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ELIMINATING ARBITRARY AGE DISCRIMINATION IN 401(K) AND PENSION PLAN ELIGIBILITY REQUIREMENTS: A SIMPLE FIX TO ENCOURAGE YOUNGER WORKERS TO SAVE FOR RETIREMENT

Andrew J. Clopton*

Current federal law allows companies to exclude their youngest workers from participating in 401(k) and other pension plans. Public policy should encourage young workers to contribute to retirement as early as practicable, rather than impose obstacles to saving. Workers who begin saving even a few years earlier improve their retirement security and reduce the likelihood they will be dependent on the government later in life. While "age discrimination" is conventionally thought of as the mistreatment of older workers, this concept applies equally to employees who are differentiated based solely on their young age. Thus, Congress should amend the Internal Revenue Code to prohibit retirement savings discrimination on the basis of (young) age.

INTRODUCTION

In the United States today, 401(k) and other pension plans are a standard benefit for most full-time employees in large corporations.[1] Federal tax law incentivizes employers to offer—and employees to participate in—pension plans.[2] Approximately fifty percent of families "own[] retirement accounts—including individual retirement accounts (IRAs), Keogh accounts, and certain employer-sponsored accounts, such as 401(k), 403(b), and thrift savings accounts."[3] Although "[p]rivate retirement arrangements in the United States were once predominately defined benefit . . . pension plans," most plans in the private sector today are "defined contribution . . . arrangements."[4]

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1. According to the Department of Labor, there are over 500,000 401(k) type plans and nearly 65,000,000 active participants. *See* Emp. Benefits Sec. Admin., U.S. Dep't of Labor, Private Pension Plan Bulletin Historical Tables and Graphs 26 E20g1 (2014).

2. *See* Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?*, 55 U. CHI. L. REV. 790, 790–91 (1988).

3. Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 FED. RES. BULLETIN, Sep. 2014, at 33.

4. James Poterba et al., *Defined contribution plans, defined benefit plans, and the accumulation of retirement wealth*, 91 J. PUB. ECON. 2062, 2063 (2007). "Workers covered by

The private sector prefers "[d]efined contribution plans, such as the very common 401(k)s" because these plans "are considered much less expensive than defined benefit plans."[5] The responsibility of managing a defined contribution plan falls on the employee.[6] However, defined contribution plans generally encourage investment diversification, which lowers risk. Further, the most popular plans adjust asset allocation by "lifecycle target date"—the date of anticipated retirement.[7]

In a typical 401(k) plan, an employer offers to match a certain percentage of an employee's individual retirement contribution,[8] making investment a prudent choice. Under this scheme, workers can invest a percentage of their income in a managed retirement account; employers make it easy to contribute by automatically deducting the contribution from paychecks and often include a matching employer contribution.[9] Many employers automatically enroll employees and make them "opt out" if they do not wish to participate.[10]

Unfortunately, benefits legislation discriminates against young adults with no apparent justification. Per I.R.C. § 410, companies can and often do refuse to offer 401(k) benefits to employees under twenty-one.[11]

[defined benefit] plans are increasingly concentrated in the public sector." *Id.*

5. JAMIE PRATT, FINANCIAL ACCOUNTING IN AN ECONOMIC CONTEXT 458 (8th ed. 2010). "Under a defined benefit plan the employer promises to provide each employee with a specified amount of benefits upon retirement." *Id.*

6. *Id.* "Accounting for a defined contribution plan is relatively simple because once the employer makes the contribution, the sponsoring company faces no further liability." *Id.*

7. DELOITTE, DEFINED CONTRIBUTION/401(K) FEE STUDY 13 (2009) ("Of those plans with auto-enrollment, 71% default to a lifecycle target date investment option with an average default contribution rate of 3%.").

8. *Id.* at 12 ("Among respondent plans, 92% had employer contributions, typically in the form of a match formula.").

9. *Id.*

10. *Id.* at 13. Social science research suggests that making employees "opt-out"—rather than "opt-in"—significantly increases 401(k) and other retirement plan participation. *See infra* notes 48–51 and accompanying text.

11. I.R.C. § 410(a)(1)(A)(i) (2012). I found this out the hard way while working during undergraduate school—my corporate employer refused to enroll me in its standard 401(k) plan until I turned twenty-one. The absence of a matching contribution equaled approximately five-thousand dollars over a period of three years between the ages of eighteen and twenty-one. The future value of this five-thousand dollar contribution upon retirement at age sixty-five exceeds seventy-thousand dollars, assuming a six-percent average annual growth adjusted for inflation. There are yet other minimum age and service conditions found under United States Department of the Treasury regulations for other types of pension plans. The minimum-age requirements of these additional regulations vary, with some even setting ages older than twenty-one. For example, in 26 C.F.R. § 1.410(a)-3(a) (2015), the general rule is that an employer may require one year of service or attainment of the age of *twenty-five*. Reading even further, the regulation has a "special rule for employees of certain educational institutions," in which the age is thirty. *Id.* § 1.410(a)-3(c). The reasons for the plethora of special rules and exceptions remain rather difficult to find.

The notion that the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act (ERISA) contain a public policy problem is unremarkable. Titles 26 ("Internal Revenue Code") and 29 ("Labor") of the United States Code—each comprising thousands of sections—provide work for legions of attorneys, human resources personnel, accountants, and bureaucrats. The sheer volume of legislation and regulations is, in some ways, a nightmare. This Comment argues that the law should prohibit discrimination with regard to retirement benefits solely on the basis of age.

I. ILLUMINATING AN IRRATIONAL INCONSISTENCY

According to a March 2013 Internal Revenue Service (IRS) survey of companies that offer 401(k) benefits, sixty-four percent of companies require employees to reach the age of twenty-one prior to enrollment.[12] The law does, however, prohibit employers from refusing older workers the same 401(k) plan and company matching contribution.[13] In fact, the Code governing 401(k) plans allows companies only one other limitation for employee enrollment: one year of full-time service.[14] Intuitively, this latter requirement makes sense; companies often want to ensure some level of commitment by the employee before expending maintenance and contribution costs for a retirement plan. The age requirement, however, is arbitrary; it is inconsistent with other age-based regulations, including other Internal Revenue Code and Treasury regulations. In addition, it is indefensible on fundamental fairness and public policy grounds.[15] Although "age discrimination" is conventionally thought of as the mistreatment of older workers, this concept applies equally to employees who employers differentiate based solely on their young age.

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12. INTERNAL REVENUE SERVICE EMPLOYEE PLANS COMPLIANCE UNIT, SECTION 401(K) COMPLIANCE CHECK QUESTIONNAIRE 16 (2013), *available at* http://www.irs.gov/pub/irs-tege/401k_final_report.pdf.

13. I.R.C. § 410(a)(2) (2012). Protections for older workers first arose to national prominence with the passage of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2012). For an overview of age discrimination as applied to older workers in employment-related contexts, see RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE (2001). *See also* Jonathan Barry Forman, *How Federal Pension Laws Influence Individual Work and Retirement Decisions*, 54 TAX LAW 143, 167–68 (2000).

14. I.R.C. § 410(a)(1)(B)(ii) (2012).

15. *See supra* notes 11, 13–14 and accompanying text. *But see* Bankman, *supra* note 2, at 812 ("There have been no empirical or even theoretical studies of the effects of the anti-discrimination requirements. However, the aggregate labor supply is generally thought to be inelastic. A number of empirical studies also have concluded that, when other variables are held constant, higher benefits are associated with lower cash salaries.").

A. Development of the "Minimum Age" and Appropriate Instances of Discrimination on the Basis of (Young) Age

The United States has a long history of establishing different "minimum ages" in different legal contexts. Today, most rights and responsibilities associated with adulthood take effect at either eighteen or twenty-one years of age.[16] Generally, society establishes most rights and responsibilities at eighteen, while reserving certain areas—usually "moral" decision-making—for twenty-one-year-olds.[17] Many rights and responsibilities that society delays until twenty-one are borne out of statistics and common sense—young adults arguably need a gradual transition into full adulthood and its responsibilities.[18] Yet, society delays very few financial or tax related rights or responsibilities beyond the age of eighteen.[19] Moreover, no societal mores suggest a young employee should postpone saving for retirement.[20] Ensuring that similarly situated employees invest equally in their retirements simply makes sense, especially in an era of high borrowing and low savings.

The United States is not the only nation to draw seemingly arbitrary lines in employment rights and age standards. For instance, the United Kingdom dictates separate minimum wages for those aged eighteen to twenty (£5.13 per hour) and those aged twenty-one years or more (£6.50 per hour).[21] Nonetheless, international mistreatment of young adults is

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16. Military enlistment, purchasing tobacco, full driving privileges, insurance, most financial contracts, etc., are generally established at the age of eighteen; adopting a child, purchasing and consuming alcohol, viewing adult entertainment, etc., are typically proscribed until the age of twenty-one. For less clarity, some benchmarks are even later, such as rental car privileges for twenty-five-year-olds, or earlier, such as individuals as young as twelve facing criminal proceedings and liability for some crimes and the privilege of viewing movies rated 'R' being granted at the age of seventeen. Yet other areas, such as gambling, offer varying age requirements across jurisdictions.

17. I use the term "'moral' decisionmaking" to refer to choices that are typically prohibited to younger adults based upon societal mores—rather than simple economic freedoms.

18. Despite lingering controversy over the drinking age, the Supreme Court granted broad deference to congressional findings that supported a uniform minimum drinking age of twenty-one. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 208 (1987) (holding that Congress had the power to make five percent of highway funds to a state contingent upon its adoption of a uniform minimum drinking age).

19. Some of the same fairness arguments might also demand protections for those *under* eighteen. This opens up many additional considerations, however, including the fact that nearly all minors are considered dependent for tax purposes. Certain emancipated minors, though, might deserve the same protections afforded to adults.

20. Admittedly, saving for retirement is far from contemplation for most at age eighteen. However, this type of regulation *reinforces* the barriers to early saving.

21. *See National Minimum Wage Rates*, GOV.UK, https://www.gov.uk/national-minimum-wage-rates (last updated Nov. 12, 2014). In some ways, an hourly rate differential seems more perverse than 401(k) participation standards. Presumably, though, those aged eighteen to twenty would have an easier time securing a minimum wage job, perhaps balancing out the negative effects

not by itself a valid reason for irrational discrimination.

Providing equal benefits for employees between the ages of eighteen and twenty-one is a matter of fundamental fairness. Employers who require a minimum age simply do not equally compensate employees who otherwise perform the same duties, and the law endorses this maltreatment on the basis of (young) age. The State, to this author's awareness, does not *statutorily endorse* unequal compensation of two individuals, who otherwise possess equal qualities, characteristics, experience, positions, and roles, and all other attributes, on any other basis than *age*.[22]

B. Applicable Legislative History

A review of the legislative history provides insight into the current state of the law. One report notes that "[i]n the early years, 401(k) plans were subject to several legal measures . . . restricting . . . participants' contribution activity. Only recently have legislators and regulators begun to loosen restrictions placed on these plans . . . to encourage their growth."[23] Since the creation of 401(k) plans, the numbers of plans and participants have increased dramatically.[24]

Before the enactment of section 410(a), governing 401(k) regulations, employers "impose[d] whatever age and service requirements they desired, as long as the requirements did not discriminate in favor of officers, shareholders, supervisors or highly compensated employees."[25] Section 410(a) actually was designed to "*extend* coverage under retirement plans *more widely*."[26] Testimony in the Congressional Record alludes to the goal of "more equitably cover[ing] blue-collar workers . . . who do not wait until the age of 25 to start working, but who commence working right out of high school,

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of the hourly rate differential.

22. One counterargument is that non-eligible employees can and do invest of their own volition—outside of the framework of the company's 401(k) or pension plan. This might be true for companies that provide no contribution match, but ignores the tangible value of the match by companies who do offer it.

23. INV. CO. INST., 401(K) PLANS: A 25-YEAR RETROSPECTIVE 2 (Nov. 2006), *available at* www.ici.org/pdf/per12-02.pdf. The ICI bills itself as the "world's leading association of regulated funds," and it performs research and issues reports on a consistent basis as a core part of its mission. *About ICI*, INV. CO. INSTITUTE, http://www.ici.org/about_ici (last visited May 10, 2015).

24. INV. CO. INST., *supra* note 23, at 3.

25. T. David Cowart, *Vesting, Participation and Coverage Victories for the "Little Guy" (Part I)*, 28 ALI-ABA BUS. L. COURSE MATERIALS J. 41, 51 (2004).

26. 120 CONG. REC. H1149 (daily ed. Feb. 26, 1974) (statement of Rep. Ullman) (emphasis added).

[which] is a reality of American life."[27] Nonetheless, the initial regulations set the allowable minimum age requirement for pension plan participation at twenty-five.[28]

Congress, though, lowered the permissible minimum age requirement to twenty-one in 1984.[29] Congress set the age at twenty-one, rather than eighteen, despite evidence dating back to the section's original enactment that indicated that many adults enter a prime working phase between *eighteen* and twenty-four.[30]

Congress set the minimum age at twenty-one because of concerns "about balancing the benefits of early participation against the costs to the employers."[31] Congress reasoned that this compromise "significantly increase[d] coverage under private pension plans, without imposing an undue cost on employers."[32] The concern for imposing an undue cost on employers was likely overblown. Most workers between eighteen and twenty-one, in the dawn of their careers, earn entry-level wages. Thus, in the aggregate, companies would not incur significant contribution costs. Further, a rational employee who begins saving for retirement at eighteen rather than twenty-one would likely retire earlier given her additional savings.[33] Accordingly, an earlier retirement saves the company on the back-end.

Even seniors were not immune to the original regulations: upon the enactment of section 410(a)(2) of the IRC, Congress allowed employers to "exclude an employee who was hired within five years of the plan's

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27. *Id.* (statement of Rep. Azbug).

28. Edmund T. Donovan, *The Retirement Equity Act of 1984: A Review*, 48 SOC. SEC. BULLETIN 38, 39 (May 1985).

29. Retirement Equity Act of 1984, Pub. L. 98-397, § 202, 98 Stat. 1436 (codified as emended at 26 U.S.C. § 410 (1994).

30. According to the 1970 census information available to Congress during the debates surrounding this section's enactment, fifty percent of Americans between the age of eighteen and nineteen were in the labor force, and over sixty-eight percent of Americans between the ages of twenty and twenty-four were in the labor force. *See* 120 CONG. REC. H1283 (daily ed. Feb. 28, 1974) (statement of Rep. Abzug). The legislative history specifically cites *women* as having a keen interest in participating in retirement plans early on: fifty-six percent of women between the ages of twenty and twenty-four were in the labor force. *See id.* With these statistics in mind, Rep. Abzug summed up the purpose of enacting Section 410(a) in the House of Representatives' discussion of the bill: "The amendments [to the Code to enact Section 410(a)] are of particular interest to women whose work pattern is to work for a number of years, generally starting between 18 and 24, then leave to fulfill their roles as wives and mothers, and then return to work." *Id.*

31. Cowart, *supra* note 25, at 51 (citing H.R. REP. NO. 93-807, at 44 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4710, *and in* 1974-3 C.B. Supp. 279).

32. *Id.* at 52.

33. Some evidence suggests that voluntary turnover rates are lower among blue-collar workers, particularly those in the manufacturing industry. *See* U.S. DEP'T OF LABOR, USDL-15-0210, JOB OPENINGS AND LABOR TURNOVER, tbl. 4 (Dec. 2014), *available at* http://www.bls.gov/news.release/archives/jolts_02102015.pdf/.

normal retirement date."[34] Congress included this allowance to reduce the likelihood that employers would refuse to hire older employees due to increased pension costs.[35] Perhaps unsurprisingly, the "maximum age limitation was repealed . . . for plan years beginning on or after January 1, 1988."[36] With that change, the current system was born: companies may only exclude employees based on a minimum age of twenty-one or on one year of service.[37]

Protecting very late retirement contributions was part of the pattern of protecting older Americans' interests, a modern trend that began in the late 1960s as America's "greatest generation"—the veterans of World War II—began to retire. Congress sought to eliminate discrimination on the basis of age for persons above the age of forty-three with the Age Discrimination in Employment Act of 1967 (ADEA).[38] Interestingly, a brief congressional statement of findings and purpose for the ADEA precisely illustrates many of the same reasons that justify prohibiting (young) age discrimination in 401(k) plans:

> (a) The Congress hereby finds and declares that—
>
> > (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> >
> > (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
> >
> > (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
> >
> > (4) the existence in industries affecting commerce, of

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34. Cowart, *supra* note 25, at 54; *see* Pratt, *infra* note 45, at 783.
35. Cowart, *supra* note 25, at 54.
36. *Id.* (citing Prop. Treas. Reg. §1.410(a)-4A).
37. I.R.C. § 410(a)(1)(a). Of course, other general fund requirements exist; for example, "a defined contribution plan which provides highly compensated employees with annual contributions equal to 5% of compensation must provide rank-and-file employees with annual contributions of at least 5% of compensation." Bankman, *supra* note 2, at 796.
38. 29 U.S.C. §§ 621–34 (2012).

> arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[39]

With the exception of section (a)(3), which has arguably shifted the opposite way in a post-financial crisis era,[40] the justifications for Congress prohibiting discrimination are also applicable to younger workers. Even considering (a)(3), real unemployment rates among young workers remain very high post-recession—in part because the official unemployment rate only takes into account those who want to work and who are actively looking for such employment.[41]

The eligibility requirements for 401(k) and pension benefits remain one of the only areas in which employers may legally discriminate against young employees. Young employees generally do not face similar barriers when obtaining company health insurance and a plethora of other benefits.

Further, under the I.R.C., 403(b) plans include a different set of restrictions. David A. Pratt notes the inconsistencies in 401(k) and 403(b) eligibility rules,[42] the latter of which forbids a one-year-service requirement: "[t]hese rules should be harmonized, as there is no good reason for having different rules for 401(k) and 403(b) plans."[43]

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39. 29 U.S.C. § 621 (2014).

40. With the recent financial crisis affecting young adults disproportionately, relative to older adults, protection against age discrimination in employment should arguably encompass age more generally, provided that employers still may exercise preferences for experience and other factors correlated to a certain extent with age. *See, e.g.*, Annie Lowrey, *When Problems Start Getting Real . . .* , N.Y. TIMES, Mar. 31, 2013, at MM12; Josh Zumbrun, *Lower Job Churn Hurts Young Workers*, WALL ST. J. (July 13, 2014), http://www.wsj.com/articles/lower-job-churn-hurts-young-workers-1405295773.

41. *See* U.S. DEP'T OF LABOR, USDL-14-1498, EMPLOYMENT AND UNEMPLOYMENT AMONG YOUTH 1 (Summer 2014), *available at* http://www.bls.gov/news.release/pdf/youth.pdf/. Even so, the youth unemployment rate was 14.3% in July 2014—the latest annual report specifically analyzing youth employment. *Id.* at 2.

42. The 403(b) plans are a less-common public retirement investment option. *See Publication 571, Tax-Sheltered Annuity Plans (403(b) Plans)*, INTERNAL REVENUE SERV., http://www.irs.gov/publications/p571/ch01.html (revised Jan. 2015)("A 403(b) plan, also known as a tax-sheltered annuity (TSA) plan, is a retirement plan for certain employees of public schools, employees of tax-exempt organizations, and certain ministers.").

43. David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 781–82 (2001).

The fact that two plans have varying provisions is not by itself surprising. What is surprising is that both plans are designed to help grow retirement savings. In spite of that common goal, the two plans contain different plan participation requirements. This discrepancy underscores the need for reform; certain young workers are already protected in existing plans and others are not.

C. Why the Current Regime?

While many employees between the ages of eighteen and twenty-one are impacted by this employment age discrimination, the injustice does not seem ripe for today's difficult political environment. For one, younger voters have historically voted and mobilized at a lower rate than their older counterparts.[44] One can easily imagine the outcry from the AARP and similar groups if Congress prohibited 401(k) participation for workers above the age of seventy-five. Indeed, the law was amended in the 1980s to prohibit participation discrimination against older workers.[45]

In fact, there are actually *better* public policy arguments for preventing participation of workers near retirement. Generally, a greater portion of a person's assets should reside in lower-risk investments when she nears retirement.[46] Many companies offer standard plans for "target retirement ages"; these types of plans are also often available on the private market.[47] Higher retirement savings are possible from sustained investment over time—beginning as early as possible.[48]

Assume that Individual A invests $20,000 at age eighteen, whereas individual B invests the same amount, $20,000, at age twenty-one. Now assume that both individuals contribute $2,000 each year, and retire at age seventy-two. With a very conservative five percent annual yield, the more prudent investor accumulates over $100,000 more for retirement.[49]

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44. *See, e.g.*, U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT, tbl. 399 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0399.pdf.

45. *See* Pratt, *supra* note 43, at 783.

46. FRANK REILLY & KEITH BROWN, INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT 34–37 (10th ed. 2011) ("Because their earning years have concluded . . . [retirees] are very conscious of protecting their capital.").

47. *See Vanguard Target Retirement Funds*, The Vanguard Group, Inc., https://investor.vanguard.com/mutual-funds/target-retirement/#/ (last visited June 5, 2015).

48. *See* REILLY & BROWN, *supra* note 46, at 35 ("As a result of their typically long investment time horizon and their future earning ability, individuals in the ['early-to-middle years of their working careers'] are willing to make relatively high-risk investments in the hopes of making above-average-nominal returns over time.").

49. Individual A would possess a total fund worth $796,321.77; Individual B would possess a

What a difference three years makes!

Alternatively, even assuming that plans targeted for retirement in five years or less gain an annual yield of eight percent, the total growth is relatively small because of the short period of investment time. For example, if Individual C invests at sixty-nine and cashes out three years later, she would net only $2,050.[50] The company's *administration* costs, over three years, likely do not vary solely on the basis of the ages of Individuals A, B, and C. Yet the company does so much more for the younger employee (and society) by allowing participation for those aged eighteen and prohibiting those within three years of retirement.

If the costs of participation are so prohibitive that employers cannot sustain a retirement plan without excluding a given age class for a three-year period, as Congress claimed to justify the 401(k) minimum age requirement, plans should exclude every employee within three years of retirement and enroll employees from age eighteen. The cost to retiring employees would be negligible, as demonstrated by Individual C, while the savings to companies would likely be even greater than under the current regime. Differences in earnings may cause the matching contribution of an employee within three years of retirement to far exceed the contribution given to an employee at eighteen.

Moreover, any responsible company should present these types of investment scenarios by reference to employee age. Retirement is leagues away for many workers, but offering concrete figures may increase the likelihood workers will begin saving early.[51] Indeed, younger individuals' failure to save for retirement is a systemic problem, in part due to high debt loads.[52] Behavioral economics research suggests people focus more on short-term benefits and less on long-term costs.[53]

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total fund worth $682,446.19. *See Retirement Calculator*, BLOOMBERG BUSINESS, http://www.bloomberg.com/personal-finance/calculators/retirement/ (last visited Jan. 21, 2015).

50. *See id.*

51. Increased early savings might also encourage employee retention. Under a varying array of regulations, employers are often allowed to require certain years of service before the company's match is "fully vested." *See, e.g.*, 29 U.S.C. § 1053(b)(3)(D). For example, if a company required five years of service before guaranteeing thousands in matching employer retirement contributions, a worker would have to think twice before leaving. Thus, the company could reduce employee turnover for participating employees—especially those younger employees who are probably very productive.

52. The failure to save for retirement is part of a broader problem of financial literacy. *See* Annamaria Lusardi et al., *Financial Literacy among the Young*, 44 J. CONSUMER AFFAIRS 358, 359 (2010). Further, "55% of young adults report they are not saving in either an individual retirement account (IRA) or a 401(k) account and 40% do not have a savings account that they contribute to regularly." *Id.* (internal citation omitted).

53. For a general discussion on irrational human tendencies, especially in matters concerning personal finance, see, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009); DAN ARIELY, PREDICTABLY

Even if Congress amends the law, much work remains to properly educate young adults on financial matters, especially involving retirement. Amending the law, though, would at least enable an otherwise ineligible young adult to *consider* saving for retirement through an employer's plan. The added incentive of matching employer contributions may encourage a healthier, long-term focus.

D. Some Additional Scenarios

Many employers automatically opt in employees for plan participation—automatically enrolling them into an applicable fund—usually withholding two to five percent of net wages.[54] Automatic enrollment is a very important tool because saving for retirement requires no special initiative by the employee—in fact, eligible employees must explicitly *opt out* of saving. Research suggests that most employees neither opt in nor out—they maintain their default status.[55] These "defaults" can and should *encourage* participation (and hence, retirement savings).[56] The withholding is more often than not bolstered by a matching company contribution.[57] Thus, in a default opt-in regime with matching contribution, a total of four to ten percent of a young employee's wages are set aside as a nest egg. Given the tax penalties for withdrawing retirement savings early,[58] most employees would likely keep that egg incubating for the long run.[59]

For example, suppose an eighteen-year-old fresh out of high school goes to work for a manufacturer.[60] He enrolls in his company's 401(k) plan, contributing five percent of his annual income and receiving a three percent employer match. Because he enrolled at eighteen instead of

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IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

54. *See* Deloitte, *supra* note 7, at 13.

55. THALER & SUNSTEIN *supra* note 53, at 109–17.

56. *Id.*

57. *Id.* at 109.

58. I.R.C. § 72(t)(1).

59. At least in the long term, this also has a demonstrably positive effect on the low-wage worker. Assume that a company withheld five percent of an employee's full-time minimum wage paycheck. (This scenario assumes 2,080 annual hours worked at $7.25/hour, equaling $15,080 in gross income.) In a year, this would amount to $754. Even if that same employee never invested another dollar towards retirement, his nest egg would grow to nearly $50,000 at a retirement age of seventy-two. (Again, assuming a very conservative five percent annual yield.) Although that amount is insufficient for retirement, it is *not* an insignificant figure for a minimum wage worker.

60. This scenario assumes 2,080 annual hours worked at nineteen dollars per hour, with an additional 520 hours of overtime at $28.50/hour, equaling $54,520 in gross income in his first year, with regular contributions and raises yearly until retirement.

twenty-one, he would have amassed an additional few hundred thousand dollars at retirement after factoring in annual contributions and raises until retirement. This would allow the employee to retire early or simply to live more comfortably when he retires. The employee would also likely depend less on government assistance during retirement and leave a greater inheritance and/or bequests to charitable organizations. Personal savings are more imperative than ever before because of the United States' growing fiscal insolvency and lack of political consensus on the correct methods to tackle our long-term fiscal woes—both collective and individual.[61] Although Social Security is stable at present, its long-term viability remains uncertain.[62] In any case, Social Security is not intended to be an individual's sole means of support in retirement, although many Americans over-depend on Social Security today.[63]

From a practical standpoint, the more money a worker saves, the less he or she will depend on government assistance during retirement. As life expectancy increases, adequate retirement savings are imperative. When employees invest in retirement a few years earlier it pays significant dividends down the road.[64] Of course, expanding retirement benefits to more people depends on the security of those benefits.[65] The uncertainty of a few weak plans, however, is substantially outweighed by the benefits of encouraging early savings across the board. Society benefits from increased wealth.

A prudent government should encourage and incentivize retirement saving.[66] Because of compound interest, a young employee who cannot

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61. As of this writing, the national debt exceeded $17 trillion. As of 2012, the average American household with at least one credit card has at $15,590 in credit card debt. That figure simply includes *credit* card debt, omitting other more substantial sources of debt, such as mortgages and student loans. *See* CNN MONEY, MONEY ESSENTIALS: CONTROLLING YOUR PERSONAL DEBT, http://money.cnn.com/magazines/moneymag/money101/lesson9/ (last visited June 5, 2015).

62. *See, e.g.*, Stephen C. Goss, U.S. Soc. Security Admin., *The Future Financial Status of the Social Security Program*, 70 SOC. SECURITY BULL., no. 3, Aug. 2010, at 111, *available at* http://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.html.

63. The Social Security Administration notes "[a]mong elderly Social Security beneficiaries, 22% of married couples and about 47% of unmarried persons rely on Social Security for 90% or more of their income." There is certainly a massive wealth disparity, though, given that total Social Security benefits represent "38% of the income of the elderly." Those retirees who are less dependent on Social Security likely draw much of their income on retirement savings gained through their own employment, pensions and otherwise. *See* OFFICE OF SOCIAL SECURITY, "Social Security Basic Facts" (Apr. 2, 2014), http://www.ssa.gov/pressoffice/basicfact.htm.

64. *See supra* Part I.C.

65. Many individuals in modern waves of bankruptcy have seen their pensions destroyed, although this has been most problematic amongst unsustainable state and local government pension liabilities—not the private sector.

66. All fault does not lie with government, though. Nothing in the law *prohibits* companies from offering benefits participation for young workers. Many companies actually do allow such participation and should be commended for doing so. *See supra* text accompanying note 14.

save does not simply forego the value of three years' wages. The loss also includes every subsequent year of investment and any additional contributions, magnifying the effect.

II. Proposed Solution

Legislative action is the best opportunity to prohibit plan participation discrimination on the basis of (young) age. Underrepresented classes, at times, turn to the courts when they fail to galvanize the elected branches to change.[67] Younger adults certainly possess less political clout than older adults; in this case, however, the courts do not provide a very hopeful avenue to seek change.

The only valid claim that affected employees could use to challenge the law would be an alleged Equal Protection Clause violation for employees between the ages of eighteen and twenty-one. However, for purposes of a constitutional analysis, workers between eighteen and twenty-one are not considered a "suspect class." Therefore, the government only needs a "rational basis" for making the distinction in the appropriate ERISA and IRC provisions.[68] A court using the "rational basis" test generally employs blanket deference to the elected branches of government.[69] The silver lining to pursuing court action is that one only needs a few zealous advocates to make an argument. By contrast, an Act of Congress takes a legion of advocates.

One other obstacle to filing a lawsuit is that courts have at times avoided entanglement with complicated ERISA and IRC regulations. At least regarding ERISA regulations, courts have refused to recognize that the regulations create any substantive rights in themselves:

> The [Treasury] regulations purport to do no more than determine whether a plan is a qualified tax plan. Failure to meet the requirements of those regulations results in the loss of a beneficial tax status; it does not permit a court to rewrite the

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67. Perhaps partially due to increasing political gridlock, advocates for social change may increasingly turn to the courts to resolve grievances.

68. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). The legislative history arguably provides a sufficient rational basis to survive a constitutional challenge. Congress compromised with regard to minimum participation standards in order to shield employers from added costs associated with expanded retirement plan participation. *See supra* notes 29–32; Cowart, *supra* note 25, at 51.

69. Congress had a debate through the political process about minimum participation standards and the youngest workers lost. Ironically, that same political process, then, may provide the only remedy to address a substantial public policy issue.

> plan to include additional employees. The Treasury regulations do not create substantive rights under ERISA that would permit the relief [plaintiff] requests.[70]

Thus, standing derived from the regulations alone seems to be foreclosed—the regulations simply *define eligible plans* under the applicable ERISA and IRC regulations. In any event, the dreaded "political option" is probably still the best hope for reform.

Congress should immediately prohibit retirement benefits discrimination on the basis of (young) age in 401(k) and other applicable pension plans. As noted, the law currently allows employers to prohibit participation in a number of 401(k) and pension plans through two limitations: a one year of service requirement and a minimum age threshold—which is usually twenty-one. For example, the 401(k) regulations read as follows:

> (a) Participation
>
> (1) Minimum age and service conditions
>
> (A) General rule
>
> A trust shall not constitute a qualified trust under section 401(a) if the plan of which it is a part requires, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—
>
> (i) the date on which the employee attains the age of 21; or
>
> (ii) the date on which he completes 1 year of service.[71]

Other pension plan participation sections mirror this language, suggesting that the "original compromise" has simply permeated all applicable language.[72] The law should simply amend "21" to "18" in Section 410(a)(1)(A)(i).[73] This would also offer further consistency with

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70. Edes v. Verizon Commc'ns, Inc., 417 F.3d 133, 144 (1st Cir. 2005) (citing Abraham v. Exxon Corp, 85 F.3d 1126, 1131 (5th Cir. 1996)).

71. I.R.C. § 410(a) (2012).

72. *See, e.g.*, *id.* § 416(a) (2012).

73. *Id.* § 410 (2012) (proposing modifications to the section).

the general financial autonomy of baseline adults who turn eighteen.

Further discussion of Section 410(a)(1)(A)(ii) may be warranted. As quoted above, this section permits employers to require one year of service prior to employee participation in an employer-provided retirement plan. In contrast to Section 410(a)'s age prohibition, this requirement makes practical sense and is neutral across all ages. Before a company accrues the cost of enrolling and managing an employee's retirement plan, it may want a signal that the employee is committed. Permitting such a requirement seems reasonable. In effect, the proposed change and the year-of-service requirement may act in conjunction to preclude many individuals at the age of eighteen from participation altogether. However, if an employee worked for the same company prior to the age of eighteen, he or she may participate in the plan upon reaching that age. Ultimately, this is a very simple proposed change that will make a substantial difference in the lives of many young adults.

Numerous regulatory agencies, including the Treasury Department and IRS, maintain enforcement control over the applicable ERISA and IRS provisions, including interpreting ambiguities in the Code. Yet, minimum requirements for plan participation are unequivocal across the various statutory sources. Thus, Congress must amend the Code to reflect the proposed change. This is not unprecedented—Congress has tweaked the applicable benefits laws for decades, including eliminating the old provisions that allowed discrimination against older workers.

Congress *should* agree to a simple up-or-down vote on the narrow proposed modification above, and save other debates for later. However, the best prospects for amending the law would probably involve burying an amendment in a *broader* package of legislation.[74] In today's politically polarized environment, adopting even the simplest and most common-sense reforms presents challenges. This is especially true as it relates to the Internal Revenue Code. Numerous elected officials would take *any* opportunity to amend the Code, and increasing partisanship could cause the entire effort to fail.[75] Further, this amendment would likely not provide the political spark for amending the Code in the first place.

In theory, this change may not garner much opposition, assuming there were other more pressing issues to mobilize lobbyists. The amendment would require a sympathetic legislator on the relevant

74. An example is the drinking age provision in the transportation funding legislation involved in South Dakota v. Dole, 483 U.S. 203, 208 (1987). *See supra* note 18.

75. *See* Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS ONE Apr. 21, 2015.

committee to insert a small change to the law that carries a big upside for our future generations.

Incentivizing our youngest generations to work and save is paramount to our financial sustainability as a nation. With the uncertain long-term future of Social Security, Medicaid, and other entitlement programs, personal responsibility in retirement planning demands our attention. Congress should amend the law to prohibit employers from shutting out eighteen to twenty-one year olds from plan participation. Retirement investments at an earlier age provide numerous benefits.[76] The idea that the law explicitly allows companies to discriminate against those who have the most potential to compound their savings is disappointing. Fundamental fairness and the social benefit of increased retirement savings collectively outweigh marginal increases in plan administration and matching-contribution costs.

CONCLUSION

Congress should immediately amend the Internal Revenue Code to prohibit retirement benefits discrimination against employees between the ages of eighteen and twenty-one. Perhaps society can justify treating young adults differently under certain circumstances, but disparate treatment must relate to a sensible purpose. The current IRC regime allows employers to treat similarly situated employees differently and to discriminate without a well-reasoned purpose. Society can and should encourage its youngest eligible adults to save for retirement early and it can do so easily by ensuring that young people are treated equally.

76. *See, e.g.*, *supra* Part I.D.