CROWDING OUT: ESTATE TAX REFORM AND THE ELDER LAW POLICY AGENDA

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The passage of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) in 2001 was a major triumph for the Bush administration, as it represented a victory for its anti-tax agenda. The passage of the EGTRRA, however, has had a number of effects both in terms of tax policy and in the larger elder law policy agenda. In this article, Professor Richard Kaplan, a noted scholar in both elder law and tax policy, takes those who advocate reducing the estate tax to task. Although the exemptions for the estate tax should, and ought to be raised to keep pace with inflation, the very issue, by dominating the elder law policy agenda, has distracted attention away from issues that are far more pressing for older Americans. Professor Kaplan goes on to question whether the estate tax is truly an elder law issue, noting that it does not affect the elderly, only their survivors. After examining the workings of the EGTRRA, Professor Kaplan then explores other elder law issues that are of more importance to elderly Americans, such as prescription drugs, long-term care insurance, advance health-care directives, Social Security's earnings test, and employer-provided pensions, a field that is increasingly more important in the wake of the Enron disaster. Professor Kaplan concludes by calling for more attention to issues that relate directly to the medical and financial quality of elders' lives, instead of the pecuniary interests of their survivors.

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In May 2001, Congress passed a major tax reduction law entitled the Economic Growth and Tax Relief Reconciliation Act (EGTRRA).[1] This new statute was a triumph of political will that reflected then-newly elected President George W. Bush's fixation with tax reduction as a major governmental priority. Among the more amazing aspects of EGTRRA is its extensive revision of the federal estate tax,[2] including the complete repeal of this tax in 2010.[3] Whether that particular provision takes effect as scheduled is highly conjectural at this point, but the indisputable point is that substantial congressional and presidential attention was focused on an issue that affects a very small minority of older Americans—namely, the federal tax on transfers of their wealth after they die.[4]

The real impact of these provisions, however, is much broader. EGTRRA's revision of the federal estate tax was characterized by the political actors who were involved in its enactment as a major benefit for older Americans.[5] As a consequence, other legal problems that affect this age cohort have been shunted aside. Unfortunately, these issues affect many more older people than does the federal estate tax and in much more fundamental ways.

This article begins by examining EGTRRA's estate tax changes from the perspective of elder law.[6] In so doing, it is less interested in the specific details of these changes and more concerned with why estate tax reform has preoccupied policymakers and others who advocate on behalf of older Americans. The article then considers five current elder law issues of major significance and analyzes the legal consequences of EGTRRA's displacing these issues onto the prover-

1. Economic Growth and Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.) [hereinafter EGTRRA].

2. *Id.* §§ 511, 521, 531, 532, 551, 115 Stat. 38, 70–75, 86 (2001), *amending* I.R.C. §§ 2001, 2010–2016, 2031, 2053, 2056A, 2057, 2058, 2102, 2106, 2107, 2201 (1989). *See generally* Sanford J. Schlesinger & Dana L. Mark, *The Economic Growth and Tax Relief Reconciliation Act of 2001: Title V*, J. RETIREMENT PLAN., July–Aug. 2001, at 42–46.

3. I.R.C. § 2210, *added by* Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69 (2001). The estate tax is reinstated, however, after 2010. § 901(a).

4. *See* Jacob M. Schlesinger & Nicholas Kulish, *Will Power: As Paper Millionaires Multiply, Estate Tax Takes a Public Beating*, WALL ST. J., July 13, 2000, at A1 (only 2.1% of those who died in 1997 paid estate tax).

5. *Cf.* TSC 2001 LEGISLATIVE SURVEY ON SENIOR CITIZENS' ISSUES, THE SENIORS COALITION 2001 LEGISLATIVE SURVEY (Apr. 17, 2001), http://www.senior.org/pr/2001ls.htm (last visited Feb. 6, 2002) (survey by The Seniors Coalition showing that 93% of seniors favor "immediate repeal" of the estate tax).

6. *See infra* Part I.

bial "back burner."[7] Finally, the article concludes with some recommendations for ensuring that elder law policy issues are not preempted by estate tax reform,[8] which does nothing to improve the lives of older Americans.

I. Estate Tax Reform

As traditionally understood, "elder law" focuses on the legal consequences of extended life and the problems that older Americans face while they are alive.[9] In this context, estate tax reform is a rather curious topic for elder law advocates, because estate taxes are never paid until after a person dies.[10] Accordingly, they have *no* impact on how an older person pays for his or her health care, housing, or other basic needs. The simple reality is that the estate tax is imposed only on those assets that remain after all of a person's needs have been financed. And if that person spends most of his or her financial resources on those needs, no estate tax is levied at all. In fact, the estate tax's pre-EGTRRA exemption of $675,000[11] meant that only about 2% of decedents faced any estate tax liability.[12] With EGTRRA raising this exemption amount to $1 million,[13] the estate tax will affect even fewer Americans in the future.[14] But even without this change, it is ridiculous to the point of fraudulent to label the estate tax a "death tax,"[15] since forty-nine out of fifty people die without owing any estate tax. What are they? The undead?

In the context of elder law, the most significant point is that the economic burden of an estate tax is borne not by the person who died,

7. *See infra* Part II.
8. *See infra* Part III.
9. *See generally* LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 3–6 (2d ed. 1999).
10. *See* I.R.C. § 2002 (1994) (imposing liability for the estate tax on the executor of the estate); *see also id.* § 2203 (defining executor).
11. *Id.* § 2010(c), before amendment by EGTRRA, *supra* note 1.
12. Schlesinger & Kulish, *supra* note 4, at A1.
13. I.R.C. § 2010(c), *as amended by* Pub. L. No. 107-16, § 521(a), 115 Stat. 38, 71 (2001). This exemption increases to $1.5 million in 2004 and to $2 million in 2006. 26 U.S.C. § 521(a) (2001).
14. Taxable estates worth less than $1 million comprise 42.3% of all taxable estates. Computation by author using data in Lynn Asinof, *Heirs' Gains May Mean Losses for 'Avoidance' Industries*, WALL ST. J., Feb. 26, 2001, at C1.
15. *See, e.g.*, Edward J. McCaffery & Richard Wagner, *A Bipartisan Declaration of Independence from Death Taxation*, 88 TAX NOTES 801, 803 (2000).

but by that person's heirs.[16] *They* are the ones whose finances are affected by the estate tax, because this tax reduces the size of their inheritances. But the decedent's lifestyle need never be affected by this levy, however onerous it may seem. Accordingly, it is fundamentally incorrect to characterize estate tax reform as an elder law issue. It is, instead, an issue for one's survivors, and only for survivors of the very well off at that.[17]

Moreover, its impact is narrower still, because no estate tax is due on assets that pass to a decedent's surviving spouse.[18] This so-called marital deduction has long been part of the estate tax,[19] and since 1981, it has applied without regard to the amount of assets involved.[20] So, when Bill Gates passes away, no estate tax will be due as long as his entire estate is bequeathed to his wife, Melinda. In other words, the estate tax is relevant only to survivors of the very well off *other than* the surviving spouse.

Nevertheless, older persons flock to seminars discussing the estate tax, and professional advisors often equate financial planning for older people with estate tax minimization.[21] As a consequence, estate tax reform is often cast as an elders' issue, despite the fact that no one pays estate tax while he or she is alive, and neither does that person's surviving spouse.[22]

To be sure, preserving inheritances for family members is a major concern for some older people. Indeed, preserving inheritances for

16. *See* Tom Herman, *A Change in Death & Taxes? Debating the Options for an Estate Tax Overhaul*, WALL ST. J., Feb. 26, 2001, at C1.

17. Estates worth at least $5 million, representing only 6.1% of all taxable estates, paid over 51% of estate tax receipts. Computation by author using Asinof, *supra* note 14, at C1.

18. I.R.C. § 2056(a) (1989).

19. RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 5.06[1] (7th ed. 1996) (noting the provision's creation in 1948).

20. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(e), 95 Stat. 301 (codified as amended at I.R.C. § 2056(a) West Supp. 2001). *See generally* Jerome Kurtz, *Marital Deduction Estate Planning Under the Economic Recovery Tax Act of 1981: Opportunities Exist, but Watch the Pitfalls*, 34 RUTGERS L. REV. 591 (1982).

21. *See, e.g.*, ROBERT B. FLEMING, ELDER LAW ANSWER BOOK §§ 5-1 to 6-24 (2000); JAMES E. PEARMAN, JR., FINANCIAL PLANNING FOR OLDER CLIENTS §§ 901–965 (2000).

22. *See* KATHRYN G. HENKEL, ESTATE PLANNING AND WEALTH PRESERVATION § 1.02 (abr. student ed. 1998). Much of the planning to minimize federal estate taxes must be accomplished while the older person is still around to effectuate the transactions required. *See generally id.* § 1.02; RALPH GANO MILLER, ESTATE PLANNING PRIMER § 1-1 to 1-6 (8th ed. 1998). These transactions usually provide no tax savings, however, while the senior citizen is alive. *See* HENKEL, *supra*, § 1.02.

one's heirs is a prominent reason why some people purchase long-term care insurance[23] or seek Medicaid assistance[24] with their long-term care expenses when they lack such insurance. The statistical reality, however, is that the federal estate tax is not a threat to the inheritances of most people.[25]

Moreover, the steady increase in life expectancies[26] has meant that the primary beneficiaries of estate tax reform are adult "children" who are often in their sixties.[27] These folks are themselves approaching retirement, so their late-in-life inheritances provide little benefit in raising a family, starting a business, and the like. Such inheritances should certainly be permitted, but making sure that they are not unduly diminished by estate taxes is hardly a compelling social objective.

Why, then, is estate tax reform so popular among policymakers and their putative constituents?[28] Several explanations are possible. First, to some people, all taxes are evil, and the estate tax is simply one more undifferentiated government exaction.[29] Second, some older people feel that they have paid taxes throughout their lives—first, when they earn their income (income tax); then, when they spend (sales tax) or invest (capital gains tax) that income; and again, when they withdraw their savings (income tax).[30] Having paid taxes at every step along the way, they genuinely resent the very idea of an additional imposition at their death, without regard to who really pays or its irrelevance to their actual financial situation.[31]

23. Debra C. Newman, *Long-Term Care Insurance Provides Peace of Mind in Retirement*, J. RETIREMENT PLAN., Nov.–Dec. 1998, at 24, 26 ("protecting assets" is the second most common reason why people purchase long-term care insurance).

24. Richard L. Kaplan, *Financing Long-Term Care in the United States: Who Should Pay for Mom and Dad?*, *in* AGING: CARING FOR OUR ELDERS, 11 INT'L LIBR. ETHICS, L. & NEW MED. 65, 70 (David N. Weisstub et al. eds., 2001); *see also* Andrew Bates, *Golden Girls*, NEW REPUBLIC, Feb. 3, 1992, at 17, 18.

25. James R. Repetti, *Democracy Taxes & Wealth*, 76 N.Y.U. L. REV. 825, 865 (2001).

26. Alison Stein Wellner, *What's Behind the Gray?*, FORECAST, Nov. 21, 2001, at 8.

27. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 147 (1990).

28. Susan Wieler, *Hardly an Heir-Tight Case—Supporters of Estate Tax Repeal Make a Poor Argument*, NEWARK STAR-LEDGER, Mar. 8, 2001, at 17 (citing a Gallup Poll that found that 60% of the public favors estate tax repeal).

29. *See, e.g.*, *NPR: Talk of the Nation: Analysis: How the IRS Decides Who to Audit* (NPR radio broadcast Apr. 9, 2001) (discussing negative public sentiment regarding the IRS).

30. *See generally* FROLIK & KAPLAN, *supra* note 9, at 354–59.

31. *See, e.g.*, Edward J. McCaffery, *Grave Robbers: The Moral Case Against the Estate Tax*, 85 TAX NOTES 1429, 1439 (1999) ("people who have worked hard and

Third, many people attribute their relative affluence primarily to their own good habits and work ethic,[32] and see no reason why the government should confiscate their hard-earned savings to subsidize those with less admirable traits. Moreover, many older Americans with substantial resources do not consider themselves *wealthy*, let alone rich, and cannot fathom being treated as if they were Rockefellers or Vanderbilts. Even the term "estate tax" itself, while legally descriptive, conjures up notions of a landed aristocracy that seems incongruent with the present level of exemption.[33] When the federal estate tax was first imposed in 1916, the exemption amount was $50,000.[34] If this amount were adjusted to reflect a similar proportion of the nation's gross domestic product, the current exemption level would approach $9 million.[35] The government's failure to make this adjustment has aggravated the sense of duplicity and bad faith that surround the federal estate tax.[36] Accordingly, a substantial and *immediate* adjustment of the estate tax exemption to $9 million is an appropriate policy decision.

Of course, to some Americans, the estate tax is hopelessly irremediable. It must be repealed in its entirety,[37] and merely augmenting the exemption level along the lines just suggested would not dissipate the deep-seated anger that they feel toward this particular tax.[38] Whether there should be an estate tax at all is a question that has spawned a major debate in recent years, and entire forests have been decimated in the process.[39] There is no need to rehash that debate

saved well all of their lives should not have to contemplate a third and large tax on their deathbeds").

32. *See, e.g.*, Glendell Jones, Jr., *Repeal the Estate Tax? Bad Move: The Transfer Tax System Paradigm*, 89 TAX NOTES 793, 794 (2000); McCaffery, *supra* note 31, at 1439; Schlesinger & Kulish, *supra* note 4, at A1 (reporting a Gallup poll that found that 53% of Americans believe that riches are the result of "'strong effort'").

33. *See generally* McCaffery, *supra* note 31, at 1430–34.

34. Revenue Act of 1916, Pub. L. No. 64-271, § 201, 39 Stat. 756, 777 (1916).

35. GARY ROBBINS & ALDONA ROBBINS, INST. FOR POLICY INNOVATION, THE CASE FOR BURYING THE ESTATE TAX 8 (1999) (the equivalent number in 1998 was $8,845,267).

36. *Id.* at 21.

37. *See id.* at 18–19; *see also* Bruce Bartlett, *The End of the Estate Tax?*, 76 TAX NOTES 105, 105 (1997); Charles O. Galvin, *To Bury the Estate Tax, Not to Praise It*, 52 TAX NOTES 1413, 1413 (1991); McCaffery, *supra* note 31, at 1430.

38. Bartlett, *supra* note 37, at 109.

39. *See, e.g.*, ROBBINS & ROBBINS, *supra* note 35, at 1; Charles Davenport & Jay A. Soled, *Enlivening the Death-Tax Death-Talk*, 84 TAX NOTES 591, 592 (1999); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 259 (1983); Edward J. McCaffery et al., *Should We End Life Support for Death Taxes?*, 88 TAX NOTES 1373, 1374 (2000). *See generally* AM. INST. OF CERTIFIED PUBLIC

here, but if the estate tax were repealed in its entirety, one significant tax problem would remain: what would be the "basis" of property that is inherited from a decedent?[40]

Under current law, the new owner of inherited property is treated as having purchased the asset in question for its fair market value when the decedent died.[41] This provision is known colloquially as the "step-up in basis" rule.[42] In point of fact, the tax code does not utilize that phrase, and the basis of property that has gone down in value during a decedent's lifetime is stepped down as well.[43] In any case, the new owner receives a new tax basis equal to the property's market value when the previous owner died.[44]

For example, assume that Milton bought some land many years ago for $100,000 and that this property is worth $2 million at his death. When his daughter Anne inherits this land, she takes as her basis in this parcel the property's market value at the time that Milton passed away—namely, $2 million. If she were to sell the property shortly thereafter, she would owe no income tax on the proceeds, because the amount she received at the sale should presumably equal her basis in the property of $2 million.[45] Thus, Anne would never owe tax on the $1.9 million gain[46] that she obtained when she sold this appreciated asset. Nor did Milton, by the way, because he did not sell the property during his lifetime.[47] As a result, the appreciation in the

ACCOUNTANTS TAX DIV., STUDY ON REFORM OF THE ESTATE AND GIFT TAX SYSTEM (2001); RETHINKING ESTATE AND GIFT TAXATION (William G. Gale et al. eds., 2000); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); *Symposium on Wealth Taxes*, *Part I*, 53 TAX L. REV. 257 (2000); *Symposium on Wealth Taxes*, *Part II*, 53 TAX L. REV. 499 (2000).

40. "Basis" is the tax term for measuring gain or loss; it can be cost or something else in the case of gifts, where there is no "cost" as such.

41. I.R.C. § 1014(a) (1989).

42. *See* BORIS I. BITTKER & MARTIN J. MCMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 29.4[1] (2d ed. 1995).

43. I.R.C. § 1014(a).

44. *Id.* Taxpayers may elect an alternative valuation date, which can be as much as six months after the date of the decedent's death, but only if doing so reduces the amount of estate tax that would otherwise be due. I.R.C. §§ 1014(a)(2), 2032(a), (c). For treatment of property held jointly with a decedent, see FROLIK & KAPLAN, *supra* note 9, at 253–54.

45. *See* I.R.C. § 1001(a) (gain is the excess of the "amount realized" over the taxpayer's "adjusted basis").

46. Current value of $2 million - purchase price of $100,000 = $1.9 million of gain.

47. In general, an asset's appreciation in value is not taxed until that asset is sold or exchanged. *See* I.R.C. § 1001(a). *See generally* BITTKER & MCMAHON, *supra* note 42, ¶ 3.2.

value of this asset that accrued over Milton's lifetime is never subjected to income tax—not to Milton, the owner, and not to Anne, his successor.

This major revenue leakage, which in 2002 is expected to cost the federal government more than $37 billion,[48] is justified on one and only one premise: the land's value of $2 million was included in Milton's estate when he died, and estate tax was imposed at that time on the full amount of the property's worth, including the unrealized gain.[49] Accordingly, some adjustment is needed to avoid taxing the same gain twice—once in the estate tax, and again when it is realized by the new owner, the legatee. The step-up in basis rule is this adjustment.[50] But if the estate tax is repealed, the rationale for the step-up in basis rule falls away as well.

For some seniors, such a trade-off would be acceptable: no stepped-up basis on inherited property, but no estate tax owed when the property's owner dies. For most seniors, however, this trade-off is much less appealing. At present, they owe no estate tax,[51] but their heirs are able to "step up" the basis of the assets that they inherit nonetheless. Repealing the estate tax and its companion step-up in basis rule represents a net loss to them. They would actually prefer that the estate tax be retained, with an increased exemption to permit even more assets to escape income tax on their appreciation.

And that is why EGTRRA retains the step-up in basis rule, though in limited form, when the estate tax is repealed in the year 2010.[52] At that time, inherited property will generally have the same basis in the hands of the new owner as it had in the hands of the decedent.[53] Thus, in the earlier example, Anne's basis in the land she in-

48. JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2002–2006, 23 (JCS-1-02, 2002)

49. *See* BITTKER & MCMAHON, *supra* note 42, ¶ 29.4[1]; *see also* I.R.C. § 2031(a).

50. *Cf.* I.R.C. § 1015(d)(6) (increasing the basis of property received as a gift by the amount of gift tax paid that was attributable to the property's unrealized appreciation).

51. *See* Schlesinger & Kulish, *supra* note 4, at A1.

52. I.R.C. § 1022(b), *added by* Pub. L. No. 107-16, § 542(a), 115 Stat. 38, 76 (2001). This provision is effective for "property acquired from a decedent dying after December 31, 2009," which is after the estate tax is repealed. I.R.C. §§ 1022(a)(1), 2210(a). *See generally* Joseph M. Dodge, *What's Wrong with Carryover Basis Under H.R. 8*, 91 TAX NOTES 961 (2001).

53. I.R.C. § 1022(a)(2)(A). But if the property is worth less than its adjusted basis in the hands of the decedent, its value is stepped down to the property's fair market value when the decedent died. *Id.* § 1022(a)(2)(B). This is essentially the same rule that applies to such assets currently.

herited from her father would be $100,000; his basis carried over to his heir. But to avoid making the heirs of most decedents worse off under this no-estate-tax regime, the step-up in basis rule is retained, though it is limited to $1.3 million of appreciation.[54] In other words, some inherited property will receive a step-up in basis, while other assets will have a carryover basis, depending upon the size of the estate in question. Moreover, even assets within the *same* estate may be treated differentially if they have more than $1.3 million of unrealized appreciation as a group, because the executor of an estate can allocate the $1.3 million step-up in value among those assets however he or she chooses.[55] In that situation, some assets will get a step-up in basis, others will not, and still others may have only a portion of their unrealized appreciation included in their basis.[56] But the point remains that retaining some vestige of the step-up in basis rule was deemed politically necessary because, for *most* decedents,[57] the estate tax is not as important as what happens to the basis of the property that their heirs inherit.

To summarize, estate tax reform is of financial consequence to a small and diminishing segment of the older population. For most older people, other issues have much more relevance to their health and financial security. By focusing on estate tax reform, policymakers allowed a relatively unimportant issue to preempt these more significant concerns.

II. Elder Law Policy Agenda

This section examines five elder law issues that have lingered without action for several years and affect older Americans much more fundamentally than does estate tax reform. This modest agenda does not purport to be comprehensive, but it does try to restore some balance and proportionality in the formulation of public policy toward older Americans. In so doing, this agenda provides a sense of the misplaced policy priorities that the current focus on estate tax reform has produced.

54. *Id.* § 1022(b)(2)(B). Property received by a surviving spouse is eligible for an additional step up in value of up to $3 million. *Id.* §§ 1022(c)(1), (2)(B). In any case, a property's basis cannot exceed the property's fair market value on the day the decedent died. *Id.* § 1022(d)(2).

55. *Id.* § 1022(d)(3)(A).

56. *Id.* § 1022.

57. Schlesinger & Kulish, *supra* note 4, at A1.

A. Prescription Drugs

When Medicare was created in 1965, it was intended to be a comprehensive health care program for older Americans, regardless of their medical profile or particular needs.[58] To that end, it covers almost all hospitalization costs incurred by persons age sixty-five years and older, along with most doctors' bills, medical equipment costs, and laboratory fees.[59] Since 1965, medicine has made major progress in the treatment of various diseases and chronic illnesses.[60] Some of these developments have been reflected in changes to the Medicare program,[61] but many others have not.

Of these, the single most significant development is undoubtedly the increasing use and rising cost of pharmaceutical drugs.[62] Prescription medications now treat conditions on an outpatient basis that previously required hospitalization or could not be treated at all.[63] While this phenomenon is global in its dimensions, Medicare is the only major national health care program that provides no general coverage of outpatient prescription medications.[64] Moreover, most private health care arrangements in the United States reflect the new

58. *See generally* THEODORE R. MARMOR, THE POLITICS OF MEDICARE (2d ed. 2000).

59. *See* FROLIK & KAPLAN, *supra* note 9, at 56–89. *See generally* MEDICARE HANDBOOK (Judith A. Stein & Alfred J. Chiplin, Jr. eds., 2000).

60. *See generally* MARMOR, *supra* note 58.

61. *Id.*

62. *See generally* John K. Iglehart, *Medicare and Prescription Drugs*, 344 NEW ENG. J. MED. 1010 (2001); Stephen B. Soumerai & Dennis Ross-Degnan, *Inadequate Prescription Drug Coverage for Medicare Enrollees—A Call to Action*, 340 NEW ENG. J. MED. 722 (1999); *see also* FAMILIES USA, HARD TO SWALLOW: RISING DRUG PRICES FOR AMERICA'S SENIORS 1 (1999).

63. Michael E. Gluck, *A Medicare Prescription Drug Benefit*, NAT'L ACAD. SOC. INS., MEDICARE BRIEF, Apr. 1999, at 1, http://www.nasi.org/publications_show.htm?doc_id=52818&name=Medicare (last visited Feb. 11, 2002). Indeed, one study has shown that older persons who are denied drugs to treat chronic conditions are twice as likely to require expensive hospitalization or nursing home stays. Stephen B. Soumerai et al., *Effects of Medicaid Drug Payment Limits on Admission to Hospitals and Nursing Homes*, 325 NEW ENG. J. MED. 1072, 1074–75 (1991).

64. *See* Deborah A. Freund et al., *Outpatient Pharmaceuticals and the Elderly: Policies in Seven Nations*, HEALTH AFF., May/June 2000, at 259. Canada's national health insurance program does not include prescription medications, but each province has some program that covers these costs. *Id.* at 260. In some limited circumstances, Medicare does cover these costs; e.g., immunosuppressive agents for organ transplant recipients, clotting factors for hemophiliacs. *See* Iglehart, *supra* note 62, at 1010.

reality of pharmaceutical treatment and provide some coverage of prescription drug costs.[65]

In the absence of such coverage, Medicare enrollees have turned to three principal means of obtaining their medications,[66] but each has significant deficiencies and programmatic drawbacks.[67] The first of these is enrollment in a Medicare health maintenance organization (HMO).[68] Such arrangements almost always cover pharmaceutical expenses,[69] and this feature is one of their most effective selling points.[70] But Medicare HMOs often have limited formularies, which means that only certain pharmaceuticals are included.[71] The cost of any drug that is not in a plan's formulary is the financial responsibility of the enrollee alone. Furthermore, 87% of Medicare HMOs impose annual caps, some of which are only $600.[72] In any case, these HMOs face a variety of cost pressures that have resulted in waves of nonrenewals,[73] leaving thousands of former enrollees to scramble for

65. Iglehart, *supra* note 62, at 1010; *see also* CYNTHIA COSTELLO, OLDER WOMEN'S LEAGUE, 2000 MOTHER'S DAY REPORT, PRESCRIPTION FOR CHANGE: WHY WOMEN NEED A MEDICARE DRUG BENEFIT 5 (2000).

66. Some Medicare enrollees who meet the stringent financial need criteria of Medicaid can obtain pharmaceutical coverage through that program. Soumerai & Ross-Degnan, *supra* note 62, at 724 (reporting that only fourteen state Medicaid programs have such coverage and that "the majority of low-income Medicare enrollees do not live in [those] states"). As to Medicaid eligibility generally, see FROLIK & KAPLAN, *supra* note 9, at 104–10.

Some twenty-nine states have prescription drug programs for their older residents, but these programs are also restricted to low-income populations. *See* AARP PUBLIC POLICY INST., STATE PHARMACY ASSISTANCE PROGRAMS 2001: AN ARRAY OF APPROACHES 10 (2001), http:/research.aarp.org/health/ib50_spap.html. Moreover, the scope of these programs varies widely. *Id.* The most current information about such programs can be obtained at the National Conference of State Legislatures, State Pharmaceutical Assistance Programs' Website, http://www.ncsl.org/programs/health/drugaid.htm.

67. *See* Soumerai & Ross-Degnan, *supra* note 62, at 724.

68. *See generally* FROLIK & KAPLAN, *supra* note 9, at 96–98; Melynda Dovel Wilcox, *Choosing a Medicare HMO*, KIPLINGER'S PERS. FIN., Aug. 1996, at 73; Nancy Ann Jeffrey, *Sign of the Times: Medicare Users Turn to HMOs*, WALL ST. J., Oct. 20, 1995, at C1 [hereinafter *Sign of the Times*].

69. Margaret Davis et al., *Prescription Drug Coverage, Utilization, and Spending Among Medicare Beneficiaries*, HEALTH AFF., Jan./Feb. 1999, at 231 (95% of Medicare HMOs cover drugs).

70. Nancy Ann Jeffrey, *Seniors in Medicare HMOs Should Know the Drugs That Prescription Plans Cover*, WALL ST. J., May 16, 1997, at C1 (coverage of pharmaceuticals is "a magnet that has helped membership in Medicare managed-care plans explode"); *see also* Wilcox, *supra* note 68, at 73.

71. *See* Jeffrey, *supra* note 70, at C1.

72. Soumerai & Ross-Degnan, *supra* note 62, at 722.

73. Iglehart, *supra* note 62, at 1011 (reporting that 120 of 266 Medicare HMOs have chosen to discontinue their participation in Medicare).

alternative arrangements. As a result, the proportion of Medicare enrollees in Medicare HMOs, never more than about one-sixth,[74] has been declining in recent years[75] and represents a shrinking response to Medicare's lack of prescription drug coverage.

A second alternative that some Medicare enrollees have enjoyed is drug coverage plans provided by their former employers.[76] These plans are similar to those offered by Medicare HMOs in many ways. For example, they typically have restricted formularies, impose copayment obligations on each prescription, and have annual caps on covered costs.[77] More generally, retiree health benefits have been targeted in recent years for corporate cost cutting,[78] and many employers have reduced or eliminated their plans' drug benefits as part of these efforts. Employer-provided retiree drug benefits, therefore, are also a shrinking response to Medicare's noncoverage of these costs.

The third alternative that some Medicare enrollees have undertaken is supplemental health care insurance called "Medigap" insurance.[79] Medigap policies plug some of the gaps in Medicare's health care package, one of which is the noncoverage of prescription medication.[80] Of the ten standardized Medigap packages, however, only three cover prescription drugs.[81] These three plans, by the way, are

74. *See* Nancy Ann Jeffrey, *Health Care: The Elderly Agonize as More HMOs Abandon Medicare*, WALL ST. J., Oct. 16, 1998, at B1 [hereinafter *HMOs Abandon Medicare*]; *see also* FROLIK & KAPLAN, *supra* note 9, at 95.

75. *See* John Thomas, *H.M.O.'s to Drop Many Elderly and Disabled People: Health Experts Predict Most Severe Consequences Will Be Loss of Prescription Drug Benefits*, N.Y. TIMES, Dec. 31, 2000, at A14 (reporting the loss of Medicare HMO coverage by one-sixth of all Medicare HMO enrollees on January 1, 2001); *see also* John K. Iglehart, *The Centers for Medicare and Medicaid Services*, 345 NEW ENG. J. MED. 1920, 1923 (2001) (only 14% of Medicare beneficiaries are in managed care arrangements).

76. *See* Gluck, *supra* note 63, at 3 (28% of Medicare enrollees have such coverage).

77. *See id*. at 2, 3.

78. *See* MERCER/FOSTER HIGGINS, NATIONAL SURVEY OF EMPLOYER-SPONSORED HEALTH PLANS 2000 44 (2001) ("While employer-sponsored medical coverage for retirees has slowly eroded throughout the 1990s, the process appears to have accelerated in 2000."); *see also* PAUL FRONSTIN, RETIREE HEALTH BENEFITS: TRENDS AND OUTLOOK 9 (2001); HEWITT ASSOC., RETIREE HEALTH COVERAGE: RECENT TRENDS AND EMPLOYER PERSPECTIVES 3 (1999); U.S. GEN. ACCOUNTING OFFICE, RETIREE HEALTH BENEFITS: EMPLOYER-SPONSORED BENEFITS MAY BE VULNERABLE TO FURTHER EROSION 2, 9, 12 (GAO-01-374, 2001).

79. *See generally* FROLIK & KAPLAN, *supra* note 9, at 89–95; HEALTH CARE FIN. ADMIN., 2001 GUIDE TO HEALTH INSURANCE FOR PEOPLE WITH MEDICARE (2001), http://www.medicare/gov/Publications/Pubs/pdf/guide.pdf (last visited Mar. 29, 2001).

80. *See* FROLIK & KAPLAN, *supra* note 9, at 94–95.

81. *See id.* at 94.

the most expensive of the ten Medigap packages available,[82] which may explain why only 29% of Medigap policy owners have prescription drug coverage.[83]

In any case, Medigap insurance is not a complete solution to Medicare's noncoverage of drug costs. Two of the three Medigap packages that cover such costs have an annual limit of only $1,250, and the third package has a limit of $3,000 per year.[84] Moreover, all three plans have an annual deductible of $250 per insured, and a copayment obligation of 50%.[85] Thus, if Rebecca fills a prescription that costs $170, her Medigap policy pays only $85 (one-half of the $170 cost), assuming that Rebecca already paid $250 for drugs this year and has not yet hit her annual limit. In other words, Medigap's drug coverage has significant limitations and in some cases, may not be cost-effective. That is, the additional cost of purchasing a Medigap package that includes a drug benefit may exceed the cost savings anticipated from that benefit.

As a result of the restrictions described above, adding prescription drug coverage to the Medicare program is vitally important to the health and finances of most older Americans. And that is why this elder law issue was featured so prominently in the last presidential election campaign.[86] Both major political parties recognized that the current situation was inadequate and proposed solutions for the voters' consideration.[87] These proposals differed in terms of their scope of coverage, eligibility of prospective enrollees, costs to the enrollees, and the extent to which they worked with or supplanted existing arrangements.[88] These are all legitimate components for debate and

82. *See* Gluck, *supra* note 63, at 4; AARP PUB. POLICY INST., MEDICARE BENEFICIARIES AND PRESCRIPTION DRUG COVERAGE: GAPS AND BARRIERS 3, 7 (1999), http://research.aarp.org/health/ib39.html (last visited Feb. 11, 2002).

83. Gluck, *supra* note 63, at 3. *See generally* Nadereh Pourat et al., *Socioeconomic Differences in Medicare Supplemental Coverage*, HEALTH AFF., Sept./Oct. 2000, at 186.

84. FROLIK & KAPLAN, *supra* note 9, at 94.

85. *Id*.

86. *See* Jackie Calmes & Laurie McGinley, *Bush Unveils Prescription-Drug Benefit for Medicare as Remedy for Campaign*, WALL ST. J., Sept. 6, 2000, at A28; Shailagh Murray, *A Couple Wonders: Which Drug Plan Will Help Them?*, WALL ST. J., Oct. 27, 2000, at A20.

87. Calmes & McGinley, *supra* note 86, at A28; Murray, *supra* note 86, at A20; *see also* Laurie McGinley & Shailagh Murray, *Lawmakers Sweeten Drug-Benefit Plans to Gain Edge with Voters*, WALL ST. J., June 26, 2000, at A48.

88. Calmes & McGinley, *supra* note 86, at A28; Soumerai & Ross-Degnan, *supra* note 62, at 724–26; *see also* Laurie McGinley & Jacob M. Schlesinger, *Clinton Drug-Benefit Plan Recasts Medicare Debate*, WALL ST. J., June 28, 1999, at A28.

programmatic design, but the point remains that both political parties recognized that there was a problem. Nevertheless, no solution has been adopted thus far.[89]

In part, this inaction reflects the considerable lobbying efforts by the pharmaceutical industry to forestall any legislative action.[90] Although Medicare coverage of prescription drugs would increase sales of such medicines, the drug makers apparently believe that with such coverage would come restrictions on how much they could charge for these drugs.[91] This fear of conjectural "price controls" has so galvanized the drug industry that it resists mightily every form of governmental pharmaceutical coverage—be it state or federal.[92] To be fair, this fear of pricing limits is completely rational, given Medicare's sorry efforts to restrict hospital charges via diagnostic range groupings[93] and its heavy-handed reductions in allowable charges by physicians and other health care providers.[94] As a result, the drug industry fights virtually every proposed drug benefit for Medicare enrollees.

But their efforts would not be so effective if Medicare enrollees were unified in seeking a drug benefit. The availability of the alternatives described above have atomized the market for prescription drug coverage and dissipated the political will necessary to undertake this structural change.[95] To some degree, therefore, current prescription drug arrangements, though limited in their availability and often inadequate in their implementation, have become barriers to genuine programmatic improvement.[96]

89. *See* Laurie McGinley, *Bush's First Budget: Congress, Bush Are at Odds on Medicare*, WALL ST. J., Mar. 1, 2001, at A19.

90. *See* Gardiner Harris, *Prescription for Gridlock: A Look at the Competing Players in the Medicare Drug Debates Shows Why It Will Be Hard to Get Legislation Passed*, WALL ST. J., Feb. 21, 2001, at R5.

91. Lucette Lagnado et al., *Doses of Reality: Idea of Having Medicare Pay for Elderly's Drugs Is Rolling the Industry*, WALL ST. J., Feb. 19, 1999, at A1.

92. *See* Russell Gold et al., *Industry Headache: States Square Off Against Drug Firms in Crusade on Prices*, WALL ST. J., Dec. 7, 2001, at A1; *see also* Russell Gold et al., *Judge Allows Drug Rebates in Florida Law*, WALL ST. J., Jan. 3, 2002, at A3; Russell Gold, *Pharmaceutical Industry Sues Michigan to Block Attempt to Cut Drug Prices*, WALL ST. J., Dec. 31, 2001, at A2.

93. *See* RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 159–62 (1997).

94. *See* Richard L. Kaplan, *Taking Medicare Seriously*, 1998 U. ILL. L. REV. 777, 785–86; *see also* Ruth S. King, *Real Medicare Reform Must End Price-Fixing*, WALL ST. J., July 12, 2001, at A16; Barbara Martinez, *Some Doctors Say They May Stop Seeing Medicare Patients After Cuts*, WALL ST. J., Jan. 15, 2002, at B1.

95. Harris, *supra* note 90, at R5.

96. *See* Thomas Rice & Jill Bernstein, *Supplemental Health Insurance for Medicare Beneficiaries*, NAT'L ACAD. SOC. INS., MEDICARE BRIEF, Nov. 1999, at 11–12,

Consequently, the issue remains: how can a program that is charged with providing for the medical needs of older Americans not cover prescription medication, when such medication is an increasingly significant part of their medical regimen?

B. Long-Term Care Insurance

Financing the cost of long-term care is one of the major issues facing older Americans and their families today.[97] As I have explained elsewhere, most older people do not realize that long-term care expenses are essentially their own responsibility.[98] In fact, a recent national survey of Americans aged forty-five years and older revealed that most people believe that long-term care costs are covered by existing governmental programs.[99] Unfortunately, that is not the case.

Medicare's coverage of long-term care is riddled with restrictions and limitations. For example, it covers nursing home expenses only if the care provided is "skilled nursing care."[100] Moreover, that care must be needed to treat a condition that was first treated in a hospital stay that preceded the nursing home admission,[101] and that hospital stay must have lasted at least three days.[102] Even if these conditions are met, Medicare pays for only twenty days[103] within a "spell of illness."[104] After that, it covers only those costs that exceed a daily deductible and only for the next eighty days.[105] That deductible is adjusted annually for inflation, and in 2002 was $101.50 per day.[106]

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http:www.nasi.org/publications2763/publications.htm (last visited Feb. 11, 2002). *See generally* THEDA SKOCPOL, BOOMERANG: CLINTON'S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS 92–95 (1996).

97. Kaplan, *supra* note 24, at 65.

98. *Id.*

99. AMERICAN ASS'N OF RETIRED PERS., THE COSTS OF LONG-TERM CARE: PUBLIC PERCEPTIONS VERSUS REALITY 9 (2001), http://www.aarp.org/health/ltc_costs.pdf (last visited Feb. 11, 2002) [hereinafter AARP].

100. 42 U.S.C. § 1395f(a)(2)(B) (1994); 42 C.F.R. § 409.31(b)(3) (2001).

101. 42 U.S.C. § 1395f(a)(2)(B); 42 C.F.R. § 409.31(b)(3).

102. 42 U.S.C. § 1395x(i).

103. *Id.* §§ 1395d(a)(2)(A), 1395e(a)(3).

104. A "spell of illness" begins with the nursing home admission and ends when the patient has been out of a hospital, nursing home, or rehabilitative facility for sixty consecutive days. 42 U.S.C. § 1395x(a)(2); 42 C.F.R. § 409.60(b).

105. 42 U.S.C. § 1395e(a)(3).

106. *See* http://www.medicare.gov/Basics/Amounts2002.asp (last visited Feb. 8, 2002). Most Medigap policies cover this deductible. *See* FROLIK & KAPLAN, *supra* note 9, at 95.

Little wonder then that Medicare pays only 13% of older Americans' nursing home costs.[107]

Outside the nursing home context, Medicare's long-term care limitations are even more severe. Care in assisted living facilities[108] is not covered at all,[109] even though 41% of respondents in the survey mentioned earlier believed otherwise.[110] Nor do Medigap insurance policies provide any coverage of these costs.[111]

Medicare does cover long-term care within a person's home, but again there are serious restrictions. Such "home health care" must be provided or supervised by a registered professional nurse, pursuant to a written plan of care. [112] This care plan must be established by a physician[113] who reviews the plan at least once every two months.[114] Moreover, only those persons who cannot leave their home without assistance are eligible for Medicare's home health care benefits.[115] Even then, these benefits are limited to no more than four hours per day on average.[116] And once again, Medigap policies provide no additional coverage, even though 49% of respondents in the survey mentioned earlier believe otherwise.[117]

A very different picture is presented by Medicaid, the government's health care program for poor people.[118] Medicaid does cover nursing home care, even at care levels below "skilled nursing care."[119] It also provides home health services, even to patients who are not confined to their homes.[120] Moreover, Medicaid's coverage can include home health aides and personal care services;[121] some state pro-

107. MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY 137 (1999).
108. *See generally* FROLIK & KAPLAN, *supra* note 9, at 176–78.
109. *See* LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER OR DISABLED CLIENTS ¶ 9.08[1], at 9–17 (2001).
110. *See* AARP, *supra* note 99, at 36.
111. *See* HEALTH CARE FIN. ADMIN., *supra* note 79, at 14.
112. 42 U.S.C. § 1395x(m)(1) (1994).
113. *Id.* § 1395x(m).
114. 42 C.F.R. § 484.18(b) (2001).
115. 42 U.S.C. §§ 1395k(a)(2), 1395n(a)(2)(A).
116. *See id.* § 1395x(m) (penultimate sentence) (general limit of twenty-eight hours per week, divided by seven days).
117. *See* AARP, *supra* note 99, at 44.
118. *See generally* FROLIK & KAPLAN, *supra* note 9, at 101–29.
119. 42 U.S.C. § 1396d(a)(4)(A), (f).
120. *See* HEALTH CARE FIN. ADMIN., OLMSTEAD UPDATE NO. 3, Attachment 3-g, July 25, 2000, http://www.hcfa.gov/Medicaid/letters/smd7250).html (last visited Apr. 1, 2002).
121. 42 U.S.C. § 1396t(a)(1), (3).

grams even cover adult daycare[122] and respite care for family caregivers.[123]

But Medicaid has two significant drawbacks. First, it is restricted to persons "whose income and resources are insufficient to meet the costs of necessary medical services."[124] Thus, a qualifying applicant's financial resources are limited to $2,000,[125] an automobile worth less than $4,500,[126] a burial plot,[127] and similar items.[128] A person can own a home,[129] but only if that person "expects to return" to that home.[130] Additional allowances are permitted when a person's spouse lives in the community at large,[131] but even then, Medicaid imposes liens and takes other measures to secure reimbursement of its outlays after the Medicaid recipient has died.[132] The details of these provisions need not be considered further here, because the point is that Medicaid eligibility is not an appealing prospect for most older Americans.

Then, there is Medicaid's second major drawback: limited access to long-term care providers. Due to various budgetary pressures over the years, Medicaid has developed a pattern of paying below-market rates, in some cases below even the cost of providing the care services in question.[133] As a result, some nursing homes no longer accept patients on Medicaid,[134] and other facilities limit sharply the number of

122. *Id.* § 1396t(a)(7).
123. *Id.* § 1396t(a)(5).
124. *Id.* § 1396.
125. *Id.* § 1382b(a)(3).
126. *Id.* § 1382b(a)(2)(A).
127. *Id.* § 1382b(a)(2)(B).
128. *See id.* § 1382b(a), (d) (life insurance with a face amount of no more than $1,500; burial expense fund of no more than $1,500).
129. *Id.* § 1382b(a)(1).
130. 20 C.F.R. § 416.1212(c) (2001).
131. *See generally* FROLIK & KAPLAN, *supra* note 9, at 116–21.
132. 42 U.S.C. § 1396p(b)(1); *see* ERIC M. CARLSON, LONG-TERM CARE ADVOCACY § 7.14 (2001). *See generally* CHARLES P. SABATINO & ERICA WOOD, MEDICAID ESTATE RECOVERY: A SURVEY OF STATE PROGRAMS AND PRACTICES (1996); Melynda Dovel Wilcox, *Will Nursing Home Bills Haunt Your Estate?*, KIPLINGER'S PERS. FIN., Apr. 1998, at 115.
133. *See* UNITED SENIORS HEALTH COOP., LONG-TERM CARE PLANNING: A DOLLAR AND SENSE GUIDE 32 (1988).
134. *But see* Nursing Home Resident Protection Amendments of 1999, Pub. L. No. 106-4, § 2(a), 113 Stat. 7, 7 (1999), *adding* 42 U.S.C. § 1396r(c)(2)(F)(i)(I), (II) (West Supp. 2000) (when a nursing home withdraws from the Medicaid program, it may not discharge current residents who are receiving Medicaid benefits).

Medicaid recipients that they do accept.[135] As a consequence, obtaining long-term care via Medicaid usually means having fewer provider options.[136] In light of the intensively personal nature of long-term care services, this reality can be very unsettling.

In my article entitled *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*,[137] I propose that the continuum of long-term care be bifurcated for purposes of policy analysis into nursing homes on the one hand and all other long-term care facilities on the other. Care in nursing homes should then be covered by Medicare as a natural extension of that program's comprehensive coverage of hospitalization costs.[138] Accordingly, the current limitations on Medicare's coverage of nursing home costs should be revised and in some cases simply repealed outright. Long-term care in facilities other than nursing homes, however, should remain a family's responsibility,[139] because such care is more in the nature of comfort care than medical services. Within this demarcation of responsibility, some elders and their families might decide to shift the financial risk via the mechanism of long-term care insurance.[140]

Whether this approach is adopted or rejected, the federal government should act immediately to regulate the terms of long-term care insurance policies, as it did with Medigap insurance in 1990.[141] That earlier effort established a core package of basic benefits and standardized the content and possible combinations of the various optional features.[142] It also created various consumer protections, such as guaranteed renewability,[143] and a limited open enrollment period.[144]

135. *See generally* John A. Nyman, *The Private Demand for Nursing Home Care*, 8 J. HEALTH ECON. 210 (1989); James O. Reschovsky, *Demand for and Access to Institutional Long-Term Care: The Role of Medicaid in Nursing Home Markets*, 33 INQUIRY 16 (1996).

136. *See* Joshua M. Wiener, *Long-Term Care and Devolution*, *in* MEDICAID AND DEVOLUTION: A VIEW FROM THE STATES 185, 203 (Frank J. Thompson & John J. DiIulio, Jr. eds., 1998).

137. Richard L. Kaplan, *Cracking the Conundrum, Toward a Rational Financing of Long-Term Care*, 2003 U. ILL. L. REV. (forthcoming 2003) (on file with author) [hereinafter *Cracking the Conundrum*].

138. *Id*. (manuscript at 38–41); *see also* FROLIK & KAPLAN, *supra* note 9, at 66–67.

139. *See Cracking the Conundrum*, *supra* note 137 (manuscript at 41–43) (explaining why Medicare coverage should not be extended beyond nursing homes).

140. *See generally* FROLIK & KAPLAN, *supra* note 9, at 131–43.

141. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4351(a)(3), 104 Stat. 1388 (1990), *adding* 42 U.S.C. § 1395ss(p) (1994).

142. *See* HEALTH CARE FIN. ADMIN., *supra* note 79, at 15, 27–28; *see also* FROLIK & KAPLAN, *supra* note 9, at 92–95.

143. 42 U.S.C. § 1395ss(q)(1).

Pricing was left largely to the marketplace on the presumption that consumers are accustomed to comparing prices for comparable products. But those products must indeed be comparable, and an appropriate role of government is to ensure such comparability. Unfortunately, no such comparability exists today.

In 1996, Congress made a token effort in this regard by imposing some basic requirements[145] in exchange for making premiums for long-term care insurance tax-deductible as medical expenses.[146] For example, long-term care insurance policies must be guaranteed renewable;[147] they cannot be cancelled except for nonpayment of premiums. Moreover, they may not condition long-term care benefits upon a patient's being hospitalized before needing long-term care.[148] In addition, the policies must provide some mechanism to avoid "unintentional lapse," which happens when a policy terminates due to inadvertent nonpayment of premiums.[149] Certain disclosures and policy features are mandated as well.[150] But *all* of these requirements apply only to "tax-qualified" policies.[151] Long-term care insurance policies that are not tax-qualified are unaffected by these provisions.

In any case, the central problem of noncomparability remains, with no fixed levels of coverage or even standardized options. To take the simplest example, one company may offer a policy that pays long-term care costs for three years, six years, or life.[152] Another com-

144. *Id.* § 1395ss(s)(2)(A). In addition, insurers may not duplicate coverage that a person already has. *Id.* § 1395ss(d)(3).

145. I.R.C. § 7702B(b), (g) (2000) (added by Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 321(a), 110 Stat. 1936, 2054 (1996)).

146. I.R.C. § 213(d)(1)(D) (Supp. V 1999). The tax benefits are subject to numerous structural limitations, especially their treatment as medical expenses, that effectively minimize their utility. FROLIK & KAPLAN, *supra* note 9, at 145–46. As a result, the impact of this legislation has been muted. Joshua M. Wiener et al., *Federal and State Initiatives to Jump Start the Market for Private Long-Term Care Insurance*, 8 ELDER L.J. 57, 96 (2000).

147. I.R.C. § 7702B(b)(1)(C).

148. I.R.C. § 7702B(g)(2)(A)(ii)(II) (referencing the NAT'L ASS'N OF INS. COMM'RS, MODEL LONG-TERM CARE INSURANCE ACT § 6D (1993)).

149. I.R.C. § 7702B(g)(2)(A)(i)(VI).

150. *See, e.g.*, I.R.C. § 7702B(g)(2)(A)(i)(X) (referring to inflation protection); *id.* § 7702B(g)(3) (discussing disclosures); *id.* § 7702B(g)(4) (requiring nonforfeiture of benefits).

151. *Id.* §§ 213(d)(10), 7702B(b)(1).

152. NORTHWESTERN LONG TERM CARE INS. CO., NORTHWESTERN MUTUAL LIFE INS. CO., QUIETCARE: A TAX-QUALIFIED COMPREHENSIVE LONG-TERM CARE INSURANCE POLICY 9 (1999) (on file with author) [hereinafter QUIETCARE].

pany policy covers terms of two years or four years.[153] How can one easily compare which policy is cost-effective when one offers apples and the other has oranges? The confusion then escalates with different possible elimination periods (comparable to a deductible),[154] daily benefit amounts,[155] inflation adjustment formulae,[156] coverage of home care costs,[157] refund provisions,[158] and so on *ad nauseaum*.[159] The result of these multiple and noncomparable features is serious consumer confusion.[160] Little wonder, then, that less than 10% of older Americans have long-term care insurance.[161]

The need to reform this product is critical even if, as I have proposed elsewhere,[162] such insurance covers care only in assisted living facilities, continuing care retirement communities, and the like. But if private long-term care insurance is also expected to finance nursing home costs, as is the case currently, some serious standardization of this product must occur immediately. The model for such action already exists in the form of the Medigap insurance reform undertaken a decade ago.[163] Government should act now!

153. *See* Nancy Ann Jeffrey, *Your Needs, Plus Your Budget, Equals What to Pay on Long-Term Care Policy*, WALL ST. J., Mar. 21, 1997, at C1 (describing John Hancock Insurance Co. policies) [hereinafter *Your Needs*].

154. *Compare* QUIETCARE, *supra* note 152, *with Your Needs*, *supra* note 153 (comparing Northwestern's periods of 90 or 180 days to John Hancock's periods of 20 or 100 days).

155. *Compare* QUIETCARE, *supra* note 152, *with Your Needs*, *supra* note 153 (comparing Northwestern's daily benefit amounts beginning at $50 per day to John Hancock's beginning at $100 per day).

156. NAT'L ASS'N INS. COMM'RS, A SHOPPER'S GUIDE TO LONG-TERM CARE INSURANCE 18–19 (1999); ALBERT NORMAN ET AL., LONG-TERM CARE INSURANCE: A PROFESSIONAL'S GUIDE TO SELECTING POLICIES 77–80 (3d ed. 1995) (fixed increases added each year versus compounded increases).

157. *Compare* QUIETCARE, *supra* note 151, *with* GE CAPITAL ASSURANCE, PRIVILEGED CARE SELECT (1996) (on file with author) (comparing Northwestern's 50% coverage of home care costs with GE's 80% coverage).

158. PHYLLIS R. SHELTON, LONG-TERM CARE PLANNING GUIDE 36 (2000).

159. *Id.* at 36–37, 45 (describing different options that can apply if premiums are discontinued after a number of years and describing options regarding worldwide coverage and medical alert systems).

160. Ellen Graham, *Weighing the Benefits of Buying Insurance for Extended Elder Care*, WALL ST. J., Mar. 31, 1999, at B1 (noting the "baffling array of variables").

161. U.S. GENERAL ACCOUNTING OFFICE, LONG-TERM CARE INSURANCE: BETTER INFORMATION CRITICAL TO PROSPECTIVE PURCHASERS 3 (GAO/T-HEHS-00-196, 2000), http://www.gao.gov/archive/2000/he00196t.pdf. (last visited Feb. 11, 2002).

162. *See Cracking the Conundrum*, *supra* note 137 (manuscript at 38–44) (calling for the extension of Medicare to cover nursing home costs).

163. 42 U.S.C. § 1395ss(p) (West Supp. 2000).

C. Advance Health Care Directives

Every state within the United States has authorized some form of advance health care directive.[164] Some directives are "living wills," relatively simple declarations that the maker of the instrument does not want life-extending medical procedures performed, if he or she has a terminal illness and death is otherwise imminent.[165] The specific language varies from state to state, but the essence of these documents is largely the same.[166]

An alternative type of advance health care directive is the health care proxy or "durable power of attorney for health care."[167] This form typically makes no explicit declaration about medical preferences, but simply designates someone to make health care decisions in the event that the maker of this instrument cannot do so.[168] These forms developed more recently than did living wills,[169] but they respond to the same basic desire—namely, to control one's medical destiny when a person either cannot understand the nature of the decision required or cannot communicate the decision itself.[170] In these circumstances, the person is said to lack decision-making "capacity,"[171] and the advance health care directive fills the void.

Health care directives are not exclusively an elder law issue, of course. Indeed, the celebrated court cases that spawned the development of health care directives involved young women in their twen-

164. For citations to the pertinent state statutes, see ABA COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, HEALTH CARE SURROGATE DECISION-MAKING LEGISLATION (July 1, 1999), http://www.abanet.org/elderly/health.html (last visited Feb. 8, 2002). For the state forms themselves, see 3 LOUIS A. MEZZULLO & MARK WOOLPERT, ADVISING THE ELDERLY CLIENT §§ 33.40–.126 (2001). *See generally* ALAN D. LIEBERSON, ADVANCE MEDICAL DIRECTIVES (1992 & West Supp. 1999) (treatise on current state of law concerning advanced medical directives).

165. *See* LIEBERSON, *supra* note 164, §§ 5:1–7:15.

166. *See* FROLIK & KAPLAN, *supra* note 9, at 29–41 (detailing the factors common to living wills that transcend state boundaries); *see also* B.D. COLEN, THE ESSENTIAL GUIDE TO A LIVING WILL 31–114 (1991) (modeling living wills for the forty-one states that had passed living will legislation as of 1990).

167. NANCY M.P. KING, MAKING SENSE OF ADVANCE DIRECTIVES 132–40 (1996).

168. *See* LIEBERSON, *supra* note 164, §§ 17:1–19:27.

169. *See, e.g.*, Stephen M. Fatum et al., *A Review of the Illinois Health Care Surrogate Act*, 80 ILL. B.J. 124, 125 (1992).

170. *See* LIEBERSON, *supra* note 164, §§ 20:1–:11; *see also* ROBERT B. FLEMING, ELDER LAW ANSWER BOOK 17-8 to 17-9 (2000) (discussing difference between a living will and health care proxy).

171. *See* FROLIK & KAPLAN, *supra* note 9, at 12–17, 23–25; *see also* OLDER ADULTS' DECISION-MAKING AND THE LAW 1–161 (Michael Smyer et al. eds., 1996). *See generally* MICHEL SILBERFELD & ARTHUR FISH, WHEN THE MIND FAILS: A GUIDE TO DEALING WITH INCOMPETENCY (1994).

ties.[172] Moreover, a federal statute known as the Patient Self-Determination Act of 1990[173] requires that "all adult individuals" who are admitted into a hospital or nursing home, or who arrange services with a home health agency be informed about their right to prepare such a directive and be given the appropriate forms.[174] Nonetheless, older people have a significantly greater awareness of, and interest in, advance health care directives. For example, one study found that 35% of persons over age seventy-five have some form of advance directive, compared with only 9% of persons under age thirty.[175] Consequently, advance health care directives and their effectiveness are important matters to older Americans.

There are a variety of intriguing legal and medical issues with such directives,[176] but one that is uniquely capable of governmental resolution is portability. That is, each state has its own form, and state laws vary as to whether out-of-state forms will be honored.[177] Elders who spend any part of their lives in more than one state must be concerned with the state-to-state acceptance of their advance health care directives.[178] While elders with homes in two states are often advised to execute health care directives in both states,[179] few do so.[180] The growing number of older people who travel out-of-state to see relatives and to take extended vacations are also at risk.[181] But what should they do? Load up their luggage with advance directives for

172. *See generally* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) (Nancy Cruzan was twenty-five years old); *In re* Quinlan, 355 A.2d 647 (N.J. 1976) (Karen Ann Quinlan was twenty-two years old).

173. Enacted as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115, 1388-204 (1990).

174. 42 U.S.C. §§ 1395cc(f), 1396a(w) (1994).

175. U.S. GENERAL ACCOUNTING OFFICE, PATIENT SELF-DETERMINATION ACT: PROVIDERS OFFER INFORMATION ON ADVANCE DIRECTIVES BUT EFFECTIVENESS UNCERTAIN 9 (GAO/HEHS-95-135, 1995), http://www.gao.gov/archive/1995/he95135.pdf (last visited Feb. 11, 2002).

176. *See, e.g.*, LIEBERSON, *supra* note 164, §§ 22:1–:15 (describing response of religious organizations and advocates for the handicapped to advance directives); Stuart D. Zimring, *Multi-Cultural Issues in Advance Directives*, NAELA Q., Summer 2000, at 12. *See generally* Sheila T. Murphy et al., *Ethnicity and Advance Care Directives*, 24 J.L. MED. & ETHICS 108 (1996).

177. *See, e.g.*, 755 ILL. COMP. STAT. 35/9(h) (1993) (Illinois will recognize a living will that is "in compliance with the law of [another] state").

178. *See* Russell E. Carlisle, *Interstate and International Recognition of Health Care Advance Directives*, ELDER'S ADVISOR, Winter 1999, at 1.

179. *See, e.g.*, FROLIK & KAPLAN, *supra* note 9, at 39; LIEBERSON, *supra* note 164, § 18:25.

180. *See generally* Carlisle, *supra* note 178.

181. *See generally id.*

every state through which they plan to travel? This solution is as preposterous as it is unrealistic.

The better solution is interstate recognition of out-of-state advance health care directives. This approach was proposed in 1999 as part of the Advance Planning and Compassionate Care Act.[182] That legislation included certain safeguards to ensure appropriate respect for state-specific policies; for example, state laws regarding the withholding or withdrawal of health care would not be abrogated by an out-of-state directive.[183] Moreover, state laws that provide "greater portability, more deference to a patient's wishes, or more latitude in determining a patient's wishes" would be honored.[184] In other words, the proposed legislation could only *enhance* a patient's existing rights; it could not contract them. Nevertheless, neither this Bill nor any other dealing with this issue[185] has emerged out of committee for consideration by the full Congress.

As a result, older Americans who want to ensure that their medical care decisions are implemented have no such assurance once they leave the borders of their home state. This problem is easily fixable and should be addressed forthwith.

D. Social Security Earnings Test

No government program is as important to older Americans as Social Security.[186] For two out of three retirees, it provides the major part of their retirement income, and for almost a third of retirees, it provides 90% or more.[187] But Social Security was never intended to be the principal source of retirement income, and its benefits are not computed with this goal in mind.[188] As a result, many older Americans supplement their Social Security retirement benefits with em-

182. S. 628, 106th Cong. § 5(a), (b) (1999); *see also* H.R. 1149, 106th Cong. § 5(a), (b) (1999) (companion proposal).

183. S. 628, 106th Cong. § 5(a) (proposing 42 U.S.C. § 1395cc(f)(5)(B)); S. 628, 106th Cong. § 5(b) (proposing 42 U.S.C. § 1396a(w)(6)(B)).

184. S. 628, 106th Cong. § 5(a) (proposing 42 U.S.C. § 1395cc(f)(5)(C)); S. 628, 106th Cong. § 5(b) (proposing 42 U.S.C. § 1396a(w)(6)(C)).

185. *Cf.* Health Care Assurance Act of 2001, S. 24, 107th Cong. § 601(a)(2)(B)(i), (iii) (2001) (directing the Secretary of Health and Human Services to "develop a national advance directive form" that would "be honored by all health care providers").

186. SOCIAL SECURITY ADMIN., FAST FACTS & FIGURES 7 (2001).

187. *Id.*

188. *See* FROLIK & KAPLAN, *supra* note 9, at 282–87 (explaining how Social Security benefits are calculated).

ployer-provided pensions, individual savings and investments, and even employment.[189] It is this latter category that demands immediate attention, more specifically the so-called retirement earnings test of Social Security.[190]

This innocent-sounding provision reduces a Social Security recipient's retirement benefit by 50% of every dollar earned over a certain limit that is adjusted annually for inflation.[191] In 2002, that limit is $11,280.[192] For example, assume that Peter is otherwise entitled to Social Security benefits of $12,000 per year, but he takes a job at Wal-Mart that pays an annual salary of $17,280. Because that amount exceeds Social Security's retirement earnings limit of $11,280 by $6,000, Peter's Social Security benefit is reduced by half of this excess—namely, $3,000. As a result, Peter receives Social Security retirement benefits of only $9,000 ($12,000 minus $3,000). In effect, the $6,000 that Peter earned above Social Security's annual limit bore an implicit tax of 50%.

To make matters worse, those earnings are subject to a federal income tax of 15% (or more),[193] as well as Social Security's own payroll tax of 15.3%, counting the employer's share.[194] The combined tax rate on Peter's income above Social Security's retirement earnings limit, therefore, exceeds 80%.[195] This computation, incidentally, does not even consider any state income taxes that might apply to these earnings.

In fact, Peter's situation could be even worse. If he has a modest pension or some investment income, his Wal-Mart earnings might take his "adjusted gross income"[196] above $25,000. At that point, the Social Security benefits themselves become subject to federal income tax.[197] By taking the job at Wal-Mart, in other words, Peter exposes as

189. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2000, at 10 (2000), http://www.aoa.dhhs.gov/aoa/stats/profile 2000.html (last visited Feb. 11, 2002).
190. *See* 42 U.S.C. § 403(b)(1) (1994).
191. *Id.* § 403(f)(3).
192. SOC. SEC. ADMIN., NATIONAL AVERAGE WAGE INDEX (2001), http://www.ssa.gov/OACT/COLA/AWI.html (last visited Feb. 11, 2002).
193. I.R.C. § 1(c) (1989). The amount of the earnings test's threshold would move Peter out of the 10% tax bracket in most circumstances.
194. I.R.C. §§ 3101(a), (b), 3111(a), (b) (1989).
195. 50% implicit tax + 15% income tax + 15.3% Social Security tax = 80.3%.
196. I.R.C. § 62(a). *See generally* BITTKER & MCMAHON, *supra* note 42, ¶ 2.1[3].
197. I.R.C. § 86(a), (c)(1)(A).

much as 85% of his Social Security benefits to tax,[198] the exact proportion depending upon Peter's income from all other sources.[199] And if his income exceeds $28,000 (in 2002),[200] Peter has entered the 27% tax bracket.[201] The combined impact of the retirement earnings test (50%), the federal income tax (27%), Social Security's payroll tax (15.3%), and the income tax on the Social Security benefits themselves (as much as 23%)[202] is an effective tax rate that can exceed 100%!

Why older Americans should face such confiscatory levels of taxation is by no means clear. Many older Americans want to remain in the workforce and to stay active for reasons other than money.[203] For example, Peter's job at Wal-Mart provides a daily regimen, interaction with people of varying ages, employee discounts on essential products, and supplemental health care benefits, perhaps even prescription drugs. As Americans live longer,[204] this trend should be encouraged, not penalized.

For these reasons, Congress repealed a less severe version of Social Security's retirement earnings test in 2000.[205] But that repeal applies only to Social Security recipients who have reached "full retirement age," which generally is sixty-five years, but is rising gradually, depending on one's year of birth.[206] So, for someone born in 1940, "full retirement age" is sixty-five years and six months.[207] In any case, the retirement earnings test for Social Security recipients below this age was not touched. As a result, those individuals who receive Social Security retirement benefits between "early retirement age" of sixty-

198. *Id.* § 86(a)(2).

199. *See* FROLIK & KAPLAN, *supra* note 9, at 306–10. *See generally* Nathan Oestreich, *Taxability of Social Security Benefits After the Repeal of the Earnings Test*, 89 TAX NOTES 543 (2000).

200. I.R.C. § 1(a)(i)(2), *adjusted by* Rev. Proc. 2001-59, 2001-52 I.R.B. 623, § 3.01 (tbl.3) (27% tax bracket begins at $27,950).

201. I.R.C. § 1(c).

202. If 85% of one's Social Security benefits are subject to a 27% income tax, the effective tax rate on these benefits is 22.95%.

203. *See generally* AM. ASS'N OF RETIRED PERS., HELPING RETIREES FIND GOOD JOBS, http://www.aarp.com/working_options/manhartprofile.html (last visited Feb. 11, 2002).

204. *It's Official: Life Expectancy in U.S. Hits New High at 76.9*, BIOMEDICAL MKT. NEWSL., Oct. 26, 2001, at 1.

205. 42 U.S.C. § 403(f)(1)(B), (3), (8)(E) (1994), *amended by* Senior Citizens' Freedom to Work Act of 2000, Pub. L. No. 106-182, §§ 2(3), (4), 3(a), 114 Stat. 198, 198 (2000).

206. 42 U.S.C. § 416(*l*)(1)–(3).

207. *See* FROLIK & KAPLAN, *supra* note 9, at 279.

two years[208] and their applicable "full retirement age" face the retirement earnings test that was examined above.[209]

Moreover, the application of this test is especially painful in light of the actuarial reduction of Social Security benefits that these people have already suffered. When someone begins receiving Social Security benefits prior to reaching "full retirement age," those benefits are reduced according to a formula that considers the precise age at which those benefits begin.[210] The younger that recipient is, the larger the benefit reduction, with the largest reduction being when benefits begin at age sixty-two years.[211] For example, in 2002 when the "full retirement age" is sixty-five years and six months, starting benefits at age sixty-two entails a reduction based of forty-two months,[212] which translates into a 22.5% reduction.[213] And as Social Security's "full retirement age" increases in the future,[214] the maximum benefit reduction will increase to 30%.[215] This reduction, moreover, is a *permanent* loss of benefits that continues throughout the recipient's life. It is not eliminated when the person reaches "full retirement age."[216] Given this reality, it seems particularly misguided, if not downright cruel, to impose the "retirement earnings test" in these circumstances. Accordingly, Congress should complete what it started in 2000 and repeal the Social Security retirement earnings test in its entirety.

To be sure, Social Security is currently on the policy horizon, but not in this regard. Widely differing proposals call for a complete restructuring of Social Security's benefit formula, substituting predictable and guaranteed benefit levels[217] for the prospect—and only the prospect—of potentially higher benefits resulting from individual

208. 42 U.S.C. § 416(*l*)(2).
209. *See id.* § 403(b)(1).
210. *Id.* § 402(q).
211. *See* FROLIK & KAPLAN, *supra* note 9, at 279–81.
212. Three years + six months = forty-two months.
213. Thirty-six months x 5/9% per month + 6 months x 5/12% per month = 20% + 2.5% = 22.5%.
214. 42 U.S.C. § 416(*l*)(1)–(3).
215. Thirty-six months x 5/9% per month + 24 months x 5/12% per month = 20% + 10% = 30%.
216. To the extent that the retirement earnings test reduces a person's Social Security benefits, the "early" retirement benefit reduction may be recalculated when the recipient reaches "full retirement age." FROLIK & KAPLAN, *supra* note 9, at 305.
217. Richard L. Kaplan, *Top Ten Myths of Social Security*, 3 ELDER L.J. 191, 205–07 (1995).

control over a portion of that person's payroll taxes.[218] These ideas may—or may not—be beneficial to retirees in some distant tomorrow,[219] but they have little relevance to current retirees or those retiring anytime soon. Indeed, President Bush has announced that his first principle in reforming Social Security is that "[m]oderization must not change Social Security benefits for retirees or near-retirees."[220] A similar commitment was expressed in a Concurrent Resolution that passed the House of Representatives by a nearly unanimous vote.[221] Repeal of Social Security's retirement earnings test, therefore, should be considered independent of any reappraisal of the overall Social Security program that might happen.[222]

E. Employer-Provided Pensions

Almost half of today's retirees have some sort of employer-provided pension plan[223] that supplements their Social Security benefits. Historically, most of these were defined-benefit plans; that is, the plan defined what benefits a retiree would receive, and the employer

218. The literature on Social Security reform proposals is far too vast for a mere footnote. For the most recent "official" proposal, see REPORT OF THE PRESIDENT'S COMMISSION, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS (2001), http://csss.gov/reports/Final_report.pdf (last visited Jan. 11, 2002) [hereinafter STRENGTHENING].

219. *See generally* JOHN MUELLER, WINNERS AND LOSERS FROM "PRIVATIZING" SOCIAL SECURITY: A REPORT COMMISSIONED BY THE NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE (1999) (which contains articles discussing restructuring of Social Security's benefit formula); SOCIAL SECURITY REFORM: BEYOND THE BASICS (Richard C. Leone & Greg Anrig, Jr. eds., 1999); U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY REFORM: POTENTIAL EFFECTS ON SSA'S DISABILITY PROGRAMS AND BENEFICIARIES (GAO-01-35, 2001); Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women's Economic Security*, 16 N.Y. L. SCH. J. HUMAN RTS. 375 (1999); Martin Feldstein & Andrew Samwick, *Potential Effects of Two Percent Personal Retirement Accounts*, 79 TAX NOTES 615 (1998); Phil Gramm, *Investment-Based Social Security*, 89 TAX NOTES 923 (2000); Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341 (2000); Pierre Pestieau & Uri M. Possen, *Investing Social Security in the Equity Market: Does It Make a Difference?*, 53 NAT'L TAX J. 41 (2000); Rebecca E. Perrine Wade, Note, *The Face of Social Security in the Twenty-First Century: An Analysis of the Reform Proposals Offered by the Social Security Advisory Council*, 6 ELDER L.J. 115 (1998).

220. STRENGTHENING, *supra* note 218, at 10.

221. H.R. Con. Res. 282, 107th Cong. § 3(2)(C) (2001). The vote was 415 to 5. CONG. REC. H9309 (daily ed. Dec. 12, 2001).

222. *Cf.* Social Security Guarantee Plus Act of 2001, H.R. 3497, 107th Cong. § 201(a) (2001) (repealing the retirement earnings test for persons age sixty-two years and older).

223. *See* FROLIK & KAPLAN, *supra* note 9, at 344.

was financially responsible for making sure that the pension plan provided those benefits.[224] More recently, however, employers have either substituted or supplemented these arrangements with defined-contribution plans.[225] Under a defined-contribution plan, the employer provides a specified sum that the employee then invests at his or her discretion.[226] Investment successes and failures are those of the employee/prospective retiree alone.

A variation on the defined-contribution theme is the 401(k) plan, so named for the authorizing section of the Internal Revenue Code.[227] Under a 401(k) plan, an employee directs that a portion of his or her salary be invested on a tax-deferred basis in the plan,[228] and the employer usually matches that portion according to some predetermined schedule.[229] But the basic arrangement is the same: the employee invests the funds in question as he or she chooses,[230] and any investment gains—or losses—are entirely that person's concern.

Most 401(k) arrangements have a limited number of investment options.[231] A typical plan might offer a fixed-income contract and an array of mutual funds, some investing in bonds, some in stock, with the exact number and variety of the offerings varying by employer.[232] There are no federal requirements regarding the mix of investments that must be offered by the employer, even though the employee bears all of the investment risk.[233]

In recent years, many prospective retirees have invested most of their section 401(k) account in the stock of their corporate employer.[234] While 401(k) plans usually offer other alternatives, certain financial incentives, such as employer matching of employee contributions and

224. *See generally id*. at 346–49.
225. *See* Jonathan Barry Forman, *How Federal Pension Laws Influence Individual Work and Retirement Decisions*, 54 TAX LAW. 143, 162 (2001).
226. *See generally* FROLIK & KAPLAN, *supra* note 9, at 349–51.
227. I.R.C. § 401(k) (1988 & West Supp. 2001); *see also* EMJAY CORP., 401(K) ANSWER BOOK vii, §§ 1-2 to 1-4 (2000) (describing the history of 401(k)).
228. *See* Leslie E. Papke, *Are 401(k) Plans Replacing Other Employer-Provided Pensions? Evidence from Panel Data*, 34 J. HUMAN RESOURCES 346, 346 (1999).
229. *See* BUCK CONSULTANTS, 401(K) PLANS SURVEY REPORT ON PLAN DESIGN 5 (1998).
230. EMJAY CORP., *supra* note 227, § 1-8.
231. *See id.* § 6-1.
232. *See id.*
233. *Id.* §§ 6-27 to 6-28.
234. *See* Ellen E. Schultz, *Workers Put Too Much in Their Employer's Stock*, WALL ST. J., Sept. 13, 1996, at C1 [hereinafter *Workers Put Too Much in Their Employer's Stock*].

special discounts, often apply exclusively to investments in the employer's corporate stock.[235] Such arrangements often produce very high concentrations of employer stock in these plans,[236] sometimes in excess of 80%.[237] Moreover, most such 401(k) plans place restrictions on when their holdings of employer stock can be sold.[238] Thus, when the stock in these plans starts to decline in value, the accountholder is unable to stem his or her loss by liquidating the shares.

The resulting lack of diversification seriously jeopardizes a retiree's financial security. After all, if the stock's value drops in response to company-specific conditions, rather than general market conditions, the company may be facing serious economic problems. In such circumstances, the employee may soon be out of a job. And because pre-Medicare health insurance is usually obtained from one's employer as a fringe benefit,[239] the loss of employment is followed shortly thereafter by the loss of health insurance—or at least *affordable* health insurance.[240] What a terrible time to discover that one's retirement account has suffered a significant reduction in its value! Rarely

235. Ellen E. Schultz & Theo Francis, *Why Company Stock Is a Burden for Many—And Less So for a Few*, WALL ST. J., Nov. 27, 2001, at A1.

236. *See* Sarah Holden & Jack VanDerhei, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2000*, EBRI ISSUE BRIEF NO. 239, Nov. 2001, at 10; *see also* EMPLOYEE BENEFIT RESEARCH INST., FACTS FROM EBRI, http://www.ebri.org/facts/0102fact.pdf (last visited Feb. 22, 2002) (reporting that 52.9% of the assets in 401(k) plans that offer employer contributions in employer stock consists of that stock).

237. *See* Ellen E. Schultz, *Employers Fight Limits on Firm's Stock in 401(k)s*, WALL ST. J., Dec. 21, 2001, at C1 (reporting concentrations of 94.7% at Proctor & Gamble, 90.2% at Abbott Laboratories, 88.2% at Dell Computer, 85.5% at Pfizer, 81.6% at Anheuser-Busch, and 81.5% at Coca-Cola) [hereinafter *Employers Fight Limits on 401(K)s*].

238. Schultz & Francis, *supra* note 235, at A1 (85% of companies with their own stock in 401(k) plans restrict the sale of such stock).

239. *See* PAUL FRONSTIN, EMPLOYEE BENEFIT RESEARCH INST., SOURCES OF HEALTH INSURANCE AND CHARACTERISTICS OF THE UNINSURED: ANALYSIS OF THE MARCH 2001 CURRENT POPULATION SURVEY 4 (2001) (four out of five nonelderly persons with health insurance have employment-based coverage).

240. When an employee is terminated, that person may continue coverage for up to eighteen months under the former employer's health insurance plan, but that person will pay the full cost of the premiums for that insurance. 29 U.S.C. §§ 1162(1), (2)(A)(i), (3)(A), 1164(1) (1994). The eighteen-month limitation does not apply if the employer files for bankruptcy. *Id.* §§ 1162(2)(A)(iii), 1163(6). In any case, the former employee's out-of-pocket cost for this insurance might be as much as ten times its pre-termination expense. *See* INSURE.COM, KNOW YOUR COBRA RIGHTS, http://www.insure.com/health/cobra.html (last modified Nov. 29, 2001). As a result, only one in five eligible individuals actually obtains COBRA insurance. KAISER COMM'N ON MEDICAID & THE UNINSURED, COBRA COVERAGE FOR LOW-INCOME UNEMPLOYED WORKERS 1 (2001), http://www.kff.org/content/2001/10252001/4021.pdf (last visited Feb. 11, 2002).

has the adage "don't put all your eggs in one basket" been more flagrantly violated.[241]

The compelled concentration of one's retirement assets in a single stock should simply be prohibited. But when a statutory amendment was proposed in 1996 to do so,[242] a coalition of major corporations effectively eviscerated the measure.[243] Since that time, the stock market has sustained a major decline,[244] and some particular stocks have lost much of their value.[245] The impact on the 401(k) plans of these companies has been catastrophic,[246] with the nearly complete wipeout of the Enron Corporation plan being only the worst example.[247] In other words, the very calamity that the 1996 proposal was designed to prevent has now occurred.

It is now time to reconsider the concentration of retirement fund assets in corporate employer stock.[248] Even if employees should be allowed to allocate *some* portion of their retirement accounts to such stock, current levels of concentration should not be permitted. Corporate match incentives should be rethought to ensure that such policies do not encourage future retirees to compromise their prospects for a secure retirement by loading up on employer stock. In addition, 401(k) account holders must be allowed to diversify out of any company stock that they receive, without excessive time and age-based restrictions.[249]

Any new legislation, moreover, should prohibit any grandfathering of existing plans. Instead, it should provide some reasonable

241. *See* Ellen E. Schultz, *Enron Workers Face Losses on Pensions, Not Just 401(k)s*, WALL ST. J., Dec. 19, 2001, at C1.

242. 401(k) Pension Protection Act of 1996, S. 1837, 104th Cong. § 2(a) (1996) (limiting the amount of employer stock in a company's 401(k) plan to 10% of the plan's assets).

243. *See* Schultz, *supra* note 234, at C1; *see also* Daniel Kadlec, *Time Bomb: 401(k)s Stuffed with Employer Stock Are a National Calamity*, TIME, Mar. 5, 2001, at 84.

244. *Year-End Review of Markets & Finance 2001*, WALL ST. J., Jan. 2, 2002, at R1. The Dow Industrial Index fell 6.18% and 7.1% in 2000 and 2001, respectively. *Id.* The NASDAQ Composite fell 39.29% and 21.05% in 2000 and 2001 as well. *Id.*

245. *See* Tom Walker, *Adjusting to the Slowdown*, ATLANTA J. & CONST., Dec. 30, 2000, at 1.

246. *See* Jim Gallager, Column, *We Had Better Learn Something from the Latest Economic Grief*, ST. LOUIS POST-DISPATCH, Dec. 30, 2001, at F1.

247. *See* Schultz & Francis, *supra* note 235, at A1; *see also* Schultz, *supra* note 237, at C11.

248. *See, e.g.*, Pension Protection and Diversification Act of 2001, S. 1838, 107th Cong. § 2(a) (2001) (limiting the amount of employer stock to 20% of the plan's assets); Pension Protection Act, H.R. 3463, 107th Cong. § 2(a) (2001) (10%).

249. *See* S. 1838, 107th Cong. § 2(a) (2001) (permitting sale of company stock in a 401(k) plan ninety days after its receipt).

schedule for bolstering the financial integrity of any 401(k) plans that do not meet whatever new standard is adopted for investment diversification. Otherwise, these retirement accounts, which often constitute their owners' single largest nonresidential asset,[250] may be unable to provide the retirement security that older Americans have been led to expect.

III. Conclusion

As the preceding section has shown, the elder law policy agenda has many issues of great importance to older Americans. A prescription drug benefit should be added to the Medicare program, so that enrollees are able to obtain the medication they need without relying on inadequate and undependable arrangements.[251] Long-term care insurance policies should be regularized, so that older people can compare different packages and optional features and make informed choices.[252] Advance health care directives should be accepted across state lines, so that the expectations of the older people making these directives are honored outside their home state.[253] Social Security's retirement earnings test should be repealed in its entirety, so that older people who continue to work are not penalized by confiscatory taxes.[254] And finally, 401(k) plans should have strict limits on how much employer stock they can hold, so that retirees can receive the retirement security that these accounts were intended to provide.[255]

This list is by no means exhaustive. But it does convey a sense of some vital concerns that relate directly to the medical and financial quality of elders' lives,[256] in contrast to reform of the federal estate tax, which affects only the finances of their nonspouse survivors.[257] Advocates for elders and the policymakers who care about their needs (or at least their votes) must refocus their attention on elder law issues of genuine consequence. They must not allow general disdain for the government's means of raising revenue to divert them to essentially

250. *See* Schultz & Francis, *supra* note 235, at A1.
251. *See supra* Part II.A.
252. *See supra* Part II.B.
253. *See supra* Part II.C.
254. *See supra* Part II.D.
255. *See supra* Part II.E.
256. *See generally* Richard L. Kaplan, *Retirement Funding and the Curious Evolution of Individual Retirement Accounts*, 7 ELDER L.J. 283 (1999).
257. 26 U.S.C. § 2056(a) (1989).

peripheral concerns. Seniors also must resist pandering efforts on matters that, in reality, are relevant only to the wealthiest among them.

Elder law issues involving health care and retirement security have enormous significance to older Americans, and this policy agenda must not be crowded out by estate tax reform.