdrawals*, U.S. NEWS (Apr. 18, 2016), <http://money.usnews.com/money/retirement/articles/2016-04-18/how-to-pay-less-taxes-on-retirement-account-withdrawals>.

the President's limit would limit a defined contribution account holder, here a Roth IRA owner, to a maximum of approximately \$102,000 in retirement income a year.<sup>210</sup> That's less than one-half of the \$210,000 defined benefit limit.<sup>211</sup>

Additionally, Obama's plan to simply limit future contributions was inadequate because Roth IRA account owners may have salted their accounts with low-priced stock investments that still have a meteoric future.<sup>212</sup> A better policy would require owners to annually distribute any excess balance.

Jacobs's proposed ceiling of \$10 million seems a better fit. For 2016, the estate tax exclusion amount was \$5.45 million.<sup>213</sup> Doubling that amount to last a person's thirty to forty year projected post-retirement lifetime seems reasonable. Again, using a three percent withdrawal rate, a \$10 million limit would enable a Roth IRA owner or any defined contribution account holder a \$300,000 annual withdrawal.<sup>214</sup> This would keep defined contribution plans on par with the defined benefit limit, especially considering employers' guaranteed defined benefit payouts.<sup>215</sup> Defined contribution account holders bear market, political, and the other risks described above.<sup>216</sup>

Further, this ceiling would not penalize successful risk-takers. Jacobs seems incorrect to recommend that account holders must pay income tax on the annual distribution of excess balances.<sup>217</sup> No

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<sup>210</sup> See Reshma Kapadia, *Retirement Rules: Rethinking a 4% Withdrawal Rate*, BARRON'S (Apr. 11, 2015), <http://www.barrons.com/articles/retirement-rules-time-to-rethink-a-4-withdrawal-rate-1428722900>; see also Donna Rosato & Penelope Wang, *Forget the 4% Withdrawal Rule*, TIME (Feb. 26, 2014), <http://time.com/money/2795168/forget-the-4-withdrawal-rule/> (concluding that a three percent withdrawal rate is more appropriate with today's increased life expectancies).

<sup>211</sup> See I.R.C. § 415(b)(1) (2012); Press Release, Internal Revenue Serv., IRS Announces 2016 Pension Plan Limitations; 401(k) Contribution Limit Remains Unchanged at \$18,000 for 2016 (Oct. 21, 2015), <https://www.irs.gov/uac/newsroom/irs-announces-2016-pension-plan-limitations-401-k-contribution-limit-remains-unchanged-at-18-000-for-2016> (updating the statutory limit to \$210,000).

<sup>212</sup> See Nancy L. Anderson, *Roth IRAs: Invest in This, Not That*, FORBES (Jan. 30, 2015), <http://www.forbes.com/sites/nancyanderson/2015/01/30/roth-iras-invest-in-this-not-that/#61c89428730f>.

<sup>213</sup> See Ashlea Ebeling, *IRS Announces 2016 Estate And Gift Tax Limits: The \$10.9 Million Tax Break*, FORBES (Oct. 22, 2015), <http://www.forbes.com/sites/ashleaebeling/2015/10/22/irs-announces-2016-estate-and-gift-tax-limits-the-10-9-million-tax-break/#51ea04b36a7c> (raising the basic exclusion amount to \$5.45 million for determining the I.R.C. § 2010(c)(3) estate tax unified credit for taxpayers passing away in 2016).

<sup>214</sup> See Jacobs, *supra* note 178; Rosato & Wang, *supra* note 210.

<sup>215</sup> See Press Release, *supra* note 211.

<sup>216</sup> See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 464 (2004); Lieber, *supra* note 170.

<sup>217</sup> See Jacobs, *supra* note 178.

apparent justification exists to break the promise to Roth IRA owners of tax-free distributions. Instead, the owners should simply be able to invest their distributed excess into any taxable or non-taxable investment that they choose. They would merely no longer be able to shelter future exponential growth in a Roth IRA retirement account.

### *B. Limit on Stretch Period for Non-Spousal Beneficiaries*

As noted, the current law generally allows non-spousal beneficiaries, including children and potentially grandchildren, to stretch their inherited Roth IRAs over their expected lifetimes.<sup>218</sup> The second anti-abuse amendment that this article recommends therefore would be to require non-spousal beneficiaries to limit the time over which they must withdraw their Roth IRA balances.

To remedy the situation, at least two articles recommended the equivalent of a zero stretch period. One article suggested requiring the distribution of the entire balance by December 31st of the year following the death of the account holder or the death of the spouse.<sup>219</sup> The other article recommended requiring complete distribution of retirement plan assets by the due date of filing the decedent's federal estate tax return.<sup>220</sup> Both proposals seem tempting in their administrative simplicity, but too abrupt in practice.<sup>221</sup> Account holders likely built or preserved their nest egg with their beneficiaries in mind. Further, beneficiaries may be young, ill, or in grief such that immediate distribution is too abrupt.<sup>222</sup>

This does not mean the current possibly decades-long stretch periods should prevail. A more pragmatic approach would be one similar to the one President Obama proposed in his 2016 budget.<sup>223</sup> Specifically, beneficiaries who are not the decedent's spouse should

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<sup>218</sup> See I.R.C. § 401(a)(9)(B)(iii)(II) (2012); Treas. Reg. § 1.408-8, Q&A (9) (2016).

<sup>219</sup> See Jay A. Soled & Bruce A. Wolk, *The Minimum Distribution Rules and Their Critical Role in Controlling the Floodgates of Qualified Plan Wealth*, 2000 BYU L. REV. 587, 621–22. Professors Soled and Wolk noted the administrative simplification advantages of such approaches. See *id.* at 622.

<sup>220</sup> See David A. Pratt & Dianne Bennet, *Simplifying Retirement Plan Distributions*, 57 N.Y.U. INST. ON FED. TAXATION, 1999, § 5.06(1)(b) (discussing a recommendation to distribute all retirement plan benefits by the federal estate tax return filing due date).

<sup>221</sup> Soled & Wolk, *supra* note 219, at 622; see Pratt & Bennett, *supra* note 220, § 5.06(1)(b); see also Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 200 (2014) (discussing that a beneficiary's first order of business is often not to settle the estate).

<sup>222</sup> See Sterk & Leslie, *supra* note 221, at 200.

<sup>223</sup> See GENERAL EXPLANATIONS, *supra* note 203, at 166.

have a limit of five years to withdraw their IRA inheritance.<sup>224</sup> The proposal provided extensions for beneficiaries who are chronically ill, disabled, less than ten years younger than the decedent, and minor children.<sup>225</sup> Here, President Obama's proposals seem a humane way to replace the currently too long stretch period.

#### CONCLUSION

To prevent further misuse, this article recommends two policy changes. One, Congress should enact a limit on the value of each person's aggregate Roth IRA accounts. Two, Congress should limit the stretch provisions by requiring that non-spousal beneficiaries withdraw their inherited Roth IRAs within a reasonable period of five to ten years. These two safeguards have the potential to turn the Roth IRA monster into its rightful role as a benevolent benefactor.

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<sup>224</sup> *See id.*

<sup>225</sup> *See id.*