REFORMING THE UNITED STATES RETIREMENT SYSTEM IN THE WAKE OF THE GREAT RECESSION

I. INTRODUCTION

At the end of 2008, financial markets across the world were in freefall. Banks were overloaded with bad debt while consumers faced rising unemployment and an inability to pay back credit card and home loans. The retirement savings of American workers sat at the center of the financial meltdown, as almost all retirement funds were tied to the financial market. Just as a lack of regulation in the housing and banking sectors allowed the Great Recession of 2008 to occur, a lack of proper regulation and safeguards over retirement assets allowed large amounts of retirement funds to disappear within a few months time. For many, especially the unemployed and already retired, those losses are near impossible to make up.

This article examines the state of the American retirement system before and during the Great Recession while seeking policy solutions to the existing problems festering within it. Part II provides an overview of the current state of retirement insurance in the United States. Part III examines the historical reasons for and consequences of the shift from defined benefit plans to defined contribution plans, as well as the advantages and disadvantages of each type of plan. Part IV addresses current Presidential and Congressional policy proposals relating to employee benefits. Part V presents a number of policy solutions intended to address the problems identified in Parts II and III, including one proposal presented by the author, and analyzes each proposal's benefits and weaknesses.

II. DEFINED BENEFIT PLANS, DEFINED CONTRIBUTION PLANS, AND REPLACEMENT RATES

A. A Brief History of ERISA, Defined Benefit Plans, and Defined Contribution Plans

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA), a comprehensive bill that reshaped the private employment benefit industry in the United States.[1]

Congress passed the bill with broad bipartisan support after almost ten years of compromise, a feat seemingly impossible in today's political climate.[2] At that time, defined benefit plans were the predominant form of employer-sponsored retirement plans.[3] Defined benefit plans come in various forms, but generally provide a plan participant with a monthly annuity upon retirement calculated based on years of service and the participant's final salary.[4] Alternatively, employers might use the participant's average salary to calculate the benefit.[5] These plans require an employer to expend on average 8% of their payroll costs on funding the plan and require mandatory participation by employees.[6]

Defined contribution plans are the other type of retirement plan governed by ERISA. Defined contribution plans provide participants with an individual investment account funded through incremental contributions made by the employee, the employer, or both.[7] Consistent contributions throughout a participant's years of employment, bolstered by investment returns, result in a sizable account to fund the participant's retirement. Employers spend on average 0–3% of payroll costs funding such plans, and employees are not required to participate.[8]

In passing ERISA, Congress set out to ensure that employer-sponsored retirement plans would pay an employee's pension benefit throughout her retirement; thus, ERISA requires retirement plans to meet strict fiduciary, funding, vesting, and disclosure requirements.[9] One of the most important aspects of the legislation requires plans to purchase insurance through the Pension Benefit Guaranty Corporation (PBGC). The PBGC is a government-run entity that guarantees an employer-sponsored defined benefit plan will pay owed retirement benefits even if the plan, or the company itself, goes bankrupt.[10] Through this system, ERISA provides defined benefit plan participants with a high level of retirement security. In exchange for meeting ERISA's strict plan requirements, employers' benefit plans receive a "qualified" status from the

Internal Revenue Service, allowing them to enjoy substantial tax breaks.[11] These tax breaks act as an incentive for employers to offer retirement plans and are central to the private benefit system of the United States. Because ERISA focused on reforming the private pension system that existed in 1974, it concentrated heavily on regulating defined benefit plans and largely ignored the less-common defined contribution plans.[12] As a result, these strict qualification requirements were mainly written for application to defined benefit plans and thus function poorly, if at all, when applied to defined contribution plans.

B. Replacement Rates and Their Application to the United States Retirement System

In the United States, the private retirement benefit system acts in concert with the public retirement system to provide for an employee's full retirement benefits. Thus, one must view any private plan, when examined for adequacy, in concert with Social Security payments.[13] Social Security is a government-run program that provides a monthly annuity for retired workers. According to the Government Accountability Office (GAO), this program provided households aged 65 and over with an average of 37% of their household income in 2006, with other income streams including savings accounts and post-retirement employment.[14] The goal of Social Security is not to provide a comfortable life for retirees; instead it is to ensure that retirees do not live in abject poverty.[15]

Most employees do not envision retirement as a step down from their accustomed lifestyles enjoyed while participating in the workforce. Thus, the goal of private retirement benefits is to supplement Social Security in order to achieve a standard of living equivalent to pre-retirement. This goal is called a replacement rate. The GAO states that the ideal replacement rate, while contentious, is somewhere between 65–85% of an employee's prior wage.[16] This lower number reflects the lack of a need to save for retirement once retired, government programs and subsidies for the retired, assets accumulated while employed, and lower tax costs.[17] Low-wage earners will receive about 50% of their replacement rate from Social Security, leaving private plans responsible for saving somewhere between 15–35% of their replacement rate, depending on an individual's needs.[18] High-wage earners will receive only 33% of their replacement rate through Social Security, thus leaving private retirement plans to compensate for the remaining 30–50% of a high earners' required replacement rate.[19] A 2007 GAO report found that defined contribution plans could provide for an average replacement rate of 22%, or annual distributions of $18,784; that number is substantially lower for low-wage earners and often leaves those employees with marginal or no retirement savings at all.[20] These GAO findings may paint too rosy a picture of the current reality of defined contribution plan savings, as many covered employees choose not to participate in defined contribution plans or do not provide maximum or consistent contributions to their accounts.[21] Indeed, the average 401(k) account balance was only $25,000 in 2006.[22] While this account level might be appropriate for younger workers, it is a troubling statistic for the remainder of the workforce, as such account levels will require an extreme amount of growth in order to meet the average replacement rates set forth above.[23] Further, it should be noted that many scholars warn that the current replacement rates for Social Security are likely to rapidly decrease in the near future, thus exacerbating the already present problem of underfunded retirement.[24]

III. The Shift from Defined Benefit Plans to Defined Contribution Plans

A. An Historical Examination of the Shift from Defined Benefit to Defined Contribution Plans

In late 1980, Ted Benna, a benefits consultant from Philadelphia, began the 401(k) retirement savings revolution.[25] The piece of tax code, which became effective on January 1, 1980, allowed employees to avoid taxation on "deferred compensation" until a later date.[26]

While not intended for general use, Benna realized that the section's wording was not limited to bank holding companies for which Congress passed the legislation; thus employers could use the provision to provide a for a new, less expensive type of retirement plan for their employees.[27]

Between 1981 and 1985, the number of employees covered by defined benefit plans declined 0.8% while the number of employees participating in defined contribution plans rose 5.8%.[28] This trend continued in the early nineties. From 1990 to 1995, the number of defined benefit plans fell 2.3% *per year*, while the number of defined contribution plans rose 1.9% per year.[29] An examination of broader statistics shows the long-term permanency of this shift in how employers provide private retirement benefits. In 1980, 84% of employees employed in medium to large establishments were covered by defined benefit plans.[30] By contrast, in 2007 only 32% of such employees were covered by a defined benefit plan, while 53% of those employees participated in defined contribution plans.[31] The GAO reports that the mid-1980s saw about eight million defined contribution plan participants, compared to over seventy million in 2006.[32] The end result is clear: defined contribution plans have emerged as the primary retirement savings vehicle of United States workers, while traditional defined benefit plans are quickly becoming obsolete.

B. Advantages and Disadvantages of Defined Benefit and Defined Contribution Plans

There is no one reason for the shift from defined benefit to defined contribution plans. Some argue that the U.S. economy's transition in the 1990s from heavily-unionized manufacturing jobs to non-unionized jobs in the service and retail sectors helped facilitate the 401(k) revolution.[33] Unions prefer the guarantees provided by traditional defined benefit plans, and those plans made sense for manufacturing jobs that workers often kept for life.[34] However, retail, white collar, and service jobs require much greater liquidity in the job market; thus the portability of the 401(k) made it a more attractive option.[35] Also, both the Department of Labor and the Internal Revenue Service have subjected defined benefit plans to extreme regulation since ERISA's enactment.[36] Those regulating agencies have not provided much regulation for defined contribution plans, making them an easier and more efficient option.[37] Further, defined benefit plans are more expensive. As noted above, defined benefit plans typically cost 8% of an employer's payroll, compared to the 0–3% cost of payroll needed to provide for a defined contribution plan.[38] These savings allow employers to reinvest more profits and expand operations, as well as providing them with an advantage over competitors locked into the long-term commitments associated with defined contribution plans.[39] Finally, the lower costs associated with defined contribution plans allow small businesses which could not previously afford a defined benefit plan to provide a retirement savings option for employees.[40]

Employees also obtained benefits from the shift, namely greater economic control over their plan investments and the portability of plan assets, allowing participants to continue to save for retirement under one plan while working for numerous employers across different lines of work.[41] Also, defined contribution plan participants, upon retirement, have access to a large fund of assets rather than a small monthly annuity.[42] This allows the retiree, after receiving a lump sum disbursement, to reinvest that money and slowly draw down on the account while leaving the remaining funds invested in bonds or other low-risk, low return investments. In this way, the retiree may focus solely on compensating for inflation while also keeping access to large amounts of funds in the case of an emergency.[43] With the strict annuity payments of defined benefit plans, these options are not available to a retiree.

The shift away from defined benefit plans contains significant downfalls for employees as well. Defined contribution plans are not governed by many of ERISA's strict disclosure requirements and shift the cost of administrative fees to the employee.[44] Thus, the fiduciaries who manage defined contribution plan accounts are not compelled to disclose their complicated fee structures, often leaving employees with less than they believed in their individual accounts and without an understanding as to why the account did not perform as expected.[45]

Most defined contribution plans offered by employers do not attempt to maximize plan coverage.[46] Instead, they require workers to opt-in to a plan.[47] This often results in a large number of nonparticipating employees.[48] In turn, these employees will not be able to achieve an adequate replacement rate, even if they decide to begin participating later in life, as they missed out on vital periods of account accumulation and growth. The availability of an affirmative choice to participate places many low-wage workers in a difficult position, as retirement savings often seem of little importance compared to the needs of the present; relatedly, those who do participate often do not contribute the maximum allowable amount.[49] Many employees do not face these difficult choices at all because of lack of plan access. The U.S. Department of Labor's National Compensation Survey in March 2008 found that 49% of workers do not have *any* access to an employer-sponsored retirement plan, creating a large group of workers without the means to achieve their needed replacement rate.[50]

Another major problem with defined contribution plans is leakage. Leakage occurs when employees access plan assets before retirement.[51] Employees with defined contribution plans may do so in one of three ways: cashing out the plan, taking a hardship withdrawal from the plan, or taking a loan from the plan.[52] Participants may only make hardship withdrawals from defined contribution plans for certain sets of conditions, like to offset college tuition costs or to finance the down payment on a new home.[53] These withdrawals are limited to those funds contributed by the employee.[54] Employees are not eligible for them if other avenues, like loans, are available to the participant.[55] Participants may also cash-out defined contribution plans when the employer either eliminates the plan or terminates the employee's employment and the employee fails to roll over the plan assets to an IRA.[56] Both of these types of withdrawals are subject to an additional 10% tax on top of the taxes already owed.[57] Loans against the plan are only subject to the additional 10% tax if the participant defaults on the loan.[58] If a default occurs, the amount of the loan is withdrawn from the account and then taxed appropriately.[59] Loans are on average the least contributing factor to plan leakage, probably because they require the unlikely event of a default on the loan before tapping plan assets.

Leakage takes place in relatively low amounts, adding up to just under $84 billion of lost 401(k) assets in 2006, or about 3% of total 401(k) assets.[60] However, when those losses occur at the individual level, they create considerable losses to an employee's individual retirement fund.[61] Further, recent studies report that over the course of the Great Recession, 60% of the unemployed tapped savings, including retirement accounts.[62] Thus, it is likely that such leakage figures are higher today than they were in 2006 because of the dramatic rise in unemployment over that period.[63]

Perhaps the most harmful consequence of the shift to defined contribution plans was the wholesale transfer of risk allocation and retirement savings responsibility from employers to employees. Under defined benefit plans, employers must contribute annual amounts of funds to a trust in order to comply with ERISA funding requirements.[64] Employers then invest those funds in the market, hoping that returns will help offset the annual cost of the plan.[65] Employers must insure their plan with the PBGC to obtain qualified status, thus guaranteeing that participants will receive their annuities no matter the state of their employer's or the plan's financial affairs.[66] In this way, ERISA provided employee retirement benefits invested through defined benefit plans with financial security, while placing the responsibility for funding and prudent investing on the employer. Indeed, Congress' desire to secure retirement benefits was one of the foremost reasons for passing ERISA.[67]

Defined contribution plans, by charging employees with the responsibility of investing their individual accounts, shift the risk of poor investment and catastrophe in the financial markets to the employee.[68] Most employees lack the required knowledge and training to make prudent investment decisions, as well as the time to obtain such training.[69] Employees near retirement become particularly exposed when a recession occurs or, as in 2008, financial markets crash. Those employees lack the time needed to recover their account balances before retirement.[70] Further, they are often the most susceptible group to unemployment during recessions, subject to enticements of early retirement and thus more likely to either cash-out of their plan without sufficient retirement funding or make high-risk investments in an attempt to quickly cover their losses to provide for immediate retirement needs.[71] In contrast, employees covered by a defined benefit plan who retire during a recession receive the same retirement benefit as they would have in any other year, as the economic climate does not disturb the calculation used to determine an employee's monthly pension.

Once the employer, if it elects to do so, deposits matching funds into the defined contribution plan account, its' investment in the plan is complete. The employer is not required to insure the plan under PBGC because the plan is always fully funded.[72] Thus, the employee's account lacks the insured security provided by defined benefit plans. Some argue that employees who invest 401(k)s in a prudent manner, such as in a life-cycle or index fund, will sufficiently insulate their account from adverse market forces and thus make PBGC or similar insurance coverage unnecessary. Yet even these relatively safe investments will expose employees to great amounts of risk over the long period of investment, resulting in the possibility of lower retirement savings than needed to meet an appropriate replacement rate.[73] Therefore, defined contribution plans, even when participants play by the rules and act prudently, do not provide a guaranteed retirement; instead they provide the *possibility* of a sufficiently funded retirement so long as prudent investment decisions are coupled with downright luck.[74]

Defined contribution plans also shift the cost of funding retirement from employers to employees.[75] While employers retain the ability to provide matching contributions in 401(k) plans, even before the Great Recession they only made, on average, one-third of plan contributions to individual accounts.[76] Thus even with employer contributions, the cost of funding 401(k) plans falls mainly on the employee. Average wages throughout the shift from defined benefit to defined contribution plans, beginning around 1980, remained surprisingly stagnant once inflation is taken into account.[77] Further, worker productivity continued to rise over that same period.[78] Thus, the money saved by employers when shifting to defined contribution plans did not result in an increase in employee wages, nor did it reflect a drop in expectations of work product. Because the savings achieved by the shift in retirement plan structure were not transferred to employees in the form of higher wages or other benefits, while also requiring the employee to personally provide funds from her wages for retirement, 401(k) plans represent a transfer of wealth from employees to employers. Thus, an employee currently holding a 401(k) account is likely paid less than her predecessor, so long as her predecessor was provided with a defined benefit plan.[79]

C. The Effect of the Great Recession on Defined Contribution Plan Assets

At the end of 2008, retirement plan losses incurred as a result of the Great Recession were sobering. The Investment Company Institute (ICI) found that retirement assets generally were down $3.9 trillion, or 22%, from 2007 levels.[80] IRA assets dropped $1.1 trillion, or 24%, while other defined contribution plans fell $985 billion, or 22%.[81] ICI estimated that retirement assets held in defined contribution plans and IRAs represented about 50% of all U.S. retirement assets as early as 2005, and those accounts maintained that heavy share of retirement savings through the end of 2008.[82] Fidelity Investments reported even greater losses, stating that the average 401(k) account fell 31% from January 2008 to March 2009.[83] Thus, many Americans received substantial losses to their retirement savings as a result of the Great Recession—losses that they would have avoided if they participated in defined benefit plans. This reality demonstrates the most pressing flaw in the current United States retirement system: the lack of retirement asset security. Any reform effort must place this problem as its top priority, as the current system not only punishes those who are not taking best advantage of its mechanisms, such as through 401(k) and IRA investments, but also arbitrarily punishes employees who act prudently with their investments only to become victim to sudden, large-scale market losses.

Some argue that those dire statistics are illusory and only represent the market at its worst while ignoring the impending market recovery. The Vanguard Group released a report on September 30, 2009 stating that its average 401(k) retirement account was up 7% from its level two years before.[84] Other financial firms are reporting similar findings.[85] However, those figures do not mean that 401(k)s and accounts like them are experiencing a complete recovery; nor does it mean that defined contribution plans are not in need of reform. First, the average rate of return varies from worker to worker, usually based upon how close that worker is to retirement.[86] Thus, the average account level means little, as it will take longer for some to catch up to their pre-recession levels than others based on age and contribution levels. Second, the 7% increase is likely an indication of continued contributions rather than real investment gains. The fact remains that employees lost at least one year of growth for their defined contribution plan accounts, lowering expected amounts at retirement. Stated differently, simply because accounts have recovered does not mean that they are meeting investment expectations.[87]

Third, the ability to continue to contribute to a 401(k) or an account rolled over into an IRA, and thus avoid substantial losses while ensuring a buy-in when the market recovers, requires employees to have a source of income. The United States unemployment rate has risen steadily throughout the Great Recession, thus eliminating the ability of many workers to make steady contributions to their accounts.[88] The dent to expected retirement account balances will vary with age, but is largely unavoidable for the ranks of the unemployed, flooded with the loss of eight million jobs over the course of the recession.[89]

Fourth, market recoveries do little for those who planned to retire, did retire, or were retired in 2008. Those planning to retire either kept on at work in order to continue making contributions to their accounts and avoid losses or did retire, either cashing out the plan entirely or rolling it over to an IRA with depleted assets. The need to quickly make up the losses incurred during the Great Recession will force those depleted assets into much riskier investments, without much help from continued contributions for those who forgo their planned retirement.[90] Thus, Great Recession retirees are subject to much greater risk than retirees in boom years. The retired face similar situations, as most cannot continue to contribute to their accounts without steady income and need to make up for the lost assets quickly to provide for retirement today rather than tomorrow. The fact that many retirees remained imprudently invested in stocks rather than safer investments like bonds was a large contributor to their heavy losses as well.[91]

Even young employees face substantial risks of a similar nature. The market's recovery is an expected event that can, with luck, protect younger employees from experiencing overall losses to retirement assets resulting from market fluctuations in their early career. However, other serious economic downturns are also expected events, thus subjecting employees to the luck of the draw when choosing or taking retirement.[92] This reality once again illustrates the major flaw in America's private retirement system: the lack of secure retirement assets. Any reform effort must place this issue as its top priority, as the current system not only punishes those who are not taking best advantage of its mechanisms, but also arbitrarily punishes employees who do act prudently with their investments.

D. Expansion of ERISA Regulations to Defined Contribution Plans by the United States Supreme Court

The shortfalls of ERISA to compensate for the risks to retirement security posed by defined contribution plans are largely due to the fact that the legislation was never intended to regulate such accounts.[93] New reform legislation is needed to re-establish regulatory controls over the security of retirement plan assets and retirement plan funding so that ERISA will remain relevant to the modern U.S. retirement system. The Supreme Court implicitly acknowledged this need in *LaRue v. DeWolff, Boberg & Associates, Inc.*[94] In that case, plaintiff LaRue instructed his employer "to make certain changes to the investments in his individual account" in 2001 and 2002.[95] The employer failed to make those changes, resulting in losses to LaRue.[96] LaRue brought suit under ERISA sections 502(a)(2) and 502(a)(3), alleging a breach of fiduciary duty by his employer and requesting the make-whole remedies provided by ERISA section 409(a).[97] The Court distinguished the case from prior precedent in *Massachusetts Mutual Life Insurance Co. v. Russell*,[98] where the Court stated in dicta that an individual may not recover under ERISA for individual losses, but only for losses to the entire plan that resulted from a breach in fiduciary duty.[99] The Court acknowledged that the prior dicta and its phrasing were outdated and that "the former landscape of employee benefit plans . . . . has changed" to favor define contribution plans.[100] The Court narrowed the "entire plan" language of *Russell* to apply to defined benefit plans only and held that a fiduciary breach which lowers a defined contribution plan participant's account level is the sort of wrong envisioned by Congress for remedy under section 409.[101] Thus, the Court held that ERISA provides defined contribution plan participants a remedy for a fiduciary breach that creates losses in her individual account under section 502(a)(2).[102]

This Supreme Court ruling should send a strong message to Congress that the heyday of defined benefit plans is over. While the Court may expand certain pieces of ERISA to include protections for defined contribution plan participants, it cannot simply invent substantive provisions to create parity between ERISA's provisions, Congress's intentions in passing ERISA, and today's economy. The Great Recession highlighted many of the problems facing the private retirement system today, including: poor investment returns from defined contribution plans, resulting from a participant's uniformed decision-making and market downturns; a lack of consistent contributions to defined contribution plans; the mismanagement of plan assets and complicated administrative fee structures imposed by fiduciaries; and the vulnerability of defined contribution plan participants who are laid off, near retirement, or currently retired to inadequate retirement funding. Only Congress can address such systemic problems in a substantial and effective manner.

IV. Presidential and Congressional Reform Proposals

On June 17, 2009, the Treasury Department published a white paper outlining the President's proposal for retirement funding reform.[103] It acknowledged that many employees lack any retirement plan coverage, and that the average defined contribution plan lacked the funds needed to meet the required replacement rate even before the Great Recession.[104] Indeed, a 2009 study by the Center for Retirement Research at Boston College found that the combined median amount of 401(k) and IRA assets in 2007 for employees age 55–64 was only $78,000.[105] The study compared that finding to market simulations which found that an employee aged 55–64 with a $50,000 salary making consistent 6% contributions with a 3% match over thirty years should result in an account of $340,000.[106] While this disparity is likely a result of defined benefit plans also supporting that age group's retirement, younger age groups show similar disparities as well.[107] The Obama administration would like to combat underfunding and the lack of plan access by requiring employers that have more than ten employees and do not offer retirement plans to offer IRA accounts with automatic enrollment.[108] The plan will not force employees to participate, but would require them to opt out of the plan to avoid making automatic payments to the account from each paycheck.[109] The plan would limit investment options by statute to certain low-cost, low-risk options, likely to include life-cycle and certain index funds.[110] The plan would also modify the Saver's Credit for households making less than $65,000 a year.[111] The Saver's Credit provides low- to middle-income households with tax credits for contributions to defined contribution plans. The administration's proposal would increase the tax credit to match the annually invested amount and make it fully refundable, the refunded amount being automatically added to the participant's account.[112] Thus, it would act more like a matching contribution than a tax credit for most applicable taxpayers, who for the most part already receive refunds from their taxes. The white paper also stressed a need for simplicity and fairness in 401(k) and IRA retirement plans, and acknowledged other areas that need improvement, including the use of hidden and unduly burdensome fees in defined contribution plans as well as leakage from defined contribution plans.[113]

Congress reacted quickly. On June 23, 2009, the House Committee on Education and Labor (HCEL) introduced the 401(k) Fair Disclosure and Pension Security Act of 2009, H.R. 2989,[114] a bill that combined two other bills which were reported out of subcommittee, the 401(k) Fair Disclosure for Retirement Security Act of 2009, H.R. 1984,[115] and the Conflicted Advice Prohibition Act, H.R. 1988.[116] H.R. 2989 will create strict fee disclosure standards by requiring each quarterly statement for an individual account to include a single dollar amount of funds expended on fees, as well as fee disclosures broken down into four categories so that participants know what types of fees are being charged.[117] It will also require that participants receive investment education materials, access to at least one low-cost index fund, and the disclosure of all potential conflicts of interest between the employer and the plan administrator.[118] HCEL reported the bill out of committee on July 31, 2009. As of the writing of this paper, the bill was under consideration by the House Ways and Means Committee.

The proposed plan by the Obama administration, supplemented by H.R. 2989, provides a great beginning to regulating defined contribution plans. Indeed, the proposed legislation would clarify and simplify fee disclosures so that employees can better understand their quarterly investment statements. However, the proposals will not create maximum coverage of working Americans, prevent leakage, or provide asset security. While the administration's proposal would address some leakage issues, particularly acting to decrease plan cash-outs by establishing a uniform retirement account for many employees, hardship withdrawals remain available and employees under different employer-sponsored plans still might choose to cash-out upon termination of employment rather than roll over the account. Automatic enrollments, coupled with the employer mandate to provide an IRA account will create substantially more retirement plan participation. However, mandatory coverage of employees will create almost universal coverage, and thus is more desirable.

The mandatory availability of index funds will improve the security of retirement assets, but this is not a fail-safe option. Investors still face considerable risk investing in an index or even a life-cycle fund.[119] While ensuring the availability of these investment options increases the probability of securing retirement funds against market fluctuations, they do not provide the same PBGC guaranty as defined benefit plans and do nothing to secure the assets of those planning to retire when a recession occurs.

V. Proposed Policy Alternative

The ideal piece of reform legislation would combine the advantages of defined benefit and defined contribution plans while minimizing their weaknesses. Thus, it should provide for some security of retirement assets, portability, the greatest possible expansion of coverage, affordable and unambiguous plan options, freedom to allocate the use of assets upon retirement, and disincentives for leakage. Further, it should accomplish these goals with minimal cost and in a manner that fairly balances the burden of funding retirement between employers, employees, and the federal government.

Pamela Perun and Eugene Steuerle proposed the "Super Simple Savings Plan" to the Urban Institute in 2008.[120] Modeled on recent reforms in the United Kingdom, the proposal would provide for a simpler, standardized defined contribution plan to which an employee would make periodic contributions.[121] Both the employer and the United States government would make some level of matching contributions.[122] The plan would be portable because the account would attach to the employee and thus follow her from job to job.[123] This proposal would not change current law for leakage concerns.[124] The plan would also provide for automatic enrollment, thus boosting participation levels.[125] The driving force for these authors is to eliminate the complicated web of different 401(k)-type plans. While intriguing, this proposal is seriously flawed. It does nothing to increase the security of retirement investments and leaves employees heavily exposed to market fluctuations. It does not call for the preferable mandatory plan participation feature, thus leaving some employees without a retirement plan. Also, it does not attempt to address leakage concerns.

The ERISA Industry Committee (ERIC) proposed the "New Benefit Platform for Life Security" plan.[126] The proposal provides for centralized, independent benefits administrators as an alternative to plans administered by employers.[127] Employers who use this plan could choose the type of plan offered to employees.[128] Of interest is the proposed Guaranteed Benefit Plan (GBP), a new type of hybrid plan.[129] The GBP would require employees and employers to make periodic contributions to individual accounts.[130] The PBGC would insure those contributions, thus guaranteeing to an employee the contributed amounts upon retirement while allowing for investment returns to fuel an employee's retirement fund.[131] Upon retirement the plan would provide either an annuity or a stream of payments.[132]

While promising, this proposal does not make clear how it will create portability. Although the centralized plan administration will create portability among employers using the plan, the plan is not mandatory. Thus, plans will only be portable if an employee's new employer also uses the ERIC plan. While the GBP is an innovative idea, it is not a mandate either. Thus, it is probable that this plan will not secure retirement assets any better than the Super Simple Savings Plan, as employers, when presented with the option, will almost always choose the less expensive defined contribution option to avoid PBGC insurance fees. Nor does the proposal address leakage concerns from defined contribution plans. The proposal mainly focuses on separating the employer from plan sponsorship, while providing employees with a new private retirement plan option separate from their employment. However, this would only overly complicate an already complicated system. It is unclear why employees would desire this new arrangement. As this proposal primarily represents an addition to the bureaucracy of plan administration, it fails to provide remedies to the problems set out at this section's beginning.

Michael Calabrese proposed the Universal 401(k) Plan in 2007.[133] The goal of this plan is to provide universal access to retirement plan coverage.[134] Employers without a plan of their own would enroll employees in a government-run defined contribution plan.[135] Employees could opt-out of this automatic enrollment, and the plan would not require employers to provide matching contributions.[136] Individual accounts would invest in life-cycle funds unless otherwise specified.[137] Like other 401(k) accounts, this plan would be fully portable.[138] To combat leakage, the proposal prohibits loans from the plan, but does not eliminate hardship withdrawals.[139] Benefits are provided in annuity form upon retirement unless otherwise specified by the employee.[140]

This proposal is similar to that of the Obama administration. The major difference lies in the annual cap on contributions of the favored savings vehicles. Calabrese's plan uses 401(k) plans, which allow a participant to save substantially more annually than the IRAs used in Obama administration's proposal.[141] Importantly, Calabrese's plan is inexpensive and will not cause major disruptions through its implementation. However, its attempt to prevent leakage targets the wrong issue. Defaulted loans against 401(k) plans resulted in total losses of $561 million in 2006, a miniscule amount when compared to the $9 billion in total assets lost through hardship withdrawals over the same period.[142] Yet the plan *would* eliminate the majority of leakage by preventing cash-out opportunities when employees change jobs. The encouragement of sound savings practices through conservative default modes is an innovative idea and should be commended. However, sound practices only lower the possibility of losses; they do not eliminate them. This proposal does not provide enough security to retirement assets, as account assets are still subject to market fluctuations. Thus, the quality of retired life will still depend largely on whether an employee retires in a bear or bull market and whether the employee made fortuitous investment decisions.

Two types of hybrid plans, or plans that use aspects of both defined contribution and defined benefit plans, could provide a sufficient framework for a national system. The first is a cash balance plan. These plans provide employees with a credit, generally determined as a percentage of their salary, for each year of service.[143] Those credits are deposited into an individual account.[144] However, the plan does not treat the accounts individually, and invests the plan assets pooled together.[145] These plans do not rely on employees electing to contribute and are normally dispersed in the form of an annuity, with the option of a lump sum distribution.[146] Thus, cash balance plans simplify the traditional defined benefit plan while allowing an employee to receive a firm number as to the value of her retirement benefit.

Professor Ghilarducci presented a similar type of plan as the basis for national reform to the Economic Policy Institute in 2007.[147] Her proposal, entitled the "Guaranteed Retirement Account Plan" (GRA), would require mandatory participation for all employers and employees. Employees would contribute 2.5% of their yearly wages, an amount fully matched by the employer.[148] The plan would contribute those funds to the employee's individual account, held in a centralized fund by the federal government.[149] The federal government in turn would provide a $600 refundable tax credit for all workers and would guarantee a minimum 3% return on plan investments.[150] The government would pool investment risks and invest deposited plan assets together.[151] Upon retirement, employees must annuitize their account.[152] However, an employee could opt to receive the lesser of $10,000 or 10% of the account assets in a lump sum.[153]

This proposal meets much of the desired criteria for reform. Its centralized structure provides for portability. The participation mandate will maximize employee savings and increase portability as well. The proposal would prohibit leakage except in the case of disability, and guarantees retirement benefits through mandatory coverage and annuities. The plan would adjust the mandatory annuities annually for inflation, thus providing the same benefit as defined contribution plans that remain conservatively invested after retirement. Also, it provides for a guarantee of an annual 3% return, just as the PBGC insures that defined benefit plans will pay the promised retirement assets. Finally, the plan provides for a maximum $10,000 cash-out upon retirement. A retiree could reinvest those funds in low-risk investments to serve as a rainy day fund in case of emergency. The plan's downside is that it increases the financial liability of the federal government. If the government invests funds poorly as a fiduciary, it would need to either raise taxes or take out loans to make up for the guaranteed 3% return. The plan would also require the creation of government administrators. These factors could potentially cause the plan to become too expensive for practical implementation.

Another hybrid plan that could act as a format for national reform is the floor-offset plan. Floor-offset plans provide for both a defined benefit and defined contribution plan working together to provide a retirement benefit. As described in *Brengettsy v. LTV Steel (Republic) Hourly Pension Plan*,[154] under a floor-offset plan an employer sponsors both a defined benefit and defined contribution plan. The employee is entitled to some annuity payment under the defined benefit plan, but that annuity payment is adjusted to take into account the employee's earnings in her defined contribution plan.[155] Throughout an employee's career, the employee may contribute to her individual account.[156] Upon retirement, the employee's annuity entitlement under the defined benefit plan is calculated based on years of service and final salary.[157] This calculation becomes a floor for the employee's annuity.[158] Then the employer calculates the size of the annuity that the employee could purchase with her defined contribution plan at the time of retirement.[159] That number is subtracted from the floor amount to determine the monthly annuity owed to the retiree by the defined benefit plan.[160] At this juncture, an employee may either liquidate the defined contribution plan and purchase the full annuity entitlement or take the annuity less the hypothetical annuity that the individual account would purchase, leaving the defined contribution plan to grow or shrink through investments.[161] Under the holding in *Brengettsy*, a retiree may not recover losses that occur after this calculation is made;[162] thus if an employee holds onto her defined contribution plan after retiring, she then takes the risk of investment losses and falling below the floor entitlement.

A national floor-offset plan[163] would allow participants to invest in the market tax-free while providing a floor benefit, thus ensuring that the participant will not lose all of her retirement savings because of market downturns. Those employees who retire in boom years will likely cover the floor benefit through their own investments and thus not drain the defined benefit plan at all. Those who retire in recessions will still receive a sizeable annuity if their defined contribution plan receives heavy losses, as the defined benefit plan will supplement the employee's account balance to provide for the full floor benefit annuity. With proper financial regulation, the risk of severe defined contribution account losses can be lowered significantly, thus lowering the defined benefit plan's funding requirements.[164] The plan would also pool the risk of employees not covering the floor benefit among most employers through the central administration of the defined benefit plan, thus lowering the funding costs for employers even more and, in essence, creating a system of insurance rather than a funded defined benefit plan.[165] In this way, the plan's funding requirements will be much less onerous and costly than that of a traditional defined benefit plan. Through the centralized system run by either the government or a private nonprofit organization, coupled with a requirement that employers employing more than 50 employees buy into the plan,[166] the plan would build a largely portable private retirement fund. The centralized plan should allow for plan exchanges for an initial period, allowing employees and employers to switch plans while retaining their accrued benefits. Thus, current account levels for defined contribution plan participants would not be affected. Leakage should be limited to hardship withdrawals for disability only, thus preventing the use of these accounts as tax shelters for investment profits.[167]

This plan would encourage the purchase of annuities for those that cover the floor benefit by making the annuity the default option upon retirement. The plan's structure will make this easier to do by its very operation. When an employee announces her intention to retire, the plan administrator will determine whether the employee's defined contribution plan account has sufficient funds to purchase an annuity greater than the floor annuity offered by the employer. Necessarily, the plan administrator must identify the employee's insurance options and then determine which will provide the highest monthly annuity for the employee. Thus, if the employee is able to buy a larger monthly annuity than the floor annuity, as a rule the plan administrator will provide that employee with the necessary information to obtain the best annuity possible with the funds she accumulated in her defined contribution account. This policy would not force the employee's hand on the matter, thus preserving the choices provided by a traditional defined contribution plan and allowing the employee greater freedom to decide how and when to spend her retirement funds. As a result of these mechanisms, annuities would become less expensive because participants would buy them in larger quantities, thus pooling the risk of such insurance. Those that do not cover the floor benefit with their defined contribution plan would still have the choice to either take the full floor annuity or take a reduced annuity in order to continue investing in the market.

As for a funding arrangement, the plan's defined contribution account would operate as a 401(k) plan. It would require employees to provide a small percentage of their wages to the defined contribution plan, along with a maximum ceiling.[168] Matching funds would come from the government for funds contributed voluntarily. The employer would then only need to provide for the plan's defined benefit funding, hopefully bringing those expenditures in line with the current high-end cost of defined contribution plans, 3% of payroll.[169]

The floor-offset plan might lead to riskier investments by employees because of the guaranteed floor annuity. Thus, to be successful, the plan should provide as the floor benefit a minimum replacement rate of an employee's average salary, calculated with Social Security benefits in mind. This is necessary to incentivize participants to invest prudently; it also serves to lower the burden of funding the plan on the employer even further.

Thus, the floor-offset plan would provide comprehensive reform for the U.S. retirement system, and would conform it to the desired regulatory effect of ERISA. It would provide near universal coverage, a level of retirement income security, and would split the burden of funding retirement between employees, employers, and the government. Through centralization it would cut administrative costs and transactional fees, making the plan more affordable. While employers might pay slightly more than they would for a bare 401(k) plan, this proposal will not subject them to the hefty costs of traditional defined benefit plans while providing employees with similar advantages. Finally, the plan takes affirmative steps to eliminate leakage. Thus, this plan would remedy the ills of the existing retirement system while keeping in place the advantages of defined contribution plans, and accomplishes this goal at minimal cost.

V. Conclusion

When Congress enacted ERISA to regulate private retirement benefits, it did not envision the current state of affairs. Heavy regulation of defined benefit plans, along with the low costs of defined contribution plans and the need to adapt to a changing economy, resulted in a shift from defined benefit plans to defined contribution plans as the primary retirement savings vehicle of most Americans. The lack of regulation and inapplicability of many ERISA protections to such plans has created widespread problems for retirees and employees nearing retirement, many of which were highlighted by the Great Recession. Congress must recognize that retirement security, one of the central reasons for passing ERISA, no longer exists for many Americans, even those currently covered by employer-sponsored retirement plans. The proposals outlined in this article present a number of viable methods to increase the retirement savings of United States workers. Proposals like the floor-offset plan and the GRA Plan work well to reinstate a level of security for retirement savings without abandoning the benefits of a defined contribution plans. While other proposals may accomplish this goal as well, this is clear: congressional action is needed sooner than later to fix the myriad of problems currently present in the United States retirement system.

ENDNOTES

[1] *See* Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of* Aetna Health Inc. v. Davila, 54 CATH. U. L. REV. 1039, 1045 (2005) ("The law's stated purpose was to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." Over the years, Congress expanded the scope of ERISA to cover health insurance and health benefits." (quoting 29 U.S.C. § 1001(b) (2000))); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses under ERISA*, 76 IOWA L. REV. 431, 434–35 (1991) ("ERISA had and continues to have broad socioeconomic significance for the entire aging American laborforce.").

[2] Watson, *supra* note 1, at 434 ("This testimony resulted in the 1974 enactment of ERISA which represented a major bipartisan effort that triumphed over conflicting lobbying interests and strong tensions between the legislative and executive branches.").

[3] *See* Robert W. Humphries, *Defined Benefit Plans Versus Defined Contribution Plans: How Are the Interests of the Public Best Served?* 6 EMP. RESP. & RTS. J. 21, 21 (1993); *see also infra* notes 28–32.

[4] U.S. Dep't of Labor, *Types of Retirement Plans*, http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited April 10, 2010).

[5] *Id.*

[6] *Hearing on Defined Benefit Pension Funding Levels and Investment Advice Rules Before the H. Comm. on Ways & Means*, 111th Cong. (2009) [hereinafter *Silvers Ways and Means Hearings*] (statement by Damon Silvers, Associate General Counsel, AFL-CIO), *available at* http://waysandmeans.house.gov/Hearings/Testimony.aspx?TID=225.

[7] U.S. Department of Labor, *supra* note 4.

[8] *Silvers Ways and Means Hearings*, *supra* note 6.

[9] *See* 26 U.S.C. § 401 (2006); *see also* John R. Keville, Note, *Retire at Your Own Risk: ERISA's Return on Investment*?, 68 ST. JOHN'S L. REV. 527, 532–33 (1994) ("Specifically, ERISA has four primary goals: to protect the interests of pension plan par [*533] ticipants and their beneficiaries, to protect employees and improve pension plans through regulation of plan design and operation, to provide the government with the means to enforce ERISA regulations, and to establish pension insurance to protect against defined-benefit plan failure. In general, ERISA's regulations were directed toward defined-benefit plans. Defined-benefit plans comprised the majority of private pensions at the time of ERISA's enactment and were subject to underfunding and other abuses.").

[10] Pension Benefit Guaranty Corporation, *General FAQs about PBGC*, http://www.pbgc.gov/about/wrfaqs.html#what_is (last visited April 10, 2010).

[11] 26 U.S.C. § 404(a)(1)–(3) (2006). Employees are not taxed on their retirement assets until distribution. 26 U.S.C. § 402(a) (2006). Further, the trust's investment earnings are tax free. 26 U.S.C. § 501(a) (2006).

[12] *See* JOHN H. LANGBEIN ET. AL., PENSION AND EMPLOYEE BENEFIT LAW 44 (Robert C. Clark et al. eds., 4th ed. 2006) ("ERISA's regulatory regime is centered on DB plans, which were dominant at the time the statute was enacted. It is unlikely that ERISA would have been enacted

if all plans had been DC plans. Neither the funding rules of ERISA Title 1, Part 3, nor the plan insurance scheme of Title 4 apply to DC plans.”).

[13] *See* U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, H. COMM. ON EDUC. AND LABOR, NO. 09-642, PRIVATE PENSIONS: ALTERNATIVE APPROACHES COULD ADDRESS RETIREMENT RISKS FACED BY WORKERS BUT POSE TRADEOFFS 4–5 (2009), *available at* http://www.gao.gov/new.items/d09642.pdf [hereinafter *GAO, Private Pensions: Alternate Approaches*].

[14] *See id.* at 5.

[15] *See* Ken J. Moyle, Comment, *A Cultural Exchange: Singapore and the United States Can Learn From Each Other In Restructuring Social Security Plans*, 6 PAC. RIM L. & POL’Y J. 449, 456 (1997) (“The Social Security Act of 1935 established old-age income benefits and a federal-state system of unemployment insurance to protect the elderly from indigence late in life - to prevent, in President Roosevelt's words, a ‘poverty-ridden old age.’” (quoting Peter G. Peterson, *Will America grow up before it grows old?*, ATLANTIC, May 1, 1996, at 55.)).

[16] *GAO, Private Pensions: Alternate Approaches*, *supra* note 13, at 6.

[17] *See id.*; Jonathan Skinner, *Are You Sure You’re Saving Enough for Retirement*, J. ECON. PERSP., Summer 2007, at 59, 59–80, *available at* http://www.dartmouth.edu/~jskinner/documents/SkinnerAreyouSure.pdf.

[18] *GAO, Private Pensions: Alternate Approaches*, *supra* note 13, at 6 (citing ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, 198–99 (2009)).

[19] *Id.*

[20] U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, H. COMM. ON EDUC. AND LABOR, NO. 08-08, PENSION PLANS: LOW DEFINED CONTRIBUTION PLAN SAVINGS MAY POSE CHALLENGES TO RETIREMENT SECURITY, ESPECIALLY FOR MANY LOW-INCOME WORKERS 3 (2007), *available at* http://www.gao.gov/new.items/d088.pdf (“[A]bout 37 percent of the sample population would have zero savings from DC plans when they retire. Workers in the lowest income quartile have projected replacement rates of 10.3 percent on average, but 63 percent of these workers are projected to have no DC savings at retirement.”).

[21] *See supra* notes 46–50 and accompanying text.

[22] Ross Eisenbrey, Vice-President, Econ. Pol’y Inst., address to the National Press Club, Why We Need Retirement USA (March 10, 2009), *available at* http://www.epi.org/publications/entry/why_we_need_retirement_usa/.

[23] *See id.* (stating that the average 401(k) account level for those approaching retirement age is currently $40,000).

[24] *See, e.g.*, David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091 (2008).

[25] James Ridgeway, *Who Shredded Our Safety Net?* MOTHER JONES, May/June 2009, *available at* http://motherjones.com/politics/2009/05/who-shredded-our-safety-net.

[26] *See* Employee Benefit Research Institute, *History of 401(k) Plans: An Update* (Feb. 2005) [hereinafter *401(k) History*], *available at* http://www.ebri.org/pdf/publications/facts/0205fact.a.pdf.

[27] *See* Ridgeway, *supra* note 25.

[28] Regina T. Jefferson, *Striking a Balance in the Cash Balance Plan Debate*, 49 BUFF. L. REV. 513, 523 (2001).

[29] *Id.* at 523–24.
[30] Regina L. Readling, *Rethinking "The Plan": Why ERISA Section 502(a)(2) Should Allow Recovery to Individual Defined Contribution Pension Plan Accounts*, 56 BUFF. L. REV. 315, 322 (2008) (citing Employee Benefit Research Institute, *Participation in Employee Benefit Programs, in* EBRI DATABOOK ON EMPLOYEE BENEFITS (2005)).
[31] Employee Benefit Research Institute, *Participation in Employee Benefit Programs, in* EBRI DATABOOK ON EMPLOYEE BENEFITS (2008) (updated), *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2004.pdf.
[32] U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, S. SPECIAL COMM. ON AGING, NO. 09-715 401(K) PLANS: POLICY CHANGES COULD REDUCE THE LONG-TERM EFFECTS OF LEAKAGE ON WORKERS' RETIREMENT SAVINGS 5 (2009), *available at* http://www.gao.gov/new.items/d09715.pdf [hereinafter *GAO, 401(k) Plans: Leakage*]. "The assets in 401(k) plans also increased significantly over the same time period, from less than $100 billion to over $3 trillion." *Id.*
[33] Readling, *supra* note 30, at 324.
[34] Craig C. Martin & Joshua Rafsky, *The Pension Protection Act of 2006: An Overview of Sweeping Changes in the Law Governing Retirement Plans*, 40 J. MARSHALL L. REV. 843, 848 (2007) ("[D]efined benefit plans reward longevity and discourage mobility. However, the American workforce has become increasingly mobile, and younger employees are attracted to the portability of defined contribution plans. Similarly, the changing workplace, as demonstrated by the decline of the number of large unionized companies and traditional industries sponsoring defined benefit plans, has contributed to the erosion of the popularity of defined benefit plans.").
[35] *See id.* at 846–50.
[36] *See id.* at 847 ("Several factors have contributed to the decline of the defined benefit program in favor of the defined contribution program. First, defined benefit plans are more costly to maintain than defined contribution plans. Those costs are associated with the myriad of complicated provisions of the Employee Retirement Income Security Act ("ERISA"), which has been a factor in the decline of defined benefit plans. ERISA places heavy regulatory burdens on defined benefit plans, such as complex minimum funding requirements, high premium payments to the Pension Benefit Guaranty Corporation ("PBGC"), and high administrative fees."); Keville, *supra* note 9, at 536–37 ("Regulation that disproportionately affected defined-benefit plans continued over the ensuing years, rendering these plans less attractive to employers . . . . As the regulation of defined-benefit plans increased, federal regulations impacting defined-contribution plans tended to be more liberal.").
[37] Henry H. Drummonds, *The Aging of the Boomers and the Coming Crisis in America's Changing Retirement and Elder Care Systems*, 11 LEWIS & CLARK L. REV. 267, 295 (2007) ("ERISA's substantial compliance burdens made the much-less-regulated defined contribution plans more attractive.").
[38] *See* notes 6 & 8 *supra* and accompanying text.
[39] *See* Martin & Rafsky, *supra* note 34, at 848–49.
[40] *See* Keville, *supra* note 9, at 535, 539 n.79.
[41] *See* Readling, *supra* note 30, at 325.
[42] *Id.*
[43] It should be noted that while a possibility, nothing guarantees this course of action. Thus, employees who invest well before retiring may make poor investment decisions in retirement so

as to fall behind inflation or to lose their savings altogether. *See GAO, Private Pensions: Alternative Approaches*, *supra* note 13, at 18–19.
[44] *GAO, Private Pensions: Alternative Approaches, supra* note 13, at 17–18.
[45] *See id.*
[46] Jefferson, *supra* note 28, at 623 ("[I]n a defined contribution plan, it is often the employee who makes the decisions about participation, contribution, and asset management.").
[47] *Id.*
[48] *Id.*
[49] *See* PATRICK PURCELL, CONGRESSIONAL RESEARCH SERVICE, RETIREMENT PLAN PARTICIPATION AND CONTRIBUTIONS: TRENDS FROM 1998 TO 2006 (2009), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1603&context=key_workplace; John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 50–55 (2002).
[50] *GAO, Private Pensions: Alternative Approaches*, *supra* note 13, at 9–10 (citing the U.S. Department of Labor's Bureau of Labor Statistics). It should be noted that those who do not have access to employer-sponsored plans do have other retirement savings vehicles available. For instance, IRAs are available for those workers who do not have access to an employer-sponsored defined contribution plan. However, IRAs have a yearly contribution rate that is substantially less than employer-sponsored options like 401(k) plans, and thus have less potential for growth. *See* Employee Benefits Legal Resource Site, *Maximum Benefits and Contribution Limits for 2005–2010*, http://benefitsattorney.com/modules.php?name=415 (last visited April 10, 2010) (Currently, $5,000 IRA contribution limit for individuals under 50, and $6,000 IRA contribution limit for individuals over 50, compared to a 16,500 individual contribution limit for 401(k) accounts). Thus, IRAs act best as a supplement to an employer-sponsored retirement plan rather than as an employee's primary retirement vehicle.
[51] *GAO, 401(k) Plans: Leakage*, *supra* note 32, at 1.
[52] *Id.*
[53] *Id.* at 9–10.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 17.
[61] *Id.*
[62] N.Y. TIMES POLL, *Unemployment's Emotional Toll*, *available at* http://www.nytimes.com/interactive/2009/12/14/us/poll.html (last visited May 31, 2010).
[63] U.S. LABOR DEPARTMENT, BUREAU OF LABOR STATISTICS, *Unemployment Rates by Year and Month 1999-2009*, *available at* http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS 14000000 (last visited May 31, 2010).
[64] PENSION BENEFIT GUARANTY CORPORATION, A PREDICTABLE SECURE PENSION FOR LIFE 13–15 (Jan. 2000), *available at* http://www.pbgc.gov/docs/a_predictable_secure_pension_for_life.pdf.
[65] *Id.*

[66] *Id.* at 16–19.

[67] Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration, and Other Employee Benefits Woes – Evaluating ERISA at Age Thirty*, 53 BUFF. L. REV. 1193, 1198 (2005) (reviewing JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 – A POLITICAL HISTORY (2004)) (paraphrasing Prof. Wooten's argument, stating that "[h]e demonstrates how a strong legislative drive for worker pension security – a component of employee welfare – came to dominate the process that resulted in the statute we live with today.").

[68] Angela Boothe Noel, *The Future of Cash Balance Plans: Inherently Illegal or a Viable Pension Option?*, 56 ALA. L. REV. 899, 901 (2005) ("In contrast to a defined benefit plan, the employee, not the employer, decides how to invest such contributions for most 401(k) plans. As a result of this feature, the investment risk falls fully on the employee instead of on the employer, as it does in a defined benefit plan.").

[69] *See* Keville, *supra* note 9, at 543–545.

[70] *See* Jack VanDerhei, Employee Benefit Research Institute, *The Impact of the Recent Financial Crisis on 401(k) Balances*, ISSUE BRIEF figs.8 & 9 (February 2009), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_2-2009_Crisis-Impct.pdf.

[71] *See Hearing on S. 1756: Protecting Older Workers Against Discrimination Act, Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. (May 6, 2010) (statement of Jacqueline A. Berrien, Chair, U.S. Equal Employment Opportunities Commission), *available at* http://www.eeoc.gov/eeoc/events/berrien_protecting_older_workers.cfm ("[I]t appears that age-based stereotypes operate to disadvantage older workers in corporate "downsizing" situations, in particular. Because the main goal of such downsizing is usually to cut costs, age-based stereotypes that older workers are more costly, harder to train, less flexible, or less competent may become much more prominent in the minds of the decision-makers. To make matters worse, once older workers are laid off, they often are again vulnerable to age-based stereotyping as they attempt to find new jobs. It seems older workers who have been laid off are less likely to obtain reemployment than younger workers, take longer to find new jobs than younger workers, and generally fail to obtain jobs paying the same wages as their previous positions."); Janice Revell, *Early Retirement? Why It Pays to Stay*, MONEY MAGAZINE, December 11, 2008, *available at* http://money.cnn.com/2008/09/05/retirement/take_buyout.moneymag/index.htm.

[72] In other words, once the funds are deposited the employer holds no responsibility for investment success, unless it acts as a fiduciary to the account; thus it is not required to provide insurance for possible market downturns. Further, the plan will not be underfunded at the time of plan termination because the after contributions are made to the account as required by the plan, the plan is fully funded. *See* Keville, *supra* note 9, at 543–545 ("A second area in which participants in defined-contribution plans lack the protection envisioned by ERISA is pension plan insurance. The PBGC provides insurance against the termination of defined-benefit plans that lack sufficient funds to pay pension liabilities. No such protection is currently provided for defined-contribution plans, however, since they are fully funded.").

[73] PATRICK PURCELL & DEBRA B. WHITMAN, CONGRESSIONAL RESEARCH SERVICE, RETIREMENT SAVINGS: HOW MUCH WILL WORKERS HAVE WHEN THEY RETIRE? 15 (2007), *available at* http://opencrs.com/document/RL33845/. In summary the report found "that a married-couple household that contributed 8% of pay annually for 30 years beginning at age 35 to a retirement plan invested in a mix of stocks and bonds could expect have accumulated $468,000 (in 2004

dollars) by age 65 if rates of return were at the median over the 30-year period. Nevertheless, given the variability of rates of return, there is a 5% chance that the couple would have $961,000 or more and a 5% chance that the couple would have $214,000 or less." *Id.* at Summary.

[74] *See id.*

[75] Joshua A. Dean, Comment, Wilson v. Wilson: *The Effect of QDROs on Appealing Divorce Decrees*, 42 AKRON L. REV. 639, 654 (2009) ("The defined contribution plan is becoming increasingly popular as employers try to shift the risk of funding retirement to the employee.").

[76] Eisenbrey, *supra* note 22.

[77] *See* CLAUDIA GOLDIN & LAWRENCE F. KATZ, NATIONAL BUREAU OF ECONOMIC RESEARCH, LONG-RUN CHANGES IN THE U.S. WAGE STRUCTURE: NARROWING, WIDENING, POLARIZING (2007), *available at* http://www.brookings.edu/es/commentary/journals/bpea_macro/forum/200709goldin_katz.pdf; LAWERENCE MICHEL, JARED BERNSTEIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., THE STATE OF WORKING AMERICA (2008/2009), *available at* http://www.stateofworkingamerica.org/.

[78] *See* Paul Krugman, *Reagan Mythbusting, Productivity Edition*, N.Y. TIMES, Nov. 9, 2009, *available at* http://krugman.blogs.nytimes.com/2009/11/09/reagan-mythbusting-productivity-edition/; LAWERENCE MICHEL, JARED BERNSTEIN & HEIDI SHIERHOLZ, *supra* note 77.

[79] *See supra* notes 25–32 and accompanying text for a discussion of the prevalence of defined benefit plans in the early 1980s; *see also Hearing on Regulation of Systemic Risk in the Financial Services Industry Before the H. Financial Services Comm.* 111th Cong. 14 (2009), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/afl-cio_-_silver.pdf (statement by Damon Silvers, Associate General Counsel, AFL-CIO) (arguing that the shift to defined contribution plans hides "a 5 percent real pay cut."). It should be noted that the 5% pay cut identified by Silvers does not include losses that result from employee wages expended on funding defined contribution plans. Nor does that finding reflect the failure of wages to track the rising productivity of the American worker.

[80] INVESTMENT COMPANY INSTITUTE, RESEARCH FUNDAMENTALS, U.S. RETIREMENT MARKET 2008, 1–2 (June 2008), *available at* http://www.ici.org/pdf/fm-v17n3.pdf.

[81] *Id.*

[82] *Id.*

[83] Steven Gandel, *Why It's Time to Retire the 401(k)*, TIME, Oct. 19, 2009, at 28.

[84] Karen Blumenthal, *Surprise! That 401(k) Account Is Looking Good*, THE WALL STREET JOURNAL, Oct. 21, 2009, *available at* http://online.wsj.com/article/SB10001424052748703816204574485161754476316.html.

[85] *Id.*

[86] In other words, it is much easier for a small retirement account to recoup its losses through riskier investments, especially when operated on behalf of a younger employee. It is much more difficult to create a 7% increase on the investment level of older workers with significant account levels, many of whom lost half of their earnings and are unable to make riskier investments because of impending retirement.

[87] *See* Jack VanDerhei, Employee Benefit Research Institute, *The Impact of the Recent Financial Crisis on 401(k) Balances*, ISSUE BRIEF figs.8,9 (February 2009), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_2-2009_Crisis-Impct.pdf.

[88] Trading Economics, *United States Unemployment Rate*, http://www.tradingeconomics.com/Economics/Unemployment-Rate.aspx?Symbol=USD (last

visited May 31, 2010) (Website contains a graph demonstrating a rise in the United States unemployment rate, beginning with 4.6% unemployment rate in January 2007 and ending with a 9.7 unemployment rate in February 2010. The rise began in May 2008.).
[89] Catherine Rampell & Javier C. Hernandez, *U.S. Job Market Brightens as Payrolls Surge in March*, N.Y. TIMES, April 2, 2010, *available at* http://www.nytimes.com/2010/04/03/business/economy/03jobs.html.
[90] Continued contributions at this juncture will be mere drops in the pan, as the account level near retirement should have reached large enough amounts to make such continued contributions rather negligible.
[91] Jack VanDerhei, Employee Benefit Research Institute, *The Impact of the Recent Financial Crisis on 401(k) Balances*, ISSUE BRIEF 1 (February 2009), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_2-2009_Crisis-Impct.pdf.
[92] *See* Eric A. Kades, Foreward: *Property Rights and Economic Development*, 45 Wm. & Mary L. Rev. 815, 815 (2004) ("Developed nations, content with or perhaps resigned to modest long-term growth rates, focus more on business cycles, with their inevitable downturns (recessions and depressions).").
[93] *See supra* note 12 and accompanying text.
[94] 128 S. Ct. 1020 (2008).
[95] *Id.* at 1022.
[96] *Id.* at 1023.
[97] *Id.*
[98] 473 U.S. 134 (1985).
[99] *LaRue*, 128 S. Ct. at 1024.
[100] *Id.*
[101] *Id.* at 1026.
[102] *Id.*
[103] U.S. DEPARTMENT OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 74 (2009) [hereinafter *2009 Treasury White Paper*], *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.
[104] *Id.*
[105] ALICIA MUNNELL, FRANCESCA GOLUB-SASS, & DAN MULDOON, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, AN UPDATE ON 401(K) PLANS: INSIGHTS FROM THE 2007 SCF 7 (2009), *available at* http://crr.bc.edu/images/stories/Briefs/ib_9_5.pdf.
[106] *Id*.
[107] *Id*.
[108] *See 2009 Treasury White Paper* at 74.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id.* at 75.
[114] H.R. 2989, 111th Cong. (1st Sess. 2009).
[115] H.R. 1984, 111th Cong. (1st Sess. 2009).
[116] H.R. 1988, 111th Cong. (1st Sess. 2009).

[117] H.R. 2989 at § 111.
[118] *Id.* at §§ 111 & 202.
[119] *See supra* note 73 and accompanying text.
[120] PAMELA PERUN & C. EUGENE STEUERLE, THE URBAN INSTITUTE, WHY NOT A "SUPER SIMPLE" SAVING PLAN FOR THE UNITED STATES? (2008), *available at* http://www.urban.org/UploadedPDF/411676_simple_saving.pdf.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] THE ERISA INDUSTRY COMMITTEE, A NEW BENEFIT PLATFORM FOR LIFE SECURITY (2007), *available at* http://www.eric.org/forms/uploadFiles/ccea00000007.filename.ERIC_New_Benefit_Platform_FL0614.pdf.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] MICHAEL CALABRESE, THE NEW AMERICAFOUNDATION, A UNIVERSAL 401(K) PLAN (2007), *available at* http://www.newamerica.net/files/nafmigration/NAF_10big_Ideas_3.pdf.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *See supra* note 50 and accompanying text.
[142] *GAO, 401(k) Plans: Leakage*, *supra* note 32, at 17.
[143] Noel, *supra* note 68, at 901–902.
[144] *Id.*
[145] *Id.* at 903.
[146] *Id.* at 902.
[147] THERESA GHILARDUCCI, ECONOMIC POLICY INSTITUTE, GUARANTEED RETIREMENT ACCOUNTS: TOWARD RETIREMENT INCOME SECURITY, (2007), *available at* http://www.sharedprosperity.org/bp204.html.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*

[154] 241 F.3d 609 (7th Cir. 2001).
[155] *Id.* at 610–11.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* Thus, if the defined benefit plan provided a $250 monthly annuity, and the defined contribution account could only purchase a $50 annuity, the employer must pay a $200 monthly annuity to make up the difference.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 612.
[163] Policy proposal developed by the author.
[164] By increasing the success rate of employees covering the base benefit through their own individual account investments, the employer will then be able to "roll over" the funds saved in the defined benefit plan account meant to provide for those employees in the event that their account levels upon retirement did not meet the base benefit annuity. Thus, the funding requirements under the defined benefit plan would already be met for those employees hired to replace the retired employees who were successful with their investments.
[165] *See* Regina Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 Fla. Tax Rev. 607, 669–71 (2000) (acknowledging the similarity between floor-offset plans and potential insurance schemes for defined contribution plans while advocating for greater security over defined contribution assets).
[166] Employers with less than 50 employees could opt into the program.
[167] This idea is inspired by Prof. Ghilarducci's proposal for retirement savings reform.
[168] E.g. a required employee 3% contribution, but an allowable 8% voluntary contribution.
[169] *See supra* note 8 and accompanying text.