

**DO ARTISTS DESERVE TO RETIRE?
METHODS TO REMEDY DISADVANTAGES
ARTISTS FACE IN SAVING FOR
RETIREMENT**

Rebecca Singerman

Many Americans struggle to save for retirement under a system built for traditional employees. This problem is particularly dire for artists, who have very unpredictable income streams and whose greatest asset, their art, is statutorily incompatible with tax-advantaged retirement vehicles. Art is the ultimate status symbol. It is used to shelter immense wealth for private collectors and corporate investors. Meanwhile, most artists make less money per year than the average American. Additionally, artists are vulnerable to the risks of employment relationships with their galleries, but are granted neither the protections nor the benefits of traditional employment.

This Note explores the working conditions faced by artists in America and their access to retirement tax advantages. This Note also examines how art is used as an investment vehicle by art collectors and entrepreneurs, an opportunity from which artists themselves are often unable to benefit. This Note identifies multiple avenues to improve artists' ability to save for retirement, which can be implemented either with no legal changes, or with reforms to the Internal Revenue Code, or ERISA.

Rebecca Singerman, Executive Administrative Editor 2023-24; J.D. '24, University of Illinois College of Law; M.A. '18, Williams College Graduate Program in the History of Art at the Clark Art Institute; B.A. '15, Art History, University of Chicago. The author would like to thank her family, friends, and writing advisors for their encouragement, guidance, and inspiration.

I. Introduction

The Western canon of art history has romanticized the death of artists since its foundation.¹ Giorgio Vasari, the first art historian, described Raphael dying as he finished painting the face of Christ, and immortalized the death of Leonardo da Vinci with the artist's head cradled in the arms of his patron, King Francis I.² Artists themselves perpetuate the mythoi of their creative geniuses: lights flickering in darkness, burning bright and fast, extinguished quickly by a world that is too harsh for their work.³ Depictions of artists beset by financial strain and sustained only by creative passion persist today, appearing frequently in the news,⁴ literature,⁵ film,⁶ and theater.⁷

Museums treasure their rare, late-career works from artists on the verge of death and those who were forced to radically change their artistic practice to account for their declining health, such as Claude

1. See generally TAMARA SMITHERS, *THE CULTS OF RAPHAEL AND MICHELANGELO: ARTISTIC SAINTHOOD AND MEMORIALS AS A SECOND LIFE* 52–61 (Kelley Di Dio) (2023) (arguing that Vasari's emphasis on burial and commemoration in his artist biographies is a hagiographic act of veneration).

2. See Marc Gotlieb, *How Orientalist Painters Die*, NONSITE (Dec. 15, 2014), <https://nonsite.org/how-orientalist-painters-die/> [<https://perma.cc/DW9N-89HV>] (citing GIORGIO VASARI, *LIVES OF THE MOST EXCELLENT PAINTERS, SCULPTORS, AND ARCHITECTS* (1550)); see also Jaś Elsner, *Art History as Ekphrasis*, 33 *ART HIST.* 10, 11 (2010) (referring to Vasari and Winkelman as “the founding fathers in the modern era . . .”).

3. Gotlieb, *supra* note 2 (analyzing history paintings artists planned for their pupils to execute that would immortalize their own deaths, artists designing their own graves, and the extensive mythologies of orientalist painters' romantic deaths).

4. Richard Lacayo, *What Powers Artists Who Reach Old Age? The Work.*, WASH. POST (Dec. 6, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/12/06/artists-old-age-hockney-bourgeois-katz/> [<https://perma.cc/M927-E62Z>].

5. E.g., TRACY CHEVALIER, *GIRL WITH A PEARL EARRING* (1999) (fictionalizing Vermeer's actual, ongoing financial woes; the novel became a *New York Times* best-seller, reprinting 18 times in the first year and ultimately being made into a major motion picture.).

6. E.g., *MOULIN ROUGE!* (Bazmark Productions 2001) (depicting the painter Henri Toulouse-Lautrec as an impoverished artist, though, in reality, he enjoyed the support of his aristocratic family and chose to mingle with the bohemian underbelly of Montmartre).

7. E.g., STEPHEN SONDHEIM & JAMES LAPINE, *SUNDAY IN THE PARK WITH GEORGE* (1984) (fictionalizing George Seurat's financial instability, poor critical reception, and resulting poor health); JOHN LOGAN, *RED* (2009) (dramatizing Marc Rothko's declining emotional state during his final project, and his discomfort monetizing his artwork, ending just prior to the artist's suicide).

Monet, Henri Matisse, and Chuck Close.⁸ Necessity breeds innovation, and galleries love to capitalize on the scarcity that follows a highly publicized artist's death.⁹ The ongoing fascination with starving, aging, and deceased artists demonstrates more than that we have bought into artists' own hagiographies—it is evidence of an art industry that does not support those who work in it, leaving artists to navigate disability and retirement planning alone.¹⁰

Planning for retirement is a lifetime endeavor for many Americans. It is a vital part of financial planning for adults, and important to the long-term wellbeing of elders.¹¹ The employer-sponsored retirement plans governed by ERISA are increasingly unavailable to workers in the growing gig-economy,¹² but have long been a pipe dream in the arts.¹³ Most working artists are self-employed, so they generally lack the benefits of traditional employer-sponsored retirement plans and are subject to great financial instability from the unpredictability of the art

8. Lacayo, *supra* note 4. See Emily Watlington, "Monet/Mitchell" Shows How the Impressionist's Blindness Charted a Path for Abstraction, ART AM. (May 12, 2023, 11:53 AM), <https://www.artnews.com/art-in-america/aia-reviews/monet-mitchell-blindness-disability-art-1234667906/> [<https://perma.cc/K848-JTY5>]; see also *Monet: The Late Years*, FINE ARTS MUSEUMS OF S.F.: DE YOUNG \ LEGION HONOR, <https://www.famsf.org/exhibitions/late-monet> (last visited Jan. 30, 2024) [<https://perma.cc/UQW9-EC EA>] (showcasing increasingly abstract paintings that coincided with the artist's declining vision). See also Sebastian Smees, *Chuck Close's Reputation as an Artist is Hard to Separate from the Impediments He Faced—and Overcame*, WASH. POST (Aug. 20, 2021, 12:30pm), https://www.washingtonpost.com/entertainment/museums/chuck-close-death-face-paintings/2021/08/20/20e2af2c-01b9-11ec-ba7e-2cf966e88e93_story.html [<https://perma.cc/S6PF-GCKK>].

9. Samuel McIlhagga, *What Drives Market Speculation After an Artist's Untimely Death*, ARTSY (Oct. 29, 2020, 5:01 PM), <https://www.artsy.net/article/artsy-editorial-drives-market-speculation-artists-untimely-death> [<https://perma.cc/B8ED-LTQ6>].

10. See generally *id.*

11. Jasmin Suknanan, *Here's Why our Brains Make it So Hard to Start Saving for Retirement*, CNBCSELECT (Jan. 2, 2024), <https://www.cnbc.com/select/why-retirement-saving-is-hard-according-to-behavioral-economics/> [<https://perma.cc/LX5J-UV5Z>].

12. See generally Caroline Lewis Bruckner & Jonathan Barry Forman, *Women, Retirement, and the Growing Gig Economy Workforce*, 38 GA. ST. U. L. REV. 259, 293–94 (2022).

13. Hannah Cole, *Tax Policy Should Be Part of our Basic Civic Education*, HYPERALLERGIC (Mar. 15, 2019), <https://hyperallergic.com/489987/tax-policy-should-be-part-of-our-basic-civic-education/> [hereinafter Cole, *Tax Education*] [<https://perma.cc/J4B6-MXS6>].

market.¹⁴ For artists, financial planning for retirement is an individual—and largely unguided—endeavor that is unachievable for many.¹⁵

For three reasons, the unique challenges artists face are even more daunting than those faced by gig workers. First, the art market is hugely unpredictable. This results in many artists having highly inconsistent income streams from year to year, while most retirement investment vehicles are designed to operate in conjunction with steady income streams.¹⁶ Second, even if successful, an artist's greatest asset—their artwork—is inherently illiquid, and therefore largely incompatible with the liquidity requirements of tax-advantaged models of retirement investing.¹⁷ Art is wealth, but artists cannot access its benefits because of unequal tax treatment.¹⁸ Third, operating outside of the traditional employment structure, in addition to having very strong ties to their gallery, puts artists at risk of the potential abuses of the employer-employee relationship without the benefits of traditional employment structures covered by ERISA.¹⁹

The Artist Pension Trust (APT) was a recent attempt to provide financial security and collectivize retirement investment risk amongst participating artists outside of the regulatory system governing tax-favored qualified retirement plans.²⁰ Invited artists contributed artwork to the APT, which would strategically sell the works after they

14. *Creatives Rebuild New York Launches Programs to Support 2,700 Artists Across New York State*, MELLON FOUND. (Feb. 14, 2022), <https://www.mellon.org/news/creatives-rebuild-new-york-launches-programs-supporting-2700-artists-across-state> [hereinafter *Creatives Rebuild New York*] [<https://perma.cc/AW8L-JA2V>] (statement of Sarah Calderon, Executive Director of CRNY) (“Artists’ employment and livelihoods are notoriously precarious, and COVID-19 has only exacerbated this unpredictability and uncertainty.”).

15. See Cole, *Tax Policy*, *supra* note 13.

16. See PEW CHARITABLE TRS., *NONTRADITIONAL WORKERS FACE MULTIPLE BARRIERS TO SAVING FOR RETIREMENT 2* (2021), https://www.pewtrusts.org/-/media/assets/2021/11/nontraditionalworkersbarrierstosaving_v3.pdf [<https://perma.cc/39RH-7QYF>]; see also *Creatives Rebuild New York*, *supra* note 14.

17. See 26 U.S.C § 408(a)(1) (“[N]o contribution will be accepted unless it is in cash . . .”).

18. Alan L. Feld, *Artists, Art Collectors and Income Tax*, 60 B.U. L. REV. 625, 626–31 (1980).

19. See Azmina Jasani, *When Artists and Galleries Split, What Are the Legal Implications?*, ART NEWSPAPER (Feb. 13, 2020), <https://www.theartnewspaper.com/2020/02/13/when-artists-and-galleries-split-what-are-the-legal-implications> [<https://perma.cc/LY8K-JYRN>]; see also *Creatives Rebuild New York*, *supra* note 14.

20. Robin Pogrebin & Siddhartha Mitter, *They Pooled Their Art to Create a Nest Egg. They Say it Was a Mistake*, N.Y. TIMES (Jul. 27, 2021), <https://www.nytimes.com/2021/07/27/arts/design/artist-pension-trust.html> [<https://perma.cc/4XLK-EQ3F>].

appreciated in value and use the pooled proceeds of those sales to provide predictable payouts to participating artists.²¹ Theoretically, if any of the emerging artists happened to make it big, all participants would share in their financial security.²² However, the APT was quickly overwhelmed by the massive operational burdens of collecting, storing, cataloguing, and selling the thousands of contributed artworks, as well as the challenges of maintaining multiple international chapters.²³ Attempted sales proved insufficient, and participating artists are eagerly awaiting the end of their twenty-year contracts with the APT in 2024.²⁴ Though the APT had major flaws from the outset, many artists clearly felt that it would address a critical gap in their financial longevity that it ultimately failed to close.²⁵ Additionally, its goal of increasing market value for its artists necessarily kept the participant pool small, and limited its ability to help artists as a wider professional group.²⁶

This Note will use the APT as a jumping-off point to examine how artists could save for retirement (1) in the existing retirement system and (2) outside of traditional employment-based retirement plan structures. Much discussion about collectivizing retirement benefits for self-employed people has focused on the gig economy and on industries that do not face the same artist-specific investing concerns arising from nonfungible creative assets.²⁷ This Note will focus on those challenges unique to artists, and consider whether a collective art-based design like the APT could be repurposed to help artists save for retirement.²⁸ It will also examine other possible ways for artists to overcome the problems of inconsistent income streams and unique, illiquid assets to effectively invest for retirement, either individually or collectively.

In Part II, this Note will explore the working conditions that shape artists' incomes. Part III will examine the inadequacies of artists' current options to save for retirement, previous attempts to improve economic stability for artists in the last century (including the APT), and other ways to invest with art. Part IV will recommend how gallery

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. Jeff Howe, *Paint by Numbers*, WIRED (Apr. 1, 2005, 12:00 PM), <https://www.wired.com/2005/04/pension/> [<https://perma.cc/VHX6-KDG>].

27. *See, e.g.*, Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 56–57 (2017).

28. *Infra* Part III.C.2, 5.

funds can better support artists, compare analogous industries, and examine other legislative methods that allow artists to use their art more effectively when saving for retirement.

Ultimately, this Note recommends (1) smaller-scale gallery funds that support artists' financial wellbeing through regular payments, funded entirely by collectors; and (2) reforms to the Internal Revenue Code and ERISA that would allow galleries and artists to contract into an arrangement wherein the gallery directly invests those payments in artists' retirement accounts. However, recognizing the difficulty of achieving such an outcome, this Note also recommends more modest tax reforms to bring artists onto a more equal playing field with collectors in the eyes of the IRS. ERISA is not structured to support the gallery-artist relationship, but new reforms in state plans outside of ERISA suggest that expanding retirement structures may be possible.²⁹

II. Background

For purposes of this Note, "artist" refers to fine artists, including visual artists, performance artists, and conceptual artists.³⁰ Musicians, actors, and other performers are excluded from this definition, because their employment structures differ drastically from those of visual artists.³¹ Arts professionals (i.e., workers in galleries, museums, or fine art services) are likewise excluded, as they are more likely to be traditional employees,³² although they too often lack adequate employee benefits.³³

29. See *infra* Part III.A.4, C.5.

30. But see I.R.C. § 263A(h)(3)(C) ("In general—the term "artist" means any individual if the personal efforts of such individual create (or may reasonably be expected to create) a picture, painting, sculpture, statute, etching, drawing, cartoon, graphic design, or original print edition.").

31. Andrew J. Adams, *The Show Must Go on: Entertainer-Employee Classification Takes Center Stage for Venues*, DARROWEVERETT LLP (Apr. 26, 2023), <https://www.darroweverett.com/are-performing-artists-contractors-or-employees/> [https://perma.cc/V6TK-RSWD] (surveying state laws pertaining to classification of performers as either employees or independent contractors in New York, California, and Washington. Neither classification is appropriate for most artists.).

32. ASS'N ART MUSEUM DIRS., 2022 SALARY SURVEY 17 (2022) (showing that 70% of the 185 responding member-museums offer no 401(k) plans for their employees, 30% offer no 403(b), 77% have no pensions, and 76% have no other defined contribution plans).

33. Tom Seymour, *State of the Unions: Why US Museum Workers Are Mobilising Against Their Employers*, ART NEWSPAPER (Feb. 2, 2022), <https://www.theartnewspaper.com/2022/02/02/state-of-the-unions-a-new-renaissance-at-us-museums> [https://perma.cc/676X-NPQY]; Julia Halperin, *Why Do US Museum Workers Want to*

A. A Brief History of Artists and their Working Conditions in the Modern Era

The APT was not the first attempt to collectivize and stabilize income for working artists. In 1933, twenty-five American artists demanded state-sponsored art projects to “eliminate once and for all the unfortunate dependence of American artists upon the caprice of private patronage.”³⁴ This manifesto was issued by a group that would soon begin calling themselves the “Unemployed Artists Group.”³⁵ After demonstrations at the Whitney Museum of American Art, the Public Works of Art Project (PWAP), which was succeeded by the Works Progress Administration (WPA), employed so many of its members that the group changed its name to “The Artists Union.”³⁶

The WPA was the most extensive and impactful of the New Deal art programs.³⁷ It is best known for its mural division, which created over 2,500 murals, many of which are still visible in public buildings today.³⁸ The WPA employed some 10,000 artists, including notables like Jackson Pollock, Willem de Kooning, Marsden Hartley, Jacob Lawrence, Diego Rivera, and John Sloan.³⁹ The artists were relatively free to select their subject matter, but they were expected to submit one painting every four to eight weeks at the rate of \$23 per week.⁴⁰ WPA projects were so widespread that the term remains a common stylistic moniker for all American Realist paintings and government art projects.⁴¹

Although the WPA was meant to temporarily employ skilled laborers like carpenters and engineers during the Great Depression until the economy recovered enough for the private sector to generate jobs independently, artists sought to make such government patronage permanent.⁴² In 1938, the Artists Union affiliated with the Congress of

Quit?, ART NEWSPAPER (Sept. 15, 2023), <https://www.theartnewspaper.com/2023/09/15/why-do-us-museum-workers-want-to-quit> [https://perma.cc/SPH8-UP33].

34. Gerald M. Monroe, *The Artist Union of New York*, 32 ART J. 17, 17 (Autumn 1972).

35. *Id.*

36. *Id.*

37. FRANCIS V. O’CONNOR, FEDERAL SUPPORT FOR THE VISUAL ARTS: THE NEW DEAL AND NOW 26 (1968).

38. *Id.* at 29.

39. Brian Naylor, *New Deal Treasure: Government Searches for Long-Lost Art*, NPR (Apr. 16, 2014, 4:00 PM), <https://www.npr.org/2014/04/16/303718738/new-deal-treasure-government-searches-for-long-lost-art> [https://perma.cc/W7MK-5TDH].

40. O’CONNOR, *supra* note 37, at 28.

41. *See id.* at 26.

42. Monroe, *supra* note 34, at 18.

Industrial Organizations (CIO) as the United American Artists Local 60 of the United Office and Professional Workers, and lobbied to create more permanent governmental arts patronage through legislation and new government agencies.⁴³ But as Congress grew increasingly at odds with such expansive governmental largesse, Artists Union membership dwindled until it left the CIO and joined the American Artists Congress to form the Artists League of America in 1942.⁴⁴ The Artists League of America dissolved in 1949, just seven years later.⁴⁵

In 1969, a group of New York artists, including Hans Haacke, Donald Judd, Lucy Lippard, Robert Smithson, and Richard Serra, formed the Art Workers' Coalition (AWC).⁴⁶ Their open meetings would sometimes draw several hundred people.⁴⁷ In March 1970, they issued a list of nine demands to museum boards, including rental fees to artists (or their heirs) to exhibit their artwork regardless of ownership, profit sharing upon the resale of artwork, expanded museum board membership, acquisitions, and exhibitions.⁴⁸ Their list also demanded that "a trust fund should be set up from a tax levied on the sale of the work for dead artists." This fund would provide stipends, health insurance, help for artists' dependents, and other social benefits.⁴⁹ The group stipulated that at least one museum in each city should maintain public registries of local artists,⁵⁰ presumably to facilitate and administer such a trust fund.

Though the AWC voted to form a union on September 23, 1970, it never identified a way to generate wages.⁵¹ Some members, like Donald Judd, suggested "a self-imposed tax by members on all sales[:] part from the artist's portion, part from the dealer's."⁵² Artist, activist, and author Gregory Sholette saw the AWC as similar to a trade union "that viewed museums, their boards, and their top administrators as a *de facto*

43. *Id.* at 19.

44. *Id.* at 20.

45. ANDREW HEMINGWAY, *ARTISTS ON THE LEFT: AMERICAN ARTISTS AND THE COMMUNIST MOVEMENT, 1926–1956* 193 (2002).

46. GREGORY SHOLETTE, *DARK MATTER: ART AND POLITICS IN THE AGE OF ENTERPRISE CULTURE* 129 (2011); LUCY LIPPARD, *The Art Workers' Coalition: Not a History*, in *GET THE MESSAGE? A DECADE OF ART FOR SOCIAL CHANGE* 12 (1984).

47. SHOLETTE, *supra* note 46, at 129.

48. LIPPARD, *supra* note 46, at 12–13.

49. *Id.* at 13.

50. *Id.* at 12.

51. JULIA BRYAN-WILSON, *ART WORKERS: RADICAL PRACTICE IN THE VIETNAM WAR ERA* 23 (2009).

52. LIPPARD, *supra* note 46, at 13.

managerial class, which effectively represented not the public good, but the interests of the commercial art market.”⁵³ And, unlike the Artists Union, the AWC did not want to receive government funding, as its members were heavily involved in protesting the Vietnam War and were therefore generally unwilling to take government support.⁵⁴ The AWC dissolved in 1971 due to internal disagreements and a lack of cohesive goals.⁵⁵ Yet, despite its dissolution, the AWC helped to create some professional arts unions in New York City and inspired the Artist’s Reserved Rights Transfer and Sale Agreement, the standard art sale contract, which secures post-sale rights for artists.⁵⁶ The AWC’s proposed artist trust fund still resonates in the structure of the APT today.⁵⁷

B. Artists’ Finances Today

It is difficult to quantify how many professional artists currently work in the United States because many artists work additional jobs, and the Census Bureau’s survey of paid employment (used by the Bureau of Labor Statistics, the National Endowment for the Arts (NEA), and other agencies) collects data based only on the job where an individual has worked the greatest number of hours.⁵⁸ Although inexact, the NEA estimated in 2017 that there are 472,000 artists in the U.S. labor force.⁵⁹ But in 2022, the U.S. Bureau of Labor Statistics estimated only 12,080 fine artists, including painters, sculptors, and illustrators.⁶⁰ This number does not include self-employed workers.⁶¹

53. SHOLETTE, *supra* note 46, at 129.

54. BRYAN-WILSON, *supra* note 51, at 23.

55. *Id.* at 25–26.

56. SHOLETTE, *supra* note 46, at 129.

57. *Id.*

58. Daniel Grant, *What Makes an Artist Professional?*, ARTISTSNETWORK (Apr. 21, 2023), <https://www.artistsnetwork.com/art-business/what-makes-an-artist-professional/> [https://perma.cc/94LP-S3FS].

59. NAT’L ENDOWMENT FOR ARTS, ARTISTS AND OTHER CULTURAL WORKERS: A STATISTICAL PORTRAIT vii, fig.ES1 (2019) [hereinafter NEA] (reporting 247,000 art directors, fine artists, and animators, as well as 225,000 photographers).

60. U.S. BUREAU LAB. STATS., 27-1013, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2022 (2023), <https://www.bls.gov/oes/current/oes271013.htm> [hereinafter LAB. STATS., 27-1013] [https://perma.cc/Y63C-SDRR]. Elaine Velie, *What’s in Store for NFTs in 2023?*, HYPERALLERGIC (Jan. 3, 2023), <https://hyperallergic.com/784662/whats-in-store-for-nfts-in-2023/> [https://perma.cc/5YXE-QH67].

61. *Id.* at n.1.

Studies on artists' incomes are similarly incomplete, but by all accounts artists are generally lower-income. A 2018 survey found that the median income for artists was \$20,000-30,000 per year.⁶² A 2019 survey from the NEA showed that the median income of fine artists was \$48,670.⁶³ The actual median income is likely between \$20,000 and \$48,670. The 2018 survey is probably below the actual median income, because the surveyed artists were mostly selling directly online without gallery representation (and thus, at lower rates). On the other hand, the 2019 NEA statistic includes directors and animators, who raise the actual median for fine artists.⁶⁴ Comparatively, the median household income for Americans averaged between those years was \$65,940.⁶⁵

While the surveyed artists above largely sold their works online, most successful artists are represented by galleries. A relationship with a gallery opens up a variety of services for an artist, such as "promotion, introducing art to various collectors, contextualizing the work properly to different audiences, obtaining studio space, providing counsel, financing works that the artists can't necessarily do independently, and building a reputation online."⁶⁶ Gallery representation can help to stabilize the prices for an artist's work by ensuring their pieces not only sell for the best price, but to appropriate buyers.⁶⁷ Moreover, gallery representation gives artists legitimacy and can bolster an artist's market value.⁶⁸

62. CREATIVE INDEP., SURVEY REPORT: A STUDY ON THE FINANCIAL STATE OF VISUAL ARTISTS TODAY 4 (2018).

63. NEA, *supra* note 59, at 25 fig.4a.

64. *Id.*

65. *Type of Household—All Households by Median and Mean Income: 1980 to 2022*, U.S. CENSUS BUREAU, tbl.H-9 (\$79,952 adjusted for inflation to 2024).

66. Karen Chernick, *What Gallery Representation Means for an Artist's Career*, ARTSY (Apr. 21, 2021, 3:00 PM), <https://www.artsy.net/article/artsy-editorial-gallery-representation-artist-s-career> [perma.cc/88UA-NTGY] (statement of Joe Kennedy of Unit London).

67. *Id.* (explaining that galleries protect artists from selling works to art flippers who would damage their market value and galleries also "vet" artists).

68. *Id.* (statement of Joe Kennedy of Unit London).

C. Working Conditions of Artists Today

The legal relationship between artists and galleries is usually a contractual consignment agreement.⁶⁹ Under a consignment agreement, the artist provides galleries with artworks (often for a limited period of time), and the gallery receives a commission if it sells the work while the piece is on consignment.⁷⁰ Consignment agreements will typically stipulate all details regarding exclusivity (and the geographic limits of that exclusivity), agreement duration, inventory management, how much power the gallery and artist each have to determine and negotiate prices, the gallery's commission, whether it holds profits in trust for the artist, when the respective parties are paid for sales, and which party pays various expenses for the sale of works, etc.⁷¹

The legal relationship between artists and galleries is usually a contractual consignment agreement.⁷² Under a consignment agreement, the artist provides galleries with artworks (often for a limited period of time), and the gallery receives a commission if it sells the work while the piece is on consignment.⁷³ Consignment agreements are mutually beneficial.⁷⁴ Artists are able to sell works without internalizing the operating costs of a store, and gallerists can sell art without purchasing inventory.⁷⁵ Under a consignment contract, a gallery acts as a fiduciary agent of the artist, negotiating sales contracts on their behalf with a legal obligation to act in their best interest.⁷⁶ Generally, galleries do not charge artists fees for representation. Instead, they profit only by taking a negotiated portion — often fifty percent — of the sale proceeds.⁷⁷

69. *Guide to Artist Contracts and Agreements*, ARTCONNECT, <https://www.magazine.artconnect.com/resources/guide-to-artist-contracts-and-agreements> (last visited Jan. 30, 2024) [hereinafter ARTCONNECT] [perma.cc/7FGC-RR2P].

70. *Id.*

71. Steve Schlackman, *Tips for Negotiating an Art Consignment Agreement with a Gallery*, ARTJ. (Dec. 20, 2022) <https://artpreneur.com/journal/art-consignment-agreement/> [perma.cc/6D9N-TJWZ].

72. ARTCONNECT, *supra* note 69.

73. *Id.*

74. Richard Stim, *Is it Risky to Sell Art or Craft Work on Consignment?*, NOLO, <https://www.nolo.com/legal-encyclopedia/consigning-arts-crafts-30281.html> (last visited Jan. 30, 2024) [perma.cc/XZ4A-7AB4].

75. *Id.*

76. Schlackman, *supra* note 71.

77. Julien Delagrangé, *The Art Gallery: Everything You Need To Know*, CAI (Oct. 11, 2021), <https://www.contemporaryartissue.com/the-art-gallery-everything-you-need-to-know/> [perma.cc/DK35-49D].

Consignment agreements will typically stipulate all details regarding exclusivity (and the geographic limits of that exclusivity), agreement duration, inventory management, how much power the gallery and artist each have to determine and negotiate prices, the gallery's commission, whether it holds profits in trust for the artist, when the respective parties are paid for sales, and which party pays various expenses for the sale of works, etc.⁷⁸ Galleries customarily pay for all costs associated with promotion (which can include exhibition, loans, and publications) and sale (including transporting the work to the buyer).⁷⁹ Many artists work with one or more galleries to sell their artwork to broader audiences, often using different galleries to reach different geographic markets.⁸⁰

Because no purchase takes place between the gallery and the artist, the artist does not realize any income for an artwork until the gallery facilitates a sale.⁸¹ When a painting is sold, the artist pays tax on the sale as ordinary income, meaning that the artist reports the entire portion they receive from the sale of the painting (after any cuts the gallery takes) to the IRS as taxable income.⁸² Artists can deduct expenses such as materials, supplies, studio rental, and other education or travel costs.⁸³ The taxable income after deductions will be taxed as ordinary income on a graduated scale between 12% and 37%.⁸⁴ Artists generally only make money the first time an artwork is sold.⁸⁵ Subsequent sales might generally boost their reputation and future sales

78. Steve Schlackman, *Tips for Negotiating an Art Consignment Agreement with a Gallery*, ARTJ. (Dec. 20, 2022) <https://artpreneur.com/journal/art-consignment-agreement/> [perma.cc/6D9N-TJWZ].

79. *Id.*

80. Chernick, *supra* note 66 (quoting artist Taymour Grahne (“Ideally, an artist should be represented by two to four galleries, as each gallery offers a different context, whether that’s in terms of their artist roster or location.”)).

81. See ARTCONNECT, *supra* note 69; see also Sean Butner, *Tax Implications of a Consignment Store*, CHRON, <https://smallbusiness.chron.com/tax-implications-consignment-store-72057.html> (last visited Jan. 30, 2024) [https://perma.cc/5U3D-MSAL].

82. See I.R.C. § 1221(a)(3).

83. *The Artist’s Guide to Tax Deductions*, ARTWORK ARCHIVE (Mar. 13, 2018), <https://www.artworkarchive.com/blog/the-artist-s-guide-to-tax-deductions> [perma.cc/D4Z3-CCLM].

84. Rev. Proc. 2023-34, 2023-48 I.R.B. 1287.

85. María Fernanda Torres, *In the Pursuit of a Fair Art Market: From Resale Royalties to Fractional Equity*, ARTSHELP (2022), <https://www.artshelp.com/fair-art-market/> [perma.cc/E59Y-29G5].

prices, but artists usually receive no money directly from sales on the secondary market (including auction sales).⁸⁶

Artists then typically pay for their own production costs (e.g., wages for assistants, materials, studio space, art storage, transportation of art to the gallery, etc.).⁸⁷ Additionally, artists take on all expenses associated with networking with collectors, gallerists, and curators, as well as all costs necessary to learn new artistic methods.⁸⁸ For instance, San Francisco artist, Rhiannon Evans MacFayden, “doesn’t get paid any extra when . . . she spends months researching, or trains herself in a new skill . . . and has to mess up ‘around 100 times’ to get something right.”⁸⁹ Even though the average artist already makes below the national median income, much of their time spent producing artworks is uncompensated.⁹⁰

D. Art as Investment

Art has a long history as an investment vehicle.⁹¹ It is largely insulated from the stock market, diversifies a portfolio, and comes with significant social cache.⁹² As a tangible asset, art’s value is largely independent from the stock market; however, that is also a major limitation of investing in art, as it cannot be quickly liquidated and may have significant maintenance costs.⁹³

Jianping Mei and Michael Moses conducted a study of art’s investment potential in 2002 at New York University which resulted in the creation of the Mei/Moses Fine Art Index (MMFAI), a measure of

86. *Id.*

87. *Id.*

88. Lily Janiak, *Two New Reports Reveal Just How Much our Society Fails Independent Art Workers*, DATEBOOK (Mar. 9, 2021, 6:47 PM), <https://datebook.sfchronicle.com/theater/two-new-reports-reveal-just-how-much-our-society-fails-independent-arts-workers> [perma.cc/NNE4-8EWD].

89. *Id.*

90. *Id.*; see also *supra* Section II.B.

91. Peter Cannon-Brookes, *Art Investment and the British Rail Pension Fund*, 15:4 MUSEUM MGMT. & CURATORSHIP 406, 406 (1996).

92. Chin-Chin Yap, *Taxing the Artist Pension Trust*, 30 COLUM. J. L. & ARTS 197, 198–199 (2007). See generally Jianping Mei & Michael Moses, *Art as an Investment and the Underperformance of Masterpieces*, 92:5 AM. ECON. R. 1656, 1661 (Dec. 2002).

93. Kat Tretina, *How to Invest in Art*, U.S. NEWS (Aug. 25, 2022, 4:28 PM), <https://money.usnews.com/investing/investing-101/articles/how-to-invest-in-art> [perma.cc/8GXW-3TZP].

the state of the art market.⁹⁴ The study concluded that the art index “outperformed fixed-income securities during the 1875-1999 period,” and it was only “a bit more risky” than stock indices.⁹⁵ They further concluded that art was an important part of a diversified portfolio.⁹⁶ The MMFAI was acquired by Sotheby’s in 2016 as “the preeminent measure of the state of the art market.”⁹⁷ In the past twenty years, such indices, which compare repeat sales of artworks to track changes in their value, have become common in the art world.⁹⁸ Companies such as artnet and Mutual Art (which now administers the APT),⁹⁹ and major banks such as CitiBank and Morgan Stanley, provide art investment and advising services.¹⁰⁰ Art is now considered a responsible part of a diversified investment portfolio.¹⁰¹ However, artists only benefit indirectly from the secondary market that the Mei/Moses study tracks.¹⁰² In fact, with respect to working artists, some of these investments may do more harm than good.¹⁰³

Sophisticated investors not only use art to diversify their portfolios, but treat art as an appreciable asset and go to great lengths to avoid paying taxes on the purchase. Some collectors house recently purchased works in states with no sales tax to avoid paying sales, use, or consumption taxes.¹⁰⁴ Others put their investment-artworks in a free

94. See Mei & Moses, *supra* note 92, at 1656; see also *The Sotheby’s Mei Moses Indices*, SOTHEBY’S, <https://www.sothebys.com/en/the-sothebys-mei-moses-indices> (last visited Jan. 30, 2024) [hereinafter *Sotheby’s Mei Moses*] [perma.cc/MA3Z-U3FT].

95. Mei & Moses, *supra* note 92, at 1661.

96. *Id.* at 1666.

97. *Sotheby’s Mei Moses*, *supra* note 94.

98. See Brian Boucher, *See What Experts Have to Say about Sotheby’s Acquisition of the Mei Moses Art Indices*, ARTNET (Oct. 29, 2016), <https://news.artnet.com/market/sothebys-acquisition-mei-moses-art-indices-725648> [perma.cc/X8W9-BYVB].

99. See *An Interview with MutualArt CEO Zohar Elhanani*, ARTCOLLECTOR (Mar. 31, 2018), <http://www.theartcollector.org/interview-mutualart-ceo-zohar-elhanani/> [perma.cc/6M37-WCWS].

100. See CITI GLOB. PERSP. & SOLS., *THE GLOBAL ART MARKET: DRIVERS OF EVOLUTION 37* (Dec. 2019), https://assets.ctfassets.net/u7fuap5iqsvx/3OH9tX8elQpFYE3QDxEISk/385dc13a896cc4a3d2e787dc67f00505/Citi_Art_Market_Report_2019.pdf [https://perma.cc/E74G-TX9R]; see also *Demystifying Art Indices*, MORGAN STANLEY, <https://www.morganstanley.com/articles/art-market-indexes> (last visited Jan. 30, 2024) [https://perma.cc/9EZM-3JXK].

101. Tretina, *supra* note 93.

102. Torres, *supra* note 85.

103. See *id.*

104. Jonathan C. Schwartz, *The Shady Trick Collectors Use to Avoid Paying Tax on Art Worth Millions*, OBSERVER (Mar. 8, 2020, 9:00 AM), <https://observer.com/>

port, a growing industry of warehouses designated as foreign trade zones, in which the art is “immune to any type of taxation.”¹⁰⁵ The untaxed works sit in storage, unseen by anyone, (hopefully) accruing value.¹⁰⁶ This is damaging because artists generally do not benefit from the secondary or resale market of their artworks. Rather, their works and their brand gain value through the endorsement of being seen in a collector’s home or being loaned out for gallery or museum exhibitions. But in a free port, artwork remains in storage until it is sold, gaining no exposure and bringing the artist no cache.¹⁰⁷

Private collectors further shelter their art collections from the IRS by establishing private foundations and museums.¹⁰⁸ Crucially, art collectors can deduct the value of charitable gifts of art to museums and foundations from their taxable income—even art that they control financially.¹⁰⁹ Some museums born of private collections, like the Barnes Foundation in Philadelphia, the Frick Collection in New York City, the Phillips Collection in Washington, DC, and newer museums like the Rubell Family Collection in Miami, are genuine public-facing institutions that welcome thousands of visitors, host public educational programs, and mount important exhibitions.¹¹⁰

But many of these tax exempt, nonprofit museums are largely inaccessible to the public.¹¹¹ For example, Harlan Crow, recently under public scrutiny over his tax savings from trips he lavished on Supreme Court Justice Clarence Thomas, houses the tax-exempt “Harlan Crow

2020/03/art-collectors-avoid-state-tax-through-shipping/ [perma.cc/23TF-XF6N] (discussing how state taxes typically rely on the buyer self-reporting on their tax returns when the art is eventually moved out of a sales-tax-free state into one with sales tax, how this creates a taxable event, and how such a transaction is hard and costly for the IRS to verify).

105. Julia Simon, *Why a Lot of Very Expensive Art is Disappearing Into Storage*, NPR (Feb. 15, 2018, 5:04 AM), <https://www.npr.org/2018/02/15/585971962/why-a-lot-of-very-expensive-art-is-disappearing-into-storage> [perma.cc/XV2K-WV7N].

106. Margie Fishman & Scott Goss, *Delaware Provides Tax Shelter for Multimillion-Dollar Masterpieces*, DEL. ONLINE (Sept. 30, 2017, 4:33 PM), <https://www.delaware-online.com/story/insider/2017/09/27/delaware-provides-tax-shelter-multi-million-dollar-masterpieces/678385001/>[perma.cc/NEY4-95W9].

107. *See id.*

108. Patricia Cohen, *Writing Off the Warhol Next Door*, N.Y. TIMES (Jan. 10, 2015), <https://www.nytimes.com/2015/01/11/business/art-collectors-gain-tax-benefits-from-private-museums.html> [https://perma.cc/5TTV-MUMV].

109. *Id.*

110. *Id.*

111. *See, e.g., id.* (explaining that the Glenstone Museum in Potomac, MD had only 10,000 visitors between 2006 and 2013).

Library” —a collection of spectacular American paintings and strange yet impressive political curios—in his private residence.¹¹² Crow’s Library has been tax-exempt since 2014, but offers no public tours of his massive collection, which does not even have a website.¹¹³ The Senate Finance Committee investigated private museums in 2015, but made no major rule changes, and the IRS has not expressed any intention to expand audits of private foundations.¹¹⁴

Collectors can, at the minimum, pay a capital gains tax rate on the sale of artworks, and at the most, evade paying sales tax on their artwork in freeports and lower their income through massive deductions of charitable gifts to their own privately held museums.¹¹⁵ Meanwhile, artists cannot even obtain capital gains tax treatment on their own work.¹¹⁶ Internal Revenue Code § 1221(a)(3) requires that the creator of an artistic composition treat it as a non-capital asset.¹¹⁷ Artists are therefore taxed on the sale of their works as ordinary income, rather than at the lower capital gains rates.¹¹⁸ If an art collector purchases and holds an artwork for more than a year and sells it once its value appreciates, the collector would have long-term capital gain (or loss) on the artwork.¹¹⁹ Meanwhile, an artist cannot receive the same favorable long-term capital gain on the sale of their own work, even though they assume the same investment risk as a collector in holding art off the market.¹²⁰

112. Crow boasts the largest private collection of paintings by George W. Bush, alongside masterpieces by Gilbert Stuart, John Singleton Copley, Rembrandt Peale, and John Singer Sargeant. He also owns paintings by Hitler, Winston Churchill, and Dwight D. Eisenhower. His garden is filled with monuments to Lenin, Stalin, and other communist leaders. See Tommy Cummings, *Inside Harlan Crow’s ‘Garden of Evil’ and his Collection from Washington to Monet*, DALL. MORNING NEWS (Apr. 11, 2023, 1:17 PM), <https://www.dallasnews.com/arts-entertainment/2023/04/11/inside-harlan-crows-garden-of-evil-and-his-collection-of-artifacts-and-books/> [perma.cc/U5RU-35P9].

113. *Id.*; An author-run search of the Google search engine for (“Harlan Crow library tours”) returned no official website for the library, nor other website offering tours. It only resulted in local news articles describing private tours.

114. Jeff Ernsthansen, *How the Ultrawealthy Use Private Foundations to Bank Millions in Tax Deductions While Giving the Public Little in Return*, PROPUBLICA (July 26, 2023, 5:00 AM), <https://www.propublica.org/article/how-private-nonprofits-ultra-wealthy-tax-deductions-museums-foundation-art> [perma.cc/SA2Y-MXT5].

115. Yap, *supra* note 92, at 200.

116. *Id.*

117. See I.R.C. § 1221(a)(3).

118. See *id.*

119. Yap, *supra* note 92, at 200.

120. *Id.*; I.R.C. § 1221(a)(3).

For example, if an art collector made \$500,000 of ordinary income in 2024 and then sold a painting that had appreciated \$100,000 while in their collection, their total income would be \$600,000. \$100,000 of that income, the capital gain on the painting, would be federally taxed at 28%.¹²¹ If a successful artist sold \$600,000 worth of art in one year (the same total income amount as the collector), their income would be taxed entirely as ordinary income (up to 37%), resulting in the artist paying 9% more on the sale of that painting than the collector would.¹²² And art collectors commonly engage in tax schemes to avoid paying sales taxes on the purchase of artworks, further sheltering their art collections from the IRS, as discussed below.¹²³

Artists receive no tax benefit for selling their artworks for a large gain at an opportune moment, while a collector may save a sizeable amount for taking the same investment risk on high-value artworks. “Sophisticated” investment systems and the associated tax shelter industry are not meant for—and provide no benefit to—the artists whose works fill the warehouse shelves of free ports and secure charitable deductions for collectors.

III. Analysis

This Section examines retirement investing as it applies to traditional employees and the self-employed (artists). It will further explore the APT, looking at the history of artists taking collective action and recent developments in collectivizing in the art world, and it will dissect the legal function of the APT. Finally, this Section will turn to how art interacts with retirement plans. This discussion will include an examination of how art is treated under the law, attempts to invest in art using financial technology methods such as crypto-investing and securitizing art, and how those methods relate to retirement investing.

121. See *Topic no. 409, Capital Gains and Losses*, IRS (Jan. 30, 2024), <https://www.irs.gov/taxtopics/tc409> [<https://perma.cc/8PTS-2UHH>].

122. See Rev. Proc. 2023-34, 2023-48 I.R.B. 1287.

123. See *supra* notes 106–16 and accompanying text.

A. Retirement Investing: Built for a Shrinking Lifestyle

Retirement plans provide significant tax advantages to investors, beyond merely allowing them to save for their future financial security.¹²⁴ Participants are able to subtract their contributions from their taxable income (with the exception of Roth accounts, discussed below).¹²⁵

A participant's contributions and gains in a non-Roth retirement account are generally not taxed until the income is distributed, which is usually after the participant retires and begins drawing on their retirement savings.¹²⁶ The participant pays less tax during their working years because their income is artificially lowered by the amount of income they defer into their retirement plan.¹²⁷ Additionally, most retired taxpayers are in lower tax brackets than they were in during their working years, so when they eventually take distributions from their retirement accounts, they will pay taxes on that income at a lower rate than they would have paid on it at the time it was earned.¹²⁸

Defined benefit retirement plans guarantee specified, regular payments during retirement, and are highly regulated to ensure that the plan is saving sufficient sums during the working life of the participant.¹²⁹ Conversely, defined contribution retirement plans accumulate and invest regular payments during the working life of the participant, and the employee will receive that full balance upon reaching the age of retirement.¹³⁰ This Note focuses on defined contribution plans and not defined benefit plans for three reasons. First, defined benefit plans, though frequently tied to union or governmental jobs, are less and less common in the United States.¹³¹ Second, defined benefit plans have

124. *Benefits of Setting Up a Retirement Plan*, IRS (July 25, 2023), <https://www.irs.gov/retirement-plans/plan-sponsor/benefits-of-setting-up-a-retirement-plan> [hereinafter *Benefits of a Plan*] [perma.cc/2AZ4-ZUC8].

125. *Id.*

126. *Id.*

127. *Id.*

128. See Erik Carter, *Why Your Taxes in Retirement Will be Lower Than You Expected*, FORBES (May 24, 2021, 10:00 AM), <https://www.forbes.com/sites/financial-finesse/2021/05/24/why-your-taxes-in-retirement-will-likely-be-lower-than-you-expected/?sh=176ac6493242> [https://perma.cc/69QT-JL56].

129. *Types of Retirement Plans*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/retirement/typesofplans> (last visited Jan. 24, 2024).

130. *Id.*

131. David Zook, *How Do Retirement Plans for Private Industry and State and Local Government Workers Compare?*, 12 BEYOND NOS.: U.S. BUREAU LAB. STATS. (Jan. 2023),

stringent funding requirements that work poorly with unpredictable income streams.¹³² Finally, these high funding requirements come with extremely severe penalties, which include excise taxes, escalating payment schedules, mandated asset liquidation, and even plan disqualification and revocation of prior tax deductions.¹³³ Those are high liabilities for a self-employed person, who would be solely saddled with escalating payments and penalty risks without the resources of an entire company.¹³⁴

1. EMPLOYER INVOLVEMENT

In 2021, 68% of private-sector workers gained access to a retirement plan through their employer.¹³⁵ Defined contribution plans are the central type of retirement plan sponsored by private-sector employers in the United States, covering more than 100 million Americans, or nearly half of the workforce in the United States.¹³⁶ As of 2020, about 60 million Americans had 401(k) plans (defined contribution plans).¹³⁷ Automatic enrollment in 401(k) plans will be required for new plans beginning after 2024, which will likely increase their prevalence.¹³⁸

When an employer offers a defined contribution retirement plan, the business establishes and operates the plan, which includes

<https://www.bls.gov/opub/btn/volume-12/how-do-retirement-plans-for-private-industry-and-state-and-local-government-workers-compare.htm> [<https://perma.cc/84F5-7UG8>] (“Only 15% of private industry workers had access to a defined benefit plan, compared to 86% of state and local government workers”).

132. *Personal Defined Benefit Plan: Your Top Questions Answered*, CHARLES SCHWAB, <https://www.schwab.com/small-business-retirement-plans/personal-defined-benefit-plan/personal-defined-benefit-plan-faqs> (last visited Jan. 30, 2024) [hereinafter *Personal Defined Benefit Plan*] [<https://perma.cc/4JR5-8EYS>].

133. *See id.*; *see also* Gary S. Fealk, *Union Pension Fund Issues*, 21:6 MICH. EMP. L. LETTER 3, 3 (Aug. 2010).

134. *Personal Defined Benefit Plan*, *supra* note 132.

135. ELIZABETH A. MYERS & JOHN J. TOPOLESKI, CONG. RSCH. SERV., A VISUAL DEPICTION OF THE SHIFT FROM DEFINED BENEFIT (DB) TO DEFINED CONTRIBUTION (DC) PENSION PLANS IN THE PRIVATE SECTOR 1 (Dec. 27, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF12007> [<https://perma.cc/JJY2-2MMX>].

136. JEFFREY W. CLARK, HOW AMERICA SAVES 2023, VANGUARD 12 (June 2023), <https://institutional.vanguard.com/content/dam/inst/iig-transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf> [<https://perma.cc/Q2KC-YW9J>].

137. *Frequently Asked Questions About 401(k) Plan Research*, INV. CO. INST. (Oct. 11, 2021), https://www.ici.org/faqs/faq/401k/faqs_401k [<https://perma.cc/7B6U-BPHG>].

138. SEYFARTH, SECURE 2.0 ACT CHART OF RETIREMENT PLAN PROVISIONS 1 (2023), https://www.seyfarth.com/dir_docs/publications/SECURE-Act-2-0-Chart-Legal-Update.pdf [hereinafter SECURE 2.0 CHART] [<https://perma.cc/6QHT-PTZ5>].

distributing benefits into the plan accounts, keeping plan participants informed, and managing the plan assets.¹³⁹ At a minimum, an employer distributing benefits is required to set aside the amount of income a participating employee elects to defer from their paycheck into their retirement account.¹⁴⁰ Many employers also match a portion of an employee's deferred contribution to a plan, providing additional retirement investment not taxed in the year of contribution.¹⁴¹ The most common matching structure in 2023 is an employer match of 50% of the first 6% of pay.¹⁴² The deferred income (and any employer match) is invested and accrues interest, often resulting in significant gains from compounding interest as an employee continues to defer income during their working years.¹⁴³ For 2024, the employee contribution limit to a 401(k) is increasing to \$23,000.¹⁴⁴

Further, the total limit for all tax advantaged contributions, including employer matches, increased to \$69,000 in 2024.¹⁴⁵ The \$46,000 of annual additions above the employee's deferred compensation contribution limit can be made up of employer matching contributions (based on the employee's elective deferral), nonelective contributions of a percentage of the employee's compensation, and profit-sharing contributions.¹⁴⁶

2. RETIREMENT FOR THE SELF-EMPLOYED

Unlike the two-thirds of Americans who make use of employer-provided retirement plans, most artists are self-employed and must save for retirement independently.¹⁴⁷ Artists can pursue individual retirement plans for tax-favored retirement savings, but they generally

139. *Benefits of a Plan*, *supra* note 124.

140. *See id.*; *see also* Evan Tarver, *Benefits of Deferred Compensation Plans*, INVESTOPEDIA (Dec. 14, 2023), <https://www.investopedia.com/articles/personal-finance/102215/benefits-deferred-compensation-plans.asp> [https://perma.cc/TQ27-R5TY].

141. CLARK, *supra* note 136, at 13.

142. *Id.* at 17.

143. *Benefits of a Plan*, *supra* note 124.

144. I.R.S. Notice 23-75, 2023-47 I.R.B. 1256 (2023).

145. *Id.*

146. *Retirement Topics: 401(k) and Profit-Sharing Plan Contribution Limits*, IRS (Dec. 22, 2023), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-401k-and-profit-sharing-plan-contribution-limits> [https://perma.cc/KW7Y-J762].

147. NAT'L ENDOWMENT FOR ARTS, *ARTISTS IN THE WORKFORCE: SELECTED DEMOGRAPHIC CHARACTERISTICS PRIOR TO COVID-19* 4 fig.2 (2022).

lack the advantages of employer-sponsored benefits plans, which often include employer matching contributions to the employee's retirement account, and substantially lower administrative and investment costs.¹⁴⁸

Self-employed artists have the same opportunities to invest in retirement as other self-employed individuals.¹⁴⁹ Nonetheless, a 2019 survey from the Pew Charitable Trust revealed that self-employed individuals had an average retirement savings balance of \$61,735, while traditional workers' average balance was \$122,800.¹⁵⁰ And like many self-employed individuals, artists often lack consistent income streams, making it difficult for them to contribute to a retirement savings vehicle on a substantially level basis.¹⁵¹ Annual contribution limits imposed by the Internal Revenue Code make it more difficult for an artist to catch up for lean years when sales are good.¹⁵² These limits may set self-employed workers' retirement savings substantially behind those of their traditionally-employed counterparts with consistent salaries.¹⁵³

Broadly, self-employed workers can save for retirement on a tax-favored basis in a variety of tax-advantaged retirement accounts.¹⁵⁴ These include solo 401(k)s, Individual Retirement Accounts (IRAs) (both Roth and Traditional), Simplified Employee Pension IRAs (SEP IRA), and Savings Incentive Match Plan for Employees (SIMPLE

148. See Denise Appleby, *Participate in an Employer-Sponsored Retirement Plan*, INVESTOPEDIA (Dec. 12, 2023), <https://www.investopedia.com/retirement/reasons-use-employer-sponsored-retirement-plan/> [<https://perma.cc/YX8K-UXEH>].

149. Hannah Cole, *What Makes an Artist Special? Nothing, According to the IRS*, ARTFCITY (Oct. 18, 2016), <http://artfcity.com/2016/10/18/what-makes-an-artist-special-nothing-according-to-the-irs/> [<https://perma.cc/7C6R-9FV3>].

150. PEW CHARITABLE TR., *AS THE SELF-EMPLOYED NEAR RETIREMENT, ARE THEY PREPARED?* 16 (2019), <https://www.pewtrusts.org/-/media/assets/2019/09/self-employedretirementreadiness.pdf> [<https://perma.cc/TVG5-L57U>]; see also Darla Mercado, *Self-Employed? Here's Why your Retirement Savings Are Falling Short*, CNBC (Sept. 12, 2019, 1:18 PM), <https://www.cnbc.com/2019/09/12/self-employed-heres-why-your-retirement-savings-are-falling-short.html> [<https://perma.cc/UKG4-GQ46>] (stating self-employed individuals had an average retirement savings balance of \$61,735, while traditional workers' mean balance was \$122,800).

151. See Hannah Cole, *The SEP IRA: A Lovesong*, ARTFCITY (Mar. 8, 2017), <http://artfcity.com/2017/03/08/the-sep-ira-a-lovesong/> [hereinafter Cole, *SEP*] [<https://perma.cc/M247-C2J9>].

152. See *id.*

153. See *id.*

154. *Retirement Plans for Self-Employed People*, IRS (Aug. 29, 2023), <https://www.irs.gov/retirement-plans/retirement-plans-for-self-employed-people> [hereinafter *Self-Employed*, IRS] [<https://perma.cc/X68F-FYSM>].

IRAs).¹⁵⁵ Each of these tax-advantaged financial vehicles offer tax advantages to users saving for retirement, but each can be difficult for artists to use because of their inconsistent income streams.¹⁵⁶ None of them can accept artwork as a contribution, or hold art as an asset.¹⁵⁷

a. Solo 401(k)s

A solo 401(k) is not distinct from the 401(k)s discussed above, but it has lower administrative burdens than most 401(k) plans, because there is no need to test for discrimination (i.e., fairness in compensation between employees).¹⁵⁸ Solo 401(k)s allow users to have the same tax advantages as a traditional 401(k), where contributions are not considered part of the user's taxable income the year they are made.¹⁵⁹ However, unlike in many employer sponsored 401(k)s, the business owner (artist) acts as both the employee and employer and is therefore "solely" responsible for contributing enough to the solo 401(k) without employer matching funds.¹⁶⁰ Solo 401(k)s allow participants to maximize their contributions in years when the business is doing well while contributing less in others.¹⁶¹ Users can defer up to \$23,000 from earnings in 2024, and they can make additional contributions as their own employer, including matching contributions, profit sharing, and other untaxed contributions until all contributions total to \$69,000.¹⁶² The solo 401(k) model, however, limits the artists' business size.¹⁶³

If an artist hired a plan-eligible employee (such as a studio assistant), the plan would then become a traditional 401(k) and the artist, as a business owner, would have to drastically decrease their contributions or contribute similarly high matching contributions to the

155. *Id.*

156. *Id.*

157. I.R.C. § 408(a)(1) ("[N]o contribution will be accepted unless it is in cash . . .").

158. *One-Participant 401(k) Plans*, IRS (Aug. 29, 2023), <https://www.irs.gov/retirement-plans/one-participant-401k-plans> [hereinafter *Solo 401(k)*, IRS] [<https://perma.cc/B8BD-76SA>].

159. Arielle O'Shea, *What Is a Solo 401(k)? Self-Employed Retirement Plans*, NERDWALLET (Jan. 5, 2024), <https://www.nerdwallet.com/article/investing/what-is-a-solo-401k> [<https://perma.cc/NX7T-JYP3>].

160. *Id.*

161. *See id.*

162. I.R.S. Notice 23-75, 2023-47 I.R.B. 1256 (2023).

163. O'Shea, *supra* note 159.

employee's 401(k) to comply with nondiscrimination testing.¹⁶⁴ In summary, solo 401(k) plans have the advantage of high contribution limits, but they require prohibitively high contributions for many artists to receive benefits similar to traditional employees, and they offer little flexibility regarding the artist's business model.¹⁶⁵

b. Individual Retirement Accounts (IRAs)

Individual Retirement Accounts (IRAs) come in many forms, the most common ones being Traditional IRAs and Roth IRAs.¹⁶⁶ To draw an important strategic distinction, a Traditional IRA is tax-deferred, but a Roth IRA is tax-free.¹⁶⁷ Meaning that under a Traditional IRA, invested income is not taxed, nor are any investment gains on the account, but withdrawals in retirement may still be taxed.¹⁶⁸ In fact, contributions lower an individual's adjusted income for the year in which they are made.¹⁶⁹ On the other hand, Roth IRA contributions are taxed at normal income tax rates in the year made, but there are no taxes on investment gains or on withdrawals in retirement.¹⁷⁰ Roth IRAs are income-delimited: individuals with income over \$146,000 cannot contribute to a Roth IRA.¹⁷¹

Both types of IRAs have contribution limits of \$7,000 for 2024, which is significantly lower than the 401(k) limits described above.¹⁷² SECURE 2.0, a legislative package signed into law in late 2022,

164. *Id.*

165. *See id.*

166. Sarah Holden & Daniel Schrass, *The Role of IRAs in US Households' Saving for Retirement*, 2021, 28:1 ICI RSCH. PERSP. 1, 2–3 (2022), <https://www.ici.org/system/files/2022-01/per28-01.pdf> [<https://perma.cc/S6EJ-8GSY>] (stating 36.6 million households in the U.S. (28.2% of all households) own Traditional IRAs, while 27.3 million households (21%) have Roth IRAs).

167. *What is an IRA?*, U.S. WEALTH MGMT., <https://www.usbank.com/retirement-planning/open-an-ira/what-is-an-ira.html> (last visited Jan. 30, 2024) [hereinafter *IRA*, U.S. WEALTH MGMT.] [<https://perma.cc/9BA9-JEAM>].

168. *Id.*

169. *Id.*

170. *Id.*

171. I.R.S. Notice 23-75, 2023-47 I.R.B. 1256 (2023).

172. I.R.S. Notice 2023-75, 2023-47 I.R.B. 1256 (2023); *Retirement Topics—IRA Contribution Limits*, IRS (July 5, 2023), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-ira-contribution-limits> [<https://perma.cc/8MMG-E688>]. *See IRA*, U.S. WEALTH MGMT., *supra* note 169; *see also* I.R.S. Notice 23-75, I.R.B. 2023-47 (2023) (listing Traditional and Roth IRA maximum annual individual contributions are \$7,000 for 2024, and that Roth IRAs have additional income limitations on contributions).

expanded retirement accounts, particularly individual plans, and, most notably, expanded Roth Contributions to most Individual Retirement Accounts.¹⁷³

c. Simplified Employee Pension IRAs (SEP IRA)

A Simplified Employee Pension IRA (SEP IRA) may be the most flexible vehicle regarding business size, contribution type, and contribution limits.¹⁷⁴ SEP IRAs offer flexibility to have covered employees (such as studio assistants) in some years but not in others.¹⁷⁵ They allow employers to contribute to IRAs for employees, regardless of the size of the business.¹⁷⁶ SEP IRAs may accept both traditional and Roth contributions under Secure 2.0.¹⁷⁷ They have the same high contribution limits as a 401(k), with a substantially lower administrative burden than regular 401(k) plans.¹⁷⁸ Users can contribute nothing in lean years and a very high amount in good years (like a solo 401(k)).¹⁷⁹ And, a SEP IRA allows a user to add employees with minimal administrative burden. However, the employees cannot contribute to their own accounts, as it is purely a profit-sharing plan.¹⁸⁰ As with a 401(k), the employer-artist would have to contribute an equal percentage of all employees' salaries.¹⁸¹

173. See Sarah Touzalin, Christina Cerasale, Richard Schwartz, Benjamin Spater, Andrew Overway, Irine Sorser & Alisha Sullivan, *SECURE Act 2.0: Hold My Beer*, SEYFARTH (Jan. 11, 2023), <https://www.seyfarth.com/news-insights/secure-act-20-hold-my-beer.html> [<https://perma.cc/W2SA-SRZD>]; see generally SECURE 2.0 CHART, *supra* note 138.

174. Cole, *SEP*, *supra* note 151.

175. SECURE 2.0 CHART, *supra* note 138, at 19.

176. *Simplified Employee Pension Plan (SEP)*, IRS (Dec. 1, 2023), <https://www.irs.gov/retirement-plans/plan-sponsor/simplified-employee-pension-plan-sep> [hereinafter *SEP*, IRS] [<https://perma.cc/2AZ4-ZUC8>].

177. SECURE 2.0 CHART, *supra* note 138, at 19.

178. Cole, *SEP*, *supra* note 151; *Self-Employed*, IRS, *supra* note 154.

179. Cole, *SEP*, *supra* note 151.

180. Mark P. Cussen, *SEP IRA vs. Solo 401(k): Which is Better for Business Owners?*, INVESTOPEDIA (Dec. 20, 2023), <https://www.investopedia.com/articles/financial-advisors/012716/solo-401k-vs-sep-which-best-biz-owners.asp> [<https://perma.cc/8MC3-XQLX>].

181. *SEP Plan FAQs*, IRS (Aug. 29, 2023), <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-seps> [<https://perma.cc/AL33-PLF9>].

d. Savings Incentive Match Plan for Employees (SIMPLE IRAs)

Savings Incentive Match Plan for Employees (SIMPLE IRAs) are also available to self-employed artists with no employees.¹⁸² Akin to SEP IRAs, SIMPLE IRAs have low administrative burdens and require only (1) the completion of a single form, and (2) a bank account at a qualifying financial institution.¹⁸³ Contributions can be made to a SIMPLE IRA either pre-tax or as Roth Contributions.¹⁸⁴ SIMPLE IRAs limit contributions to \$16,000 in 2024, plus either a 2% fixed contribution or a 3% matching contribution to take the place of an employer contribution.¹⁸⁵ Though a SIMPLE IRA has a low administrative burden, it also has a significantly lower contribution limit than a SEP IRA.¹⁸⁶

All of these retirement options are available to self-employed artists depending on whether or not they have employees they wish to cover.¹⁸⁷ However, these options largely (1) have significantly lower contribution limits than employer-sponsored defined contribution plans or (2) require an immense contribution from a single artist.¹⁸⁸ This significantly disadvantages artists who may only be able to contribute in some years.¹⁸⁹ Under a SEP IRA or solo 401(k), by contrast, an artist can contribute \$23,000 and could get close to \$69,000 of tax-deferred savings under a solo 401(k), if they are having a particularly good year.¹⁹⁰ But an artist using most IRA types would be limited to contributing \$7,000 in good years (the 2024 limit, which is adjusted annually for inflation) and would have no opportunity to get anywhere close to the \$69,000 of tax-deferred savings under the annual addition limit available to traditional employees, even if they could afford to contribute that much.¹⁹¹

182. *Self-Employed*, IRS, *supra* note 154.

183. See *SIMPLE IRA Plan*, IRS (Dec. 1, 2023), <https://www.irs.gov/retirement-plans/plan-sponsor/simple-ira-plan> [<https://perma.cc/3YPG-SE39>].

184. SECURE 2.0 CHART, *supra* note 138, at 19.

185. I.R.S. Notice 2023-75, 2023-47 I.R.B. 1256 (2023).

186. See *id.*

187. See O'Shea, *supra* note 159.

188. I.R.S. Notice 2023-75, 2023-47 I.R.B. 1256 (2023).

189. *Id.*

190. *Id.*

191. *Id.*

3. MULTIPLE AND POOLED EMPLOYER PLANS

Multiple Employer Plans (MEPs, not to be confused with Multiemployer plans, which are defined benefit plans between multiple employers and a union¹⁹²) are maintained by at least two unrelated employers.¹⁹³ Such plans are sponsored by a third party, and some require that the participants be in the same industry or geographic area.¹⁹⁴ MEPs can only have defined benefit pension plans or defined contribution 401(k) plans—IRAs are ineligible.¹⁹⁵ Because solo-401(k)s are not legally distinct from 401(k) plans, they are likely eligible.

Pooled Employer Plans (PEPs) are relatively recent and less tested than MEPs, but are also designed to pool 401(k) administrative costs.¹⁹⁶ PEPs were created by the SECURE Act of 2021¹⁹⁷ and are an arrangement in which an employer does not sponsor its own plan, but is a participating employer within the PEP, outsourcing most administrative and fiduciary burdens to the PEP.¹⁹⁸ Such plans have low recordkeeping and administrative costs.¹⁹⁹ Still, critics worry that any savings are minimal, because they (1) require payments of an additional middleman (2) and allow for very little customization.²⁰⁰

192. *Multiemployer Plans*, PBGC (Feb. 6, 2024), <https://www.pbgc.gov/prac/multiemployer> [<https://perma.cc/5NKL-LR4X>].

193. *Multiple Employer Plans*, IRS (Aug. 3, 2023), <https://www.irs.gov/retirement-plans/multiple-employer-plans> [<https://perma.cc/3TSJ-AFJW>].

194. Jim Probasco, *Multiple Employer Plan: Meaning, Overview, Different Types*, INVESTOPEDIA (Jan. 26, 2023), <https://www.investopedia.com/multiple-employer-plan-mep-definition-4766937> [<https://perma.cc/PJ24-TDSG>].

195. SEE DAVID E. MORSE & ANGELA M. ANTONELLI, GEO. UNIV. CTR. FOR RET. INITIATIVES, *MULTIPLE EMPLOYER PLANS (MEPs)* 19 (Aug. 2017), https://cri.georgetown.edu/wp-content/uploads/2017/08/CRI_MEP_PolicyReport17-2.pdf [<https://perma.cc/N75M-6F52>].

196. See Allie Alperovich, Jack Eckart & David A. Kirchner, *Pooled Employer Plans (“PEPs”): Putting a Little PEP in a 401k Retirement Plan Could Help to Protect your Portfolio Companies*, ROPES & GRAY (Apr. 19, 2022), <https://www.ropesgray.com/en/insights/alerts/2022/04/pooled-employer-plans-peps-putting-a-little-pep-in-a-401k-retirement-plan-could-help-to-protect> [<https://perma.cc/E72T-UEQB>].

197. *Id.*

198. *Id.*

199. *Id.*

200. Jason Bortz, *PEP Talk: Pooled Employer Plans*, CAP. GRP. (Sept. 8, 2023), <https://www.capitalgroup.com/advisor/insights/articles/ir-pooled-employer-plans.html> [<https://perma.cc/NES7-TCQF>].

4. STATE-MANDATED PLANS

Alongside the federal efforts in SECURE 2.0 to increase Americans' retirement savings, nineteen states and two cities have implemented automatic enrollment into individual state-administered retirement savings programs.²⁰¹ These state-mandated plans are most commonly payroll deduction IRAs, but some states provide state-approved providers in a retirement marketplace or multiple-employer plans in which unrelated employers can jointly sponsor a 401(k).²⁰² ERISA does not require employers to offer retirement plans, so even many traditional employees do not have retirement savings.²⁰³ State-mandated plans, such as the CalSavers program, are not preempted by (or contrary to) ERISA if they do not require or cause an employer to establish a qualified plan and only applies to employers who do not provide an ERISA plan.²⁰⁴

For example, CalSavers mandates that employers who do not sponsor a plan with one or more California employees participate in the state plan.²⁰⁵ A self-employed individual who is the only employee of their sole proprietorship is exempt from this mandate.²⁰⁶ However, if an artist were to hire a gallery assistant, they may need to enroll their employee, which could create complications regarding administrative costs and discrimination testing.²⁰⁷ CalSavers provides easy registration

201. ELIZABETH A. MYERS, CONG. RSCH. SERV., STATE-ADMINISTERED IRA PROGRAMS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 1 (Mar. 18, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11611> [<https://perma.cc/9XHZ-9C7T>].

202. See *id.*; *State Programs 2024*, GEO. UNIV.: CTR. FOR RET. INITIATIVES, <https://cri.georgetown.edu/states/> (last visited Jan. 30, 2024) [<https://perma.cc/FYV9-D8G4>].

203. MYERS, *supra* note 201, at 1 (explaining that 32% of private-sector works did not have access to a workplace retirement plan in March 2021).

204. Wendy Baker, *Implications of SCOTUS Refusal of CalSavers ERISA Preemption Case*, BLOOMBERG L. (Apr. 2022), <https://www.bloomberglaw.com/external/document/XFR8H49K000000/retirement-benefits-professional-perspective-implications-of-sco> [<https://perma.cc/6D85-EA43>] (discussing the Supreme Court denying writ to the Ninth Circuit decision in *Howard Jarvis Taxpayer Assoc. v. Cal. Secure Choice Ret. Savs. Program*, 997 F.3d 848, 848 (9th Cir. 2021)).

205. *Welcome to CalSavers*, CALSAVERS, <https://employer.calsavers.com/> [<https://perma.cc/TWB9-85NU>] (last visited Jan. 30, 2024) (“Only employers who do not sponsor a retirement plan and have one or more California employee must join CalSavers.”).

206. See *How Can We Help?*, CALSAVERS, <https://www.calsavers.com/home/frequently-asked-questions.html> [<https://perma.cc/FNJ3-L8VJ>] (last visited Jan. 30, 2024).

207. *Id.*

for employers and automatic enrollment for employees, as well as no fees or fiduciary responsibilities for the employer.²⁰⁸

These programs are intended to promote retirement savings for private sector individuals without access to employer plans.²⁰⁹ Research shows that employees are more likely to save for retirement if they have an employer sponsored plan, especially if they are automatically enrolled.²¹⁰ So state-mandated programs will likely increase the number of Americans saving for retirement, but they have low income deferral limits, and allow for no additional contributions, like the IRAs discussed above.²¹¹ These programs do not permit employer contributions at all, so though they encourage greater participation, they limit the available savings greatly.²¹²

B. Taxing and Retiring with Art

The modern economy is based on the fungibility of currency and credit, which is fundamentally incompatible with art's often unique and tangible character.²¹³ Tax-advantaged retirement accounts rely on the fungibility of currency to comply with the mathematical requirements promulgated by the IRS limiting contributions and "annual additions."²¹⁴

The IRS classifies artworks as collectibles, and, as such, they are explicitly excluded from contributions to retirement accounts.²¹⁵ Artists also cannot purchase artworks (collectibles) as investments with their qualified retirement plan assets.²¹⁶ If a qualified plan acquired a collectible, or piece of art, it would not necessarily disqualify the plan, but the IRS would treat that acquisition as an immediate distribution from

208. *Your Money. Your Future.*, CALSAVERS, <https://www.calsavers.com/> (last visited Jan. 30, 2024) [<https://perma.cc/U85M-VBDP>].

209. MYERS, *supra* note 201, at 2.

210. *Id.*

211. *See id.*

212. *Id.* at 1.

213. *See, e.g.,* WALTER BENJAMIN, ART IN THE AGE OF MECHANICAL REPRODUCIBILITY 3 (1935).

214. *See* I.R.C. § 408(a)(1) ("[N]o contribution will be accepted unless it is in cash . . .").

215. *Id.* at § 408(m).

216. *See id.*

account funds.²¹⁷ That distribution is generally taxed as ordinary income and the participant will be subject to a 10% additional tax on early withdrawals if they are under age 59½.²¹⁸

The investment of a qualified-plan in closely held, unconventional assets (such as an artist's own work) may be a prohibited self-dealing transaction and may even disqualify the plan.²¹⁹ The example the IRS provides for a prohibited transaction under IRC § 4975(c)(1)(d) is a plan acquiring artworks for use in the participant's own home.²²⁰ The IRS forbids an individual to use their IRA to buy property for personal use, meaning an individual's IRA can purchase a residential property for investment purposes, but that individual cannot live in it.²²¹ Applying the same logic to artwork, an artist's IRA could purchase an artwork, but the piece could not be their own, they could not display the piece in their own property, and (arguably) the social benefits derived from loaning an artwork or even reselling the investment would provide enough personal gain to be considered self-dealing.²²² An artist would certainly run afoul of self-dealing restrictions were they to use their qualified plan to purchase their own artworks to hold as an investment under IRC § 4975(c)(1)(d), resulting in tax penalties or disqualification.²²³

C. Previous Efforts to Improve Artists' Financial Wellbeing

The financial plight of the starving artist is not new or unknown.²²⁴ There are enterprises that seek to collectivize risk in investing in artwork, increase access to art investments, or collectivize employee benefits among arts workers.²²⁵ This Section will first examine investing

217. *Issue Snapshot—Investments in Collectibles in Individually-Directed Qualified Plan Accounts*, IRS (DEC. 21, 2023), <https://www.irs.gov/retirement-plans/investments-in-collectibles-in-individually-directed-qualified-plan-accounts> [hereinafter *Investments in Collectibles*] [<https://perma.cc/73G7-F2V6>].

218. *Id.*; I.R.C. § 72(t).

219. *Investing in Collectibles*, *supra* note 217.

220. *Id.*; I.R.C. § 4975(c)(1)(d).

221. Eric Bank, *What Assets Can Be Held Inside an IRA?*, NEST, <https://budgeting.thenest.com/assets-can-held-inside-ira-30567.html> (last visited Jan. 30, 2024) [<https://perma.cc/Y7QM-UN5G>].

222. *Id.*

223. *IRA FAQs*, IRS (Dec. 1, 2023), <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras> [<https://perma.cc/D8VG-FNTW>].

224. *See infra* Section I; *see also* SARAH BURNS, *INVENTING THE MODERN ARTIST: ART AND CULTURE IN GILDED AGE AMERICA* 107 (1996).

225. Tretina, *supra* note 93.

models that expand the market for art investments that may be able to assist artists. This Section then analyzes models for collective employee benefit dispersal among art works that may help artists save for retirement either directly or through providing more reliable income streams.

1. INVESTING

Art has long been used as an investment.²²⁶ Investing in art has the benefit of being largely insulated from the stock market, diversifies a portfolio, and comes with significant social cache.²²⁷ However, art's tangibility is also a major investment limitation, as it cannot be quickly liquidated and may have significant maintenance costs.²²⁸

a. Crypto/Securitizing

Millennials are more likely than previous generations to view art as a tool to build wealth, and more likely to digitally engage both with art and financial markets.²²⁹ However, crypto-investing and fractionalized ownership, as they exist today, are poor solutions to increase liquidity for artists' retirement accounts. Platforms, such as Masterworks and Maecenas, allow investors to purchase fractional shares of artworks to diversify an investment portfolio, and digital art in the form of NFTs (non-fungible tokens).²³⁰ The artists whose works are being used and securitized for investments have thus far been omitted from publicity surrounding these art investment start-ups and do not seem to derive any benefit such as royalties from this secondary market.²³¹

226. See Cannon-Brookes, *supra* note 91, at 406–07.

227. Yap, *supra* note 92, at 1656.

228. Tretina, *supra* note 93.

229. Steven Sulley, *How Millennials Are Challenging and Changing the Art Market*, FORBES (Apr. 13, 2022, 8:30 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/04/13/how-millennials-are-challenging-and-changing-the-art-market/?sh=1cb72b0b4212> [https://perma.cc/P8ZD-X3CA].

230. Tretina, *supra* note 93; see Montse Guiu, *Maecenas, The First Blockchain Platform for Investing in Art*, BBVA (Sept. 5, 2017), <https://www.bbva.com/en/maecenas-first-blockchain-platform-investing-art/> [https://perma.cc/K722-GVBY]; see also Elizabeth Gravier, *Masterworks: The Platform that Allows Nearly Anyone to Invest in Multi-million-Dollar Art*, CNBC SELECT (July 30, 2023), <https://www.cnbc.com/select/what-is-masterworks/> [https://perma.cc/76LS-YLU3].

231. See, e.g., Gravier, *supra* note 230.

Masterworks is an invitation-only digital platform that allows users to buy and sell shares representing investments in artworks.²³² Masterworks purchases artworks, which it individually securitizes with the Securities and Exchange Commission (SEC).²³³ The Masterworks portfolio includes works by both deceased artists such as Pablo Picasso, Andy Warhol, and Mark Rothko, and living artists, including Banksy, Yayoi Kusama, KAWS, and Ed Ruscha—all of whom are successful, blue-chip artists.²³⁴ The artworks are maintained and stored by a third-party administrator, and it is unknown whether the works are ever loaned or displayed during Masterworks' ownership.²³⁵

Investors can buy and sell shares in particular artworks, or Masterworks will sell the work and distribute dividends to the investors.²³⁶ At the end of 2021, Masterworks had 250,000 investors purchasing shares at as little as twenty dollars per share (although Masterworks requires a minimum investment of \$1,000).²³⁷ Users receive 80% distributions of the profits upon sale of particular pieces.²³⁸ However, Masterworks has no obligation to sell the artwork at any time, so the investment may be tied up indefinitely with no distributions because the returns to investors come only when artwork is sold for a profit.²³⁹

Though investors can trade Masterworks shares on a secondary market, their securitized shares come with a caveat: “[Masterworks] cannot assure you that the Trading Market will provide enough liquidity, a reliable or effective means of monetizing your investment or valuing your shares.”²⁴⁰ Masterworks shares can only be traded with other Masterworks investors, so the likelihood that a user will not be able to find a buyer for their shares is much higher than in a less specialized

232. *A Complete Platform for Investing in Art*, MASTERWORKS, <https://www.masterworks.com/about/how-it-works> (last visited Jan. 30, 2024) [hereinafter *How It Works*, MASTERWORKS] [<https://perma.cc/L2SJ-4JC2>].

233. *Id.*

234. Gravier, *supra* note 230.

235. Masterworks, Semiannual Report (Form 1-SA) (Jun. 30, 2023).

236. *Id.*

237. Tretina, *supra* note 230. See Guiu, *supra* note 232; see also Gravier, *supra* note 230.

238. *How It Works*, MASTERWORKS, *supra* note 232; Gravier, *supra* note 230.

239. R. J. Weiss, *Masterworks Review: Is This Art Investment Platform a Scam or Legit?*, WAYS TO WEALTH (Oct. 23, 2023), <https://www.thewaystowealth.com/reviews/masterworks-review/> [<https://perma.cc/WTZ2-TLDK>].

240. *How it Works*, MASTERWORKS, *supra* note 232; Tretina, *supra* note 93. See Guiu, *supra* note 230; see also Gravier, *supra* note 230.

investment.²⁴¹ The secondary market of Masterworks users also comes with the risk of selling one's shares at a loss and thus undermining the value of the artwork.²⁴² For instance, in January 2023, sixty people were looking to sell their shares of Banksy's "Exit Through the Gift Shop" painting—a work that lent its title to the artist's Academy Award nominated mockumentary—with only three parties looking to purchase.²⁴³ The sellers were asking for a minimum of \$19.99 per share, but the buyers' highest bid was \$18.80.²⁴⁴ This bidding disparity suggests that the value of the painting, based on the demand for its shares, is only \$7,010,000—already below the \$7,428,000 for which Masterworks purchased the piece, creating an internal market value possibly independent of the actual art market in which Masterworks and other buyers trade.²⁴⁵ Though too soon to tell, Masterworks' internal secondary market may have real, negative ramifications to the actual sale price of an artwork, which may be detrimental to the artists whose works Masterworks purchases, since it creates an internal value for the artwork based on a closed market.²⁴⁶

Masterworks users can invest IRA assets into fine art through a partnership with Alto IRA, a self-directed "cryptoIRA."²⁴⁷ CryptoIRAs cannot be funded with existing crypto assets; the crypto shares can only be purchased with money in the retirement account, which can then be invested in a variety of coins, including Masterworks.²⁴⁸ These cryptoIRA investments, like all crypto investments, are highly volatile.²⁴⁹ As Business Insider's guide, "The 6 Best Bitcoin IRAs of February 2023" warned readers: "[u]ntil the dust settles [from FTX's bankruptcy], proceed with extreme caution; it may be wiser to park your funds in a high-yield savings account until the crypto market stabilizes."²⁵⁰

241. See Weiss, *supra* note 239.

242. *Id.*

243. *Id.*; see also David Ng, *Banksy Scores Oscar Nomination for 'Exit Through the Gift Shop'*, L.A. Times (Jan. 25, 2011; 10:20 AM), <https://www.latimes.com/archives/blogs/culture-monster-blog/story/2011-01-25/banksy-scores-oscar-nomination-for-exit-through-the-gift-shop> [<https://perma.cc/V9YL-4BMJ>].

244. Weiss, *supra* note 239.

245. *Id.*

246. See *id.*

247. Gravier, *supra* note 230.

248. See Rickie Houston, *Best Bitcoin IRAs of January 2023*, BUS. INSIDER: PERS. FIN. (Jan. 3, 2023, 12:26 PM), [<https://web.archive.org/web/20230129191958/https://www.businessinsider.com/personal-finance/best-bitcoin-cryptocurrency-iras>].

249. *Id.*

250. See *id.*

The first crypto-art investment platform is Maecenas, which divided multimillion-dollar artworks into “asset tokens” that were compared to buying shares of an artwork.²⁵¹ Maecenas sees its greatest competitors as (1) auction houses, (2) art galleries, and (3) fine art investment funds, comparing its 8% fees favorably against the 25%, 50%, and 2% annual fee with 20% of profits charged by its competitors, respectively.²⁵² Additionally, Maecenas offers “collateralized art lending” and “speculative investing,” unlike the other three means of investing in art.²⁵³ Maecenas’s ART coin has been essentially worthless since late 2018, with a few small resurgences in which the coin value reached a few cents.²⁵⁴ Its value at the time of writing is \$0.000575.²⁵⁵

At its peak, crypto investing and NFTs ran a significant risk of illiquidity from their volatile market, and had significant environmental impacts.²⁵⁶ The cryptocurrency mining industry uses half of the electricity of the global banking sector as of 2021, and this percentage was growing, while holding only a sliver of the value.²⁵⁷ The amount of energy required to create an NFT can power a house in the United States for 4.7 days, not to mention the amount of energy required to trade in NFTs and to hold one’s retirement savings in a crypto-IRA.²⁵⁸

Though these options theoretically provide more potential liquidity than traditional art collecting, their intangibility leaves them more susceptible to market concerns.²⁵⁹ It is unclear how the secondary markets created by these art investments help or hurt the artists whose works are owned by start-up art funds. But they may have already been

251. *What is Maecenas*, MAECENAS, <https://www.maecenas.co/whats-maecenas/> (last visited Jan. 30, 2024) [<https://perma.cc/UL78-6EM7>].

252. *Id.*

253. *Id.*

254. *MaecenasART*, COINBASE, <https://www.coinbase.com/price/maecenas> (last visited Jan. 30, 2024) [<https://perma.cc/URU4-ZTD9>].

255. *Id.* (showing an updated value of \$0.00).

256. *See generally* WHITE HOUSE OFF. SCI. & TCH. POL’Y., CLIMATE & ENERGY IMPLICATIONS OF CRYPTO-ASSETS IN THE U.S. 4 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/09/09-2022-Crypto-Assets-and-Climate-Report.pdf> [<https://perma.cc/28B6-SFM3>].

257. Mandy DeRoche, Jeremy Fisher, Nick Thorpe & Megan Wachspres, *The Environmental Impacts of Cryptomining*, EARTHJUSTICE (Sept. 23, 2022), <https://earthjustice.org/features/cryptocurrency-mining-environmental-impacts> [<https://perma.cc/FU5X-URBY>].

258. Romano Santos, *What is the Environmental Impact of NFTs?*, VICE (Mar. 3, 2022, 1:08 AM), <https://www.vice.com/en/article/bvnp95/what-nft-environment-impact-climate-crypto-explainer> [<https://perma.cc/S7JD-MPKR>].

259. *See* Tretina, *supra* note 93.

a flash in the pan.²⁶⁰ For an artist attempting to leverage their own works as an investment, these abstract investment vehicles do not solve their very physical investment problems.²⁶¹ Finally, for an artist to invest in shares of their own artworks through their IRA in an arrangement like the Masterworks-Alto IRA partnership would certainly run afoul of prohibitions against self-dealing in one's retirement investing.²⁶² NFTs and crypto-currency are not solutions to creating greater liquidity for artists' retirement accounts.

2. COLLECTIVIZING

Art-workers have renewed unionization efforts in recent years.²⁶³ Employees at the Art Institute of Chicago,²⁶⁴ the Solomon R. Guggenheim Museum,²⁶⁵ the Whitney Museum of American Art,²⁶⁶ and a number of other museums nationwide have successfully bargained for

260. Elaine Velie, *What's in Store for NFTs in 2023?*, HYPERALLERGIC (Jan. 3, 2023), <https://hyperallergic.com/784662/whats-in-store-for-nfts-in-2023/> [<https://perma.cc/5YXE-QH67>].

261. Maintaining art collections are expensive, and doing so is economically inefficient. See, e.g., Sara Roffino, *What it Really Costs to Be a Mega Art Collector*, ARTSY (July 7, 2017, 2:19 PM), <https://www.artsy.net/article/artsy-editorial-costs-mega-art-collector> [<https://perma.cc/9BDM-SQU4>] (noting that fine art storage in Manhattan cost \$10–12.50 per square foot in 2017, while also discussing other costs of maintaining a collection, such as installation labor, shipping, advisors, collection managers, and insurance); Julia Simon, *Why a Lot of Very Expensive Art is Disappearing into Storage*, NPR (Feb. 15, 2018, 5:04 AM), <https://www.npr.org/2018/02/15/585971962/why-a-lot-of-very-expensive-art-is-disappearing-into-storage> [<https://perma.cc/CW28-L EUF>] (discussing the growth of specialized, boutique art storage free ports with Delaware Freeport owner, Fritz Dietl).

262. See *Retirement Topics – Prohibited Transaction*, IRS (July 24, 2023), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-prohibited-transactions> [<https://perma.cc/NXD8-KT7X>].

263. Tom Seymour, *State of the Unions: Why US Museum Workers are Mobilising Against Their Employers*, ART NEWSPAPER (Feb. 2, 2022), www.theartnewspaper.com/2022/02/02/state-of-the-unions-a-new-renaissance-at-us-museums [<https://perma.cc/N6SX-53DZ>].

264. Robert Channick, *Art Institute Employees Win Vote to Form Chicago's First Major Museum Union*, CHI. TRIB. (Jan. 11, 2022, 9:27 PM), <https://www.chicagotribune.com/2022/01/11/art-institute-employees-win-vote-to-form-chicagos-first-major-museum-union/> [<https://perma.cc/33V3-NJVE>]; see also *Museum Public Letter*, ART INST. CHI. WORKERS UNITED (Aug. 3, 2022), <https://www.aicwu.org/updates/museum-public-letter> [<https://perma.cc/2SEL-BRL5>].

265. Hakim Bishara, *Guggenheim Signs Contract With Union After a Year of Tense Negotiations*, HYPERALLERGIC (Feb. 16, 2021), <https://www.hyperallergic.com/622396/guggenheim-signs-union-contract-local-30/> [<https://perma.cc/6VAQ-U4DA>].

266. Zachary Small, *Whitney Museum Reaches Agreement with Unionized Workers*, N. Y. TIMES (Mar. 6, 2023), www.nytimes.com/2023/03/06/arts/design/whitney-museum-union-contract.html [<https://perma.cc/69JW-74BE>].

recognition since 2021.²⁶⁷ Several museums and fine art services have faced allegations of unfair labor practices for alleged union-busting, including the Philadelphia Museum of Art and the New York-based fine art service, UOVO.²⁶⁸ But although this unionization trend may benefit arts workers generally, artists will only benefit inasmuch as they may have day jobs with these employers.

A 2021 report from the Urban Institute calls for artists to be reclassified from independent contractors to employees.²⁶⁹ It recommends: (1) “strengthen[ing] classification laws to combat misclassification of employees as independent contractors,” (2) “extend[ing] worker protections and social insurance programs to freelance art workers and others working as independent contractors”, and (3) “strengthen[ing] and scal[ing] collective efforts to rebalance power and support freelance art workers.”²⁷⁰ All three suggestions would require expanding the definition of employees to allow for greater organization and bargaining power.²⁷¹ Misclassification is a major issue in the growing gig economy and can lead to employers denying benefits and protections to their workers.²⁷²

267. *Id.*

268. *See, e.g., Organized Staffers Accuse Philadelphia Museum of Art of Union-Busting*, ARTFORUM (June 10, 2020, 6:22 PM), <https://www.artforum.com/news/organized-staffers-accuse-philadelphia-museum-of-art-of-union-busting-83221> [<https://perma.cc/X2X4-NP6F>]; *see also* Rhea Nayyar, *Philadelphia Museum Accused of Reneging on Union Contract*, HYPERALLERGIC (June 29, 2023), <https://hyperallergic.com/830947/philadelphia-museum-accused-of-reneging-on-union-contract/> [<https://perma.cc/F66B-GX44>]; Wallace Ludel, *New York Art-Handling Company Lays Off Pro-Union Workers, While Others are Paid to Stay Home During Coronavirus Pandemic*, ART NEWSPAPER (Apr. 8, 2020), <https://www.theartnewspaper.com/2020/04/08/new-york-art-handling-company-lays-off-pro-union-workers-while-others-are-paid-to-stay-home-during-coronavirus-pandemic> [<https://perma.cc/9SW6-3KSA>]; Sten Spinella, *Weekend Negotiations Raised Hopes for a Resolution to the Mass MoCA Labor Dispute, but the Strike Continues*, BERKSHIRE EAGLE (Mar. 18, 2024), https://www.berkshireeagle.com/news/northern_berkshires/no-resolution-in-mass-moca-labor-dispute-union-art-museum-north-adams-strike-negotiations/article_ecc29ef0-e568-11ee-9319-6721b5d12046.html [<https://perma.cc/S4DY-4TSP>].

269. JENNY R. YANG, AMANDA BRIGGS, JESSICA SHAKESPREERE, NATALIE SPIEVACK, SHAYNE SPAULDING, K. STEVEN BROWN, URB. INST., *ARTS WORKERS IN CALIFORNIA* 30 (2021), https://www.urban.org/sites/default/files/publication/103496/arts-workers-in-california_0_0.pdf [<https://perma.cc/C4TK-SBEM>].

270. *Id.* at VII.

271. *Id.* at 2.

272. U.S. DEP'T LAB.; WAGE & HOUR DIV., *GET THE FACTS ON MISCLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT* (2022), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/misclassification-facts.pdf> [<https://perma.cc/GVD4-6JMT>].

Expanding the definition of “employee” may help many arts workers, but it is unlikely to help fine artists.²⁷³ Artists are self-employed at three-times the national average for the total workforce.²⁷⁴ The definition of “employee” varies state-to-state, but even to apply lax standards like California’s *Borello* test of an entity’s “right to control [the details of the service] activities” to the artist-gallery relationship would almost invariably find that artists control those details themselves.²⁷⁵ In some instances, where artists take direct commissions from collectors or through a grant-giving body, for example, artists may be fairly described as independent contractors.²⁷⁶ Under the IRS’s twenty-factor independent contractor test, which examines decisions about training and determinations about who provides tools, who determines the method and rate of payment, who controls scheduling, degree of supervision, etc., artists again make most of those choices themselves and are likely to fall outside of the independent contractor classification.²⁷⁷

To classify an artist as an employee of a gallery, however, would obliterate the definition of an employee. It also would invariably cause conflicts and confusion amongst artists who are represented by multiple galleries in different geographic markets.²⁷⁸ The ability to collectively bargain *as employees* is not an avenue likely to have much success for artists. However, a collective pooling structure along the lines unsuccessfully implemented by the APT may still prove to be a helpful organizational mechanism to provide income security to artists during their careers, allowing them to save money for retirement more effectively.²⁷⁹ There are models of collectivizing investment risk for financial security throughout the broader arts world.²⁸⁰ These include the Artist Pension Trust, the Screen Actors’ Guild and American Federation of Television and Radio Artists (SAG-AFTRA) pension plans, and a new investment fund through the Commonwealth and Council gallery all have elements that could aid artists in saving for retirement.

273. YANG ET AL., *supra* note 269, at 28–29.

274. *Id.* at 12 tbl.2.

275. *S. G. Borello & Sons, Inc. v. Dep’t Indus. Rels.*, 769 P.2d 399, 403–04 (1989).

276. YANG ET AL., *supra* note 269, at X.

277. Lobel, *supra* note 27, at 61.

278. See Chernick, *supra* note 66 (statement of artist Taymour Grahne) (“Ideally, an artist should be represented by two to four galleries, as each gallery offers a different context, whether that’s in terms of their artist roster or location.”).

279. See Yap, *supra* note 92, at 203.

280. See, e.g., *id.* at 198.

3. THE ARTIST PENSION TRUST

The Artist Pension Trust (APT) is a for-profit company established in 2004 as an investment vehicle to provide long-term financial assistance to artists.²⁸¹ The APT was created by entrepreneur Moti Shniberg and economist Dan Galai, who shared the goal of using up-and-coming artists' works to create a diversified investment portfolio that benefits the artists themselves.²⁸² They recruited the former director of the Whitney Museum of American Art, David Ross, and founded Mutual Art, an online art sales platform to administer the APT and invest the sale proceeds in a common fund.²⁸³

As designed, the Trust sought to recruit fifty up-and-coming artists per year into local chapters, which were structured as partnerships that would be capped at 250 artists.²⁸⁴ The local chapters were theoretically used to select and organize local artists—although storage of the works is not tied to any local chapter, leading to frustration among artists as to the unknown whereabouts of their contributed works.²⁸⁵ After its founding in 2004, the APT expanded with 250-member chapters in New York and Los Angeles, with later chapters in London, Mexico City, Berlin, Beijing, Mumbai, and Dubai.²⁸⁶ Members were selected by regional selection committees made up of art critics, scholars, dealers, curators, and other arts professionals.²⁸⁷

The invited artists gave works to the Trust, which aimed to sell them at opportune moments and distribute sale proceeds to all participating artists in regular, pension-like payments.²⁸⁸ The APT design of enlisting early-career artists is intended to spread out the risk of failure under a venture capital-like model.²⁸⁹ If some artists made it big, the

281. *Id.*

282. *Id.*

283. *Id.*

284. Howe, *supra* note 26.

285. Catherine Wagley, *The Artist Pension Trust Had a Utopian Dream to Give Artists a Shared Retirement Fund. It's Devolved Into Legal Threats and Despair*, ARTNET (Jan. 11, 2022), <https://news.artnet.com/art-world/artist-pension-trust-rise-fall-part-one-2058236> [hereinafter Wagley, *Utopian Dream*] [<https://perma.cc/768N-XFEG>].

286. *Id.*

287. Yap, *supra* note 92, at 204.

288. *Id.*

289. Adam Hayes, *Venture Capital: What Is VC and How Does it Work?*, INVESTOPEDIA (Jan. 27, 2024), <https://www.investopedia.com/terms/v/venturecapital.asp> [<https://perma.cc/53HG-ZP46>].

logic goes, their profits would be shared among all participating artists.²⁹⁰

Rather than a traditional pension or defined benefit plan, the APT is an investment fund that offered annuities.²⁹¹ An annuity is “a series of payments under a contract that can be bought at any time,” whereas pension payments must be made after retirement.²⁹² The APT encourages artists to contribute their APT income to retirement accounts, but in fact distributes income to participating artists annually and at the time of sales, when it is taxed as ordinary income.²⁹³ The artists can then contribute those payments to an independent, tax-qualified savings plan if they so choose.²⁹⁴

The contract to enter the APT was vague regarding sales and payments.²⁹⁵ The initial plan was that, for twenty years, participating artists would send one work to the APT annually, with 40% of its sale proceeds going to the artist, 32% percent to the collective for distribution among participants, and 28% percent to cover the APT’s operating costs.²⁹⁶ The APT expected to pay out \$1.5 billion to artists in the original trusts, at an average of \$600,000 per person (assuming a dropout rate of 20%).²⁹⁷ But as of April 2006, the APT’s investors (fund investors separate from the artists, of which there were approximately fifty) had contributed approximately \$6 million, and the APT held \$5 million in artworks with an average value of only \$10,000 each.²⁹⁸

Because the APT relies on the future success of a portion of its participating artists, limiting its participation to mid-career artists is a calculated risk to maximize the likelihood that participants will have mature, successful careers after they are admitted to the APT.²⁹⁹ Additionally, the APT envisions that participation itself will be a stamp of approval to engender market confidence in the participating artists, thus further enhancing their reputations and increasing the value of the

290. Yap, *supra* note 92, at 203.

291. *Id.* at 205.

292. *Id.*

293. *Id.*

294. *Id.*

295. Pogrebin & Mitter, *supra* note 20.

296. Wagley, *Utopian Dream*, *supra* note 285.

297. Howe, *supra* note 26.

298. Yap, *supra* note 92, at 203.

299. *See* Howe, *supra* note 26.

contributed artworks.³⁰⁰ The APT intends to “aggressively promote” the collection to further “tilt the market in its favor.”³⁰¹

Participants can contribute up to twenty artworks in exchange for partnership interests.³⁰² The APT has the exclusive option to sell the contributed artworks, which could also be done through the artists’ primary galleries, auction houses, or dealers.³⁰³ The artists’ partnership interests, described as “Pool Units,” represents their share of income from the common pool and the 40% interest in the APT’s sale of the artists’ individual works.³⁰⁴ The Pool Units will presumably increase in value during term of participation to incentivize artists to remain in the Trust for the full twenty years.³⁰⁵

The artworks have to be separately appraised for both sale value and legal and financial purposes such as taxes, insurance, or bankruptcy.³⁰⁶ Pre-sale estimates are set by specialists as both a prediction and a promotional tool intended to create speculative buzz for an artwork and increase the “hammer,” or sale price.³⁰⁷ Appraisal value for insurance is a complex calculation based upon previous sale prices of comparable works, condition, and other extenuating circumstances like reputational changes or scarcity.³⁰⁸ Poor sales prices may damage both fair market appraisals for legal purposes and future sales prices because they reflect poorly on the value of the artists’ works and its potential to appreciate in value.³⁰⁹ Artists generally prefer private sales because the price is negotiated and kept a secret, while auction prices are public and less predictable.³¹⁰

The APT’s first auction in March of 2017 sold most of the offered works under market value, leaving artists and gallerists concerned that

300. *See id.*

301. *Id.*

302. Yap, *supra* note 92, at 204.

303. *Id.*

304. *Id.*

305. *See id.*

306. *See FAQs for Consumers*, AM. SOC’Y APPRAISERS, <https://www.appraisers.org/why-hire-an-appraiser/faqs-for-consumer> (last visited Jan. 30, 2024) [hereinafter *FAQs, APPRAISERS*] [<https://perma.cc/V8DQ-3M7K>].

307. *See* Martin Gammon, *What Auction House Estimates Really Mean—and What They Can Tell Us*, ARTSY (Nov. 20, 2019, 3:53 PM), www.artsy.net/article/artsy-editorial-auction-house-estimates [<https://perma.cc/6HQQ-6J87>].

308. *See FAQs, APPRAISERS, supra* note 306.

309. *See* Gammon, *supra* note 307.

310. Zoe Thomas, *Artists Use Work To Fund Pensions*, BBC (Mar. 3, 2017), <https://www.bbc.com/news/business-39161271> [<https://perma.cc/UXU3-92P8>].

participation in the APT sales was damaging their brand values.³¹¹ The former APT Director of Sales, Sarah Murkett, criticized the 2017 auction, saying it occurred too soon to generate “enough of a market for the works to be able to maximize their value by selling them at auction.”³¹²

After this underwhelming first auction at Sotheby’s New York, the APT pulled out from a second sale slated for April of the same year.³¹³ Participating artists and galleries were concerned that another auction would irreparably damage the value of their artworks by further saturating the market after an underwhelming sale.³¹⁴ With no sales on the horizon, the cost of maintaining and selling the APT’s 13,000 artworks proved to be a substantial financial drain on the APT.³¹⁵ In response, the APT informed participants that they would have to pay \$6.50 per work per month to keep artworks with the APT, or else pay to relocate the works themselves.³¹⁶ This is an extremely reasonable storage price, considering that shipping artworks can range from hundreds to thousands of dollars.³¹⁷ In recent years, the APT has been operated by Mutual Art,³¹⁸ which ostensibly marketed the art to collectors online.³¹⁹ Works from the APT continue to sell, mostly through the artists or their galleries.³²⁰

While the APT is an important and ambitious attempt to improve the financial stability of artists, the logistical impracticalities make it

311. Colin Gleadell, *The Problem with Selling Contemporary Art at Auction: The Artist Pension Trust Withdraws 18 Lots from Sotheby’s*, TELEGRAPH (Apr. 18, 2017, 11:03 AM), <https://www.telegraph.co.uk/luxury/art/problem-selling-contemporary-art-auction-artist-pension-trust> [https://perma.cc/4WW4-SRLJ].

312. Catherine Wagley, *A New Generation of Idealists is Learning from the Artist Pension Trust’s Mistakes. Can They Deliver on its Promise?*, ARTNET (Jan. 12, 2022), <https://news.artnet.com/art-world/artists-pension-trust-rise-fall-part-two-2059097> [hereinafter Wagley, *A New Generation*] [https://perma.cc/MN6G-Y39L].

313. *Id.*

314. *See id.*

315. Colin Gleadell, *Artist Pension Trust Faces Yet Another Crisis as Artists Fume Over New Storage Fees*, ARTNET (July 28, 2017), <https://news.artnet.com/market/artist-pension-trust-storage-fee-1035569> [https://perma.cc/YU7L-3KUZ].

316. *Id.*

317. *Cost of your Art Collection: Shipping and Storage*, ARTWORK ARCHIVE (July 7, 2018), <https://www.artworkarchive.com/blog/cost-of-your-art-collection-shipping-and-storage> [https://perma.cc/K6DP-6LDY].

318. *See* Pogrebin & Mitter, *supra* note 20.

319. *Artist Pension Trust*, APT, <http://aptglobal.org/en/About/> (last visited Jan. 30, 2024), [https://web.archive.org/web/20240207005244/http://aptglobal.org/en/About].

320. *See id.*

unscalable and ultimately untenable as a model to improve artists' investing abilities. Additionally, because the participant pool is necessarily kept low to foster cache and increase market value for the participants' works, it is not a model that can be applied broadly to artists as a class of workers underserved by existing retirement models.³²¹

4. THE SCREEN ACTORS GUILD AND THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS PLANS

The Screen Actors Guild and the American Federation of Television and Radio Artists (together, SAG-AFTRA) provides a useful model of how to administer a qualified pension benefit plan and wellness benefit plan for workers who are in the same industry but distributed across different employers.³²² Both SAG and AFTRA maintain their own pension plans, despite the union's merger of health plans.³²³ The SAG-Producers Pension Plan is a multiemployer defined benefit plan.³²⁴ New members of SAG-AFTRA pay a one-time-only initiation fee of \$3,000 and annual base dues of \$231.96, in addition to 1.575% of covered earnings up to \$1,000,000.³²⁵ These dues are applied to union operations, including processing residual checks, negotiating contracts, monitoring the safety of members, and lobbying elected officials.³²⁶

All payments to the SAG-Producers Pension Plan are contributions from producers as a condition of working with SAG-AFTRA members under the SAG-AFTRA collective bargaining agreement.³²⁷ Productions pay into the SAG Pension & Health and AFTRA Health & Retirement plans at a rate of 17% for principal performers and

321. See *supra* Section II.

322. See, e.g., SAG PRODUCERS, PENSION PLAN, SUMMARY PLAN DESCRIPTION (2019), https://www.sagaftraplans.org/sites/default/files/r1_258269_02_SAG-AFTRA%20Pensions%20SPD%20WEB.pdf [hereinafter SAG PRODUCERS PENSION SPD] [<https://perma.cc/WP38-LFX8>].

323. See *id.*; see also AFTRA RET. FUND, BENEFITS UPDATE (2020), https://aftraretirement.org/docs/default-source/default-document-library/december-2020-benefits-update946715b1d2446ae9a23dff00001d7895.pdf?sfvrsn=ddee4312_0 [<https://perma.cc/79L5-KNVC>].

324. SAG PRODUCERS PENSION SPD, *supra* note 322, at 48.

325. *Membership Costs*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/membership-costs> (last visited Jan. 30, 2024) [<https://perma.cc/6YEA-85AX>].

326. *Id.*

327. *General Info*, SAG PRODUCERS PENSION PLAN, <https://www.sagaftraplans.org/sag-pension/faq> (last visited Jan. 30, 2024) [hereinafter *General Info*, SAG] [<https://perma.cc/QG4Z-JSRE>].

background actors.³²⁸ Day performers in 2023 must be paid a minimum of \$1,082 per day.³²⁹

Under the SAG Producers Plan, participants earn one pension credit if they earned \$20,000 per year (2012 or later) or worked seventy days or more in a calendar year (2003 and later).³³⁰ SAG allows for a one-year “break in service” in any calendar year in which a participant does not earn \$10,000.³³¹ Members’ benefits vest once they have accumulated ten pension benefits, or five credits without a permanent break in service, or once they have attained normal retirement age without a permanent break.³³² With fewer than twenty credits, SAG members receive up to \$6,500 in monthly payments.³³³ The monthly rates increase by \$500 per month for additional credits, with participants receiving up to \$8,000 for thirty-five or more credits.³³⁴

This structure provides a useful model for industry-wide collective benefits. However, it is unlikely to provide much help to artists, in part because defined benefit plans like the SAG plan are complex and expensive to fund and administer.³³⁵ Such unionization is a difficult process that is heavily subject to political tides.³³⁶ Since artists are not employees, no bargaining obligations apply under existing labor laws.³³⁷ SAG was created during the Great Depression, when political climates favored collectivizing and institutional support for individuals.³³⁸ It is unlikely now that such an industry-wide bargaining

328. *What is the Minimum Pay Scale for New Media Productions?*, SAG-AFTRA, <https://www.sagaftra.org/what-minimum-pay-scale-new-media-productions> (last visited Jan. 30, 2024) [https://perma.cc/W43M-DE4H].

329. SAG-AFTRA, SAG-AFTRA THEATRICAL WAGE TABLE 1 (2023), <https://www.sagaftra.org/files/1.%202023%20Theatrical%20Wage%20Tables.pdf> [https://perma.cc/6GV3-G2LJ].

330. SAG PRODUCERS PENSION PLAN SPD, *supra* note 322, at 9–10.

331. *Id.* at 12.

332. *Id.* at 14.

333. *Id.* at 15.

334. *Id.*

335. *See generally id.*

336. Jackie Fortier, *Hollywood Union Health Insurance is Particularly Good. And It’s Jeopardized by Strike*, NPR (Aug. 31, 2023, 11:58 AM), <https://www.npr.org/sections/health-shots/2023/08/30/1196652142/hollywood-union-health-insurance-sag-aftra-wga> [https://perma.cc/59T8-H76U].

337. *See Employee Rights*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/employee-rights> (last visited Jan. 30, 2024) [https://perma.cc/KH5S-3NPT].

338. *1930s*, SAG-AFTRA, <https://www.sagaftra.org/about/our-history/1930s> (last visited Jan. 30, 2024) [https://perma.cc/HBM2-T2G8].

agreement could be reached, but the unionization wave amongst art museums provides some hope.³³⁹

5. COMMONWEALTH & COUNCIL GALLERY

A recent, promising effort for artists to collectivize outside of the union or employment context is a new model of patronage spearheaded by a Los Angeles gallery, Commonwealth & Council.³⁴⁰ Co-directors Young Chung and Kibum Kim founded the Council Fund during the COVID-19 pandemic to redistribute sales proceeds amongst artists.³⁴¹ Galleries customarily give discounts to collectors, ranging from 5% to 50% of the sales price of an artwork, to encourage customer loyalty.³⁴² Chung and Kim proposed to have this discount paid into the Council Fund, along with additional donations from patrons and museums.³⁴³ The members of the Fund would vote to disburse funds according to the goals of their represented artists, all of whom must participate.³⁴⁴ The Fund is maintained through the gallery to maintain maximum flexibility in payments.³⁴⁵ The gallery holds all assets and tax liabilities.³⁴⁶ This keeps the fund from being subject to ERISA or other insurance regulations, and allows the artists to vote on disbursement amongst themselves or to others.³⁴⁷ Because the beneficiaries are ostensibly the artists or others chosen by them, the fund is not eligible for 501(c)(3) status as it does not serve a wide enough public to be considered a not-for-profit.³⁴⁸ The flexibility of the fund allows the artists to

339. See Zachary Small, *U.S. Museums See Rise in Unions Even as Labor Movement Slumps*, N.Y. Times (Feb. 22, 2022), <https://www.nytimes.com/2022/02/21/arts/design/museums-unions-labor.html> [<https://perma.cc/N3HP-3G6R>].

340. Margaret Carrigan, *Gallery Asks Collectors to Give their Discounts Back to the Artists*, ART NEWSPAPER (Dec. 22, 2020), <https://www.theartnewspaper.com/2020/12/22/gallery-asks-collectors-to-give-their-discounts-back-to-the-artists> [<https://perma.cc/MS9X-ND77>].

341. Catherine Wagley, *'The Gallery System Itself is a Redistribution Scheme': Commonwealth & Council's Founders on Pooling its Resources for the Collective Good*, ARTNET (Jan. 17, 2023), <https://news.artnet.com/market/the-gallery-system-itself-is-a-redistribution-scheme-commonwealth-councils-founders-on-pooling-its-resources-for-the-collective-good-2235449> [*hereinafter* Wagley, *The Gallery System*] [<https://perma.cc/89AX-AFN2>].

342. Carrigan, *supra* note 340.

343. *Id.*

344. *Id.*

345. Telephone Interview with Kibum Kim, Co-Director, Commonwealth & Council (Jan. 5, 2024) [*hereinafter* Kim Interview].

346. *See id.*

347. *See id.*

348. *See id.*

vote on the money's application, whether that be payments to particular participants in need, to fund their own or others' arts projects, or even to make charitable contributions.³⁴⁹

Also under the Commonwealth umbrella is the Commonwealth Trust, which was inspired by the APT.³⁵⁰ Artists represented by the gallery pooled works with estimated values around \$20,000 into the Commonwealth Trust.³⁵¹ The pooled works will be held to mature for up to twenty years, and then sold alongside non-Trust works at the gallery for profit-sharing.³⁵² The Commonwealth Trust has sold artwork as of January 2023 and profits were shared among participating artists.³⁵³ Additionally, Commonwealth & Council gives artists 50% of resale rights, while most galleries give much smaller portions.³⁵⁴ Though the Commonwealth & Council model is new and operates only on a small scale, it provides a model for the gallery-artist relationship that hopefully will collectivize investment risk and provide financial security for the participating artists.³⁵⁵

The Council Fund is still nascent in its provision of benefits to artists, as it has only disbursed a few payments.³⁵⁶ However, burgeoning enthusiasm from art collectors and museums suggests that such a model may be scalable and has the potential to help many artists across many galleries.³⁵⁷ But as currently structured, the Fund provides current income to the participating artists, rather than tax-advantaged benefits.³⁵⁸ Any retirement contributions would either need to be made by the artists out of Fund distributions or made in the form of a deferred annuity that would nonetheless be taxed as current ordinary income.³⁵⁹ This would contribute to the financial stability of participating artists, which would allow them to better save for retirement, yet without the additional tax benefits of employer-sponsored retirement plans.³⁶⁰

349. Carrigan, *supra* note 340.

350. *Id.*

351. *Id.*

352. *Id.*

353. Kim Interview, *supra* note 345.

354. Wagley, *The Gallery System*, *supra* note 341.

355. *See id.*

356. *See id.*; *see also* Kim Interview, *supra* note 345.

357. Kim Interview, *supra* note 345.

358. *Id.*

359. *See id.*

360. *See id.*

IV. Recommendation

This Note recommends two options which could either work in tandem or individually to assist artists. The first recommendation is that galleries, in the model of Commonwealth & Council, mobilize their patrons and local museums to donate discount fees to a gallery-run fund, to be distributed to its represented artists in collectivized Multiple or Pooled Employer Plans. This would be even more effective with expansions to the Internal Revenue Code and ERISA to permit parties to contractually arrange businesses to make tax-deferred contributions into individual retirement accounts.³⁶¹ The second recommendation is a modest change to the Internal Revenue Code to allow artists to elect to receive capital gain treatment on the sale of their own artworks.³⁶²

A. Mobilizing Galleries to Encourage Retirement Savings

The Commonwealth & Council model of profit-sharing could increase the financial stability of artists and allow them to better save for retirement.³⁶³ It works within the existing gallery system, and could be implemented by any gallery—with no legislative changes needed.³⁶⁴ However, because the artist and gallery share only a contractual arrangement and do not share an employer-employee relationship, the artists are ineligible to receive any qualified (tax-advantaged) benefits under ERISA with respect to contributions made to a retirement program by the gallery.³⁶⁵ Therefore, although this model can greatly increase the financial security of artists, the best it can do under the

361. See I.R.C. § 408; *see also* 29 U.S.C. § 1052 (limiting contributors to individual retirement plans to individuals and employers, excluding independent contractors, such as artists).

362. See I.R.C. § 1221 (excluding property held for sale to customers from capital asset treatment); *see also* I.R.C. § 61 (defining dealings in property as ordinary income, meaning an artist who sells his or her own created piece of art would treat the sale of such as ordinary income).

363. See Carrigan, *supra* note 341.

364. *Id.*

365. 29 U.S.C. §1002(16)(B) (stating that “[t]he term ‘plan sponsor’ means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan, or (iv) in the case of a pooled employer plan, the pooled plan provider.”).

current structure of ERISA is to provide more predictable income streams to artists to allow them to save individually for retirement.³⁶⁶

The Commonwealth & Council model presents some solutions to the problems that the APT sought to address.³⁶⁷ For example, the model significantly decreases the logistical burden that the APT took on—though it does come with key economic concerns of its own.³⁶⁸ First, the Commonwealth model depends on the active cooperation and agreement of the gallery owner, who must forego the ability to provide discounts to attract and retain loyal customers.³⁶⁹ It is unclear if that model can be sustained if competing galleries continue to provide such discounts.³⁷⁰ Assuming the sustainability of this model, though, it will make a participating gallery more attractive to artists seeking greater income security.³⁷¹ On the other side of the art sale equation, the model also depends on a continued willingness of art collectors to purchase art at undiscounted rates.³⁷² Some collectors have embraced this model at Commonwealth & Council, but such a paradigmatic shift in the gallery-collector relationship may come with serious growing pains.³⁷³ The Council Fund is a profit-sharing arrangement built from contributions by collectors who are already buying work from the gallery.³⁷⁴ It is a purely financial model, built from donations solicited as part of the normal gallery sales process.³⁷⁵ Though the founders attest that it does complicate and extend their sales process, they also have had collectors and museums simply donate to the fund even without making a purchase.³⁷⁶

The Commonwealth Trust operates much like the APT on a smaller scale: the gallery's artists put some of their artworks in the Trust, which then sells them through normal gallery operations and shares the proceeds amongst the participating artists.³⁷⁷ The APT was hobbled by the sheer volume of artworks it had to store, and it lacked

366. See Wagley, *A New Generation*, *supra* note 312.

367. Wagley, *The Gallery System*, *supra* note 341.

368. See *id.*

369. *Id.*

370. See *id.*; see also Kim Interview, *supra* note 345.

371. See Kim Interview, *supra* note 345.

372. See *id.*

373. See *id.*; see also Wagley, *The Gallery System*, *supra* note 341.

374. See *supra* Section III.C 5.

375. See *supra* Section III.C.5.

376. Wagley, *The Gallery System*, *supra* note 341; see also Kim Interview, *supra* note 345.

377. *Id.*

the infrastructure that galleries already have to promote and sell their artists' works. Commonwealth & Council is selling the Commonwealth Trust artworks alongside other works by the same group of artists.³⁷⁸ Trust sales are part of the existing gallery sales process.³⁷⁹

The Commonwealth model is limited in its utility as a retirement vehicle in the current legal landscape, however, because the payments to the artists can only be taxed as ordinary income and are subject to the same limitations of retirement vehicles for the self-employed discussed above.³⁸⁰ Though increased financial stability through a predictable income stream would surely benefit artists' financial wellbeing and ability to save for retirement, the gallery cannot make contributions to the artist's tax-advantaged retirement plan; only the artist or the artist's employer (presumably the artist's sole proprietorship or wholly owned corporation) can make such contributions.³⁸¹ The artist can defer income by contributing into an individual non-Roth retirement account (via a solo 401(k) or non-Roth IRA) to receive tax benefits similar to traditional employees.³⁸² However, there is currently no way for a gallery to make the same contributions that an employer would contribute for its employees.³⁸³

Participating galleries could further improve the retirement prospects of their artists by making available a pooled retirement vehicle, such as a MEP or PEP, to lower the administrative and investment costs associated with maintaining a small or individual retirement plan.³⁸⁴ However, artists who want more control over their retirement plan design may prefer to maintain a separate plan.³⁸⁵ Solo artists with more modest incomes who live in a state that offers a state-sponsored IRA arrangement may also enroll in that IRA, which offers shared investment and administrative costs within the state system.³⁸⁶

378. *See id.*; *see also* Kim Interview, *supra* note 345.

379. *See* Wagley, *The Gallery System*, *supra* note 341; *see also* Kim Interview, *supra* note 345.

380. *See* I.R.C. § 61; *see also* I.R.C. § 402(a); Wagley, *The Gallery System*, *supra* note 341.

381. *See* IRAs, IRS, *supra* note 170. Individual Retirement Arrangements (IRAs), IRS (Aug. 29, 2023), <https://www.irs.gov/retirement-plans/individual-retirement-arrangements-iras> [hereinafter IRAs, IRS] [<https://perma.cc/C597-H73V>].

382. *See id.*; *see also* I.R.C. § 402.

383. IRAs, IRS, *supra* note 381.

384. *See supra* Section III.A.3.

385. *See supra* Section III.A.2.

386. *See supra* Section III.A.4.

There is currently no pathway for a fund like the Commonwealth Fund to make payments directly into the retirement accounts of artists who are not their employees.³⁸⁷ Permitting such a direct contribution would allow artists to benefit from the same retirement funding practices as traditional employees.³⁸⁸ It would also allow galleries to make profit-sharing payments directly into artists' solo-401(k) plans.³⁸⁹ However, this would require a change to both the Internal Revenue Code and ERISA to accomplish, because the artist is not in an employer-employee relationship with the gallery.³⁹⁰ Rather, artists have contractual agreements with their galleries that determine the division of profits between the parties following a sale.³⁹¹ There is a demonstrated legal relationship between the two parties regarding the profits of the gallery as a business entity.³⁹²

If the Code were to be expanded to allow the gallery or a gallery-sponsored fund like the Commonwealth Fund to make payments into an artist's solo-401(k) plan (or a MEP or PEP in which the artist participates), such a payment would be subject to the same taxes that the gallery and artists are already incurring.³⁹³ Thus, the payment would be a deductible business expense for the gallery as a retirement plan contribution.³⁹⁴ If the Code were amended to permit this relationship, these payments would be a deferred compensation arrangement under IRC § 401(k), which could be designated as elective deferrals or profit sharing contributions.³⁹⁵ The artist would be responsible for correcting any potential overpayments in the event that their individual contribution (in tandem with the payments from the gallery fund) exceed the contribution limits.³⁹⁶ Excess contributions could be withdrawn and treated as taxable income for the current year, as is the case for 401(k) participants.³⁹⁷ This does not treat the artist more favorably than traditional

387. See 29 U.S.C. § 1002(16)(B).

388. IRS, *supra* note 393.

389. IRAs, IRS, *supra* note 381.

390. See *Type of Relationship*, IRS (Mar. 17, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/type-of-relationship> [https://perma.cc/E95N-SUR8]; see also 26 C.F.R. § 31.3401(c)-1(2024).

391. ARTCONNECT, *supra* note 69.

392. *Id.*

393. See I.R.C. § 404.

394. See *id.*; see also I.R.C. § 401.

395. I.R.C. § 401(k).

396. I.R.C. § 402(g)(2).

397. *Id.*

employees, but it makes the same tools and incentives for saving for retirement more available to artists.³⁹⁸

Additionally, ERISA should be amended to permit contributions to appropriate retirement vehicles (solo-401(k)s, whether collectivized into a MEP or PEP or not, or IRAs) when specifically provided for by contract. This would allow artists and galleries under the Commonwealth model to contract into a relationship similar to an employee-employer relationship, wherein the gallery can make contributions to the artists' retirement accounts.³⁹⁹ But reforms to ERISA should make clear that the contributing gallery's liability for contributions arises under the contract, not as a fiduciary or plan sponsor under ERISA.⁴⁰⁰

These amendments may help self-employed workers beyond artists. Such closely-held relationships between businesses and individuals outside of the employment context are increasingly common in the gig-economy.⁴⁰¹ Art collecting has an established philanthropic culture that may be less prevalent in other gig-industries, but such a contractually agreed-upon model of retirement support could provide compelling incentives for companies that rely on gig-workers.⁴⁰² Though major corporations that rely on gig-workers, like Uber or Etsy, may not have the philanthropic culture to back a retirement fund as under the Commonwealth model, setting up a fund to disburse even a small amount of retirement savings to the millions of Uber drivers may give the company an edge in driver recruitment and retention without having to redefine employees and independent contractors.⁴⁰³ More likely, such an arrangement could help publications that rely on freelance writers, or companies that work with influencers, to promote their products.⁴⁰⁴ Such companies could maintain loyalty among contractors in a competitive market without the obligation of making them full employees and without drastically disrupting the ERISA framework.

398. I.R.C § 401(k).

399. See *supra* Section III.A.1.

400. See *A Plan Sponsor's Responsibilities*, IRS (June 5, 2023), <https://www.irs.gov/retirement-plans/plan-sponsor/a-plan-sponsors-responsibilities> [<https://perma.cc/H7CR-MURF>]; see also Schlackman, *supra* note 71.

401. See *supra* Section II.C.

402. See Bruckner & Forman, *supra* note 12, at 369–70.

403. See Wagley, *The Gallery System*, *supra* note 341.

404. *Id.*

B. Investing like a Collector

To help self-employed artists solve the difficulties of saving for retirement with an unpredictable income stream from the sale of non-liquid assets, this Note recommends that the Internal Revenue Code be amended to provide a Section 83(b)-type election to allow artists to realize the same capital gains treatment on the sale of their artworks that is already available to art collectors.⁴⁰⁵

Section 83 of the Code generally provides for income taxation of property that is transferred in connection with the performance of services.⁴⁰⁶ Section 83(b) provides for an election for a service provider who receives a transfer of property (typically an award of restricted stock) that is subject to vesting or other risk of forfeiture.⁴⁰⁷ Ordinarily, when an employer receives that equity, it is subject to income tax at the time of vesting at the equity's fair market value at that time.⁴⁰⁸ Section 83(b) allows an employee to elect to pre-pay taxes on the equity at the time that they receive the compensation, rather than when it vests.⁴⁰⁹ This election can be beneficial for tax purposes, because (hopefully) the value of the equity will increase during an employee's vesting period and subsequent sales will be taxed as a capital gain.⁴¹⁰ The employee does risk overpaying for the stock in the event that the value of the company decreases or if they do not stay through their vesting period and the equity fails to vest.⁴¹¹

The Code already allows some professional creatives to treat the income from the sale or exchange of their artworks to be treated as a capital asset.⁴¹² For example, Section 1221(b)(3) allows a musician to elect to treat a musical composition (or copyright of it) that they created as a capital asset at the time of sale or exchange as a capital asset.⁴¹³

Artworks are already an asset that can receive capital gain tax treatment in the hands of art collectors.⁴¹⁴ This proposed amendment to

405. I.R.C. § 83.

406. *Id.*

407. Julia Kagan, *83(b) Election: Tax Strategy and When and Why to File*, INVESTOPEDIA (Aug. 28, 2023), <https://www.investopedia.com/terms/1/83b-election.asp> [<https://perma.cc/H4CB-935T>].

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. 26 C.F.R. § 1.1221-3.

413. I.R.C. § 1221(b)(3) (2024).

414. I.R.C. § 1221(a).

the IRC would allow artists to receive similar tax treatments on their artworks as investments to collectors.⁴¹⁵ This Note proposes an IRC amendment under which an artist can elect to pay ordinary income taxes on their artwork in the taxable year of its creation, with any further gains or losses on the work treated as capital gains or losses at the time of actual sale. The ordinary income tax would be based on the fair market value of the artwork, determined by an appraisal at the time of its creation.⁴¹⁶ The IRS already requires art to be appraised for income, estate, and gift taxes.⁴¹⁷ The IRS lays out requirements for art valuation or appraisals in Revenue Procedure 96-15 that could be applied to appraisals done for this amendment.⁴¹⁸ If an artist chooses to forego this elective tax, they could sell their artworks without tax appraisal, to be taxed as ordinary income at the time of sale, as they currently do.⁴¹⁹

This amendment would allow artists to elect to be treated, for tax purposes, in the same manner as an art collector.⁴²⁰ They could realize capital gains on any appreciation in value of their own works.⁴²¹ By paying ordinary income tax on the artwork at the time of creation rather than the year sold, the artwork would be treated as an investment by the artist.⁴²² This gives artists the same tax benefits of the lower capital gains tax rates on the sale of artworks that the IRS already extends to art collectors.⁴²³

This proposed tax election runs the same risk of losses that come with any other investment—that the asset will sell for a lower price.⁴²⁴ Some artists may not find the cost of appraisal worth the tax benefits.⁴²⁵ However, the additional income saved from taxing art sales as capital

415. Yap, *supra* note 92, at 210–13 (proposing an 83(b) election for participants in the APT as partners within the trust).

416. I.R.C. § 64; I.R.C. § 1221.

417. *Art Appraisal Services*, IRS (Sept. 6, 2023), <https://www.irs.gov/appeals/art-appraisal-services> [hereinafter *Art Appraisal Services*] [<https://perma.cc/8YSU-QU RD>].

418. Rev. Proc. 96-15, 1996-03 I.R.B. 41.

419. I.R.C. § 1221.

420. Yap, *supra* note 92, at 213.

421. *Id.* at 200.

422. *Id.*

423. *Id.*

424. Kagan, *supra* note 407.

425. See *Art Appraisal Services*, *supra* note 417 (“The current fees for a SOV are \$7,500 for one to three items and \$400 for each additional item.”); see also *Appraiser Fees & Process with Art of Estates*, ART ESTS., <https://artofestates.com/appraiser-fee-process/> (last visited Jan. 30, 2024) [<https://perma.cc/7S2K-3AA8>] (quoting the market rate for New York City appraisers as exceeding \$450).

gains can create more financial security and allow artists to better invest for their retirement.⁴²⁶

V. Conclusion

Artists are not alone in being disadvantaged by the retirement system in America, which is focused on the traditional employer-employee relationship: this is a problem faced by an ever-growing number of gig-workers.⁴²⁷ Artists are uniquely positioned in this system because they have very close legal and financial ties to one or a few galleries yet are not deemed employees of the galleries.⁴²⁸ Artists can create immense wealth for others at the expense of their own future financial security because of inequalities in the tax code.⁴²⁹ As ERISA is entirely organized around the employment relationship, anyone in the growing gig-labor market will be at a disadvantage.⁴³⁰ State and federal legislators are aware of this problem, but are limited in how to address it within the constraints of ERISA.⁴³¹

The proposed cultural shift in the gallery world and the modest legislative reforms to the tax treatment of collectibles would allow artists to have greater financial stability thanks to more predictable income streams.⁴³² Both will allow artists to save more effectively and reliably for retirement, but will never even the playing field with employees until ERISA can expand to recognize more working relationships.⁴³³ The proposed expansion of the contractual powers under ERISA could help to give artists and gig-workers the tools to save for retirement that they earn and deserve.⁴³⁴

426. *See supra* Section III.A.4.

427. *See* Bruckner & Forman, *supra* note 12, at 369–70.

428. *See supra* Section II.C.

429. *See generally* Feld, *supra* note 18.

430. *See* 29 U.S.C. 1002(16)(B).

431. *See supra* Section III.A.4.

432. *See supra* Section IV.

433. *See supra* Section IV.A–B.

434. *See supra* Section IV.A–B.