RETHINKING RETIREMENT SAVINGS

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At the end of 2020, Americans held a collective $35 trillion in their retirement accounts.[1] To put this in perspective, $35 trillion is larger than the federal government's total spending in the eight years of the Obama Administration;[2] it is more than one-third of the world's GDP.[3] Most of this $35 trillion is governed by the Employee Retirement Income Security Act of 1974[4] (ERISA), which aims to provide for the economic security of American workers by requiring trustees to seek the highest risk-adjusted return on retirement plan assets.[5] While this approach might be reasonable at the level of each individual pension fund, when applied at scale to the tens of trillions of dollars in U.S. retirement accounts, it is disastrous. As we demonstrate, ERISA's strict fiduciary rules have funneled assets into the industries that have been the primary drivers of the climate crisis and rising inequality, ultimately harming the people the statute is meant to protect.

Our goal in writing this Commentary is to present a 30,000-foot view of ERISA to illustrate some of the statute's failures that can be seen only at scale. ERISA was crafted under an assumption that employees would retire into a world that is habitable and free of existential risk — an assumption that, for millennials and Generation Z, might no longer be valid. Without drastic action to avoid the effects of climate change, workers who retire toward the end of this century will inherit a world

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1 *Retirement Assets Total $34.9 Trillion in Fourth Quarter 2020*, INV. CO. INST. (Mar. 18, 2021), https://www.ici.org/research/stats/retirement/ret_20_q4 [https://perma.cc/U63P-RX6S].

2 *See* BRIAN RIEDL, MANHATTAN INST., OBAMA'S FISCAL LEGACY: A COMPREHENSIVE OVERVIEW OF SPENDING, TAXES, AND DEFICITS 8 fig.2 (2017), https://media4.manhattan-institute.org/sites/default/files/R-BR-0917.pdf [https://perma.cc/A85W-VGTZ] (showing total federal spending of roughly $29 trillion from 2009 to 2016).

3 *See World Development Indicators: Structure of Output*, WORLD BANK, http://wdi.worldbank.org/table/4.2 [https://perma.cc/CM5Y-RU9D] (showing 2019 global GDP of $87.779 trillion).

4 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

5 *See infra* Part I, pp. 349–54. A significant portion of these assets are governed by ERISA's state law analogs, which often copy their fiduciary duty provisions directly from ERISA. David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2120 (2014) ("[M]any states share, or have even copied, ERISA's fiduciary duties to govern their own pension funds.").

that is almost unrecognizable from our own. Roughly half of known species on Earth will face extinction.[6] Dozens of coastal cities will be underwater.[7] Rising sea levels, droughts, and superstorms will force hundreds of millions of people to abandon their homes in search of livable land.[8] ERISA's fund-maximization mandate has fueled this crisis, ensuring that American workers' retirement savings have been subsidizing the destruction of the world they will retire into.

In 2021, an ERISA-compliant investment strategy looks a lot like picking up pennies in front of a steamroller.[9] The statute's fiduciary rules, adapted from trust law, are primarily designed to prevent trustees from pocketing too many pennies before handing them over to beneficiaries. In this Commentary, we invite you to consider an alternative regime designed to slow the path of the steamroller, if not stop it entirely — and perhaps allow American workers to collect more than pennies along the way.

In Part I, we offer a brief overview of ERISA's fiduciary requirements and the negative externalities they have created. In Part II, we draw from our work at the Sustainable Economies Law Center to imagine an alternative regime that encourages people to take control of their retirement savings and invest in local, sustainable, justice-oriented initiatives. Although specific statutory and administrative proposals are beyond the scope of this brief Commentary, we offer general principles that should be used to construct an alternative regime that is better for workers, their communities, and the planet.

I. THE GLOBAL CONSEQUENCES OF ERISA'S FUND-MAXIMIZATION MANDATE

Congress enacted ERISA primarily in response to a very specific problem: embezzlements, kickbacks, and "outright looting" of union-controlled pension and benefit funds.[10] ERISA's drafters turned to the

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[6] Robin McKie, *Biologists Think 50% of Species Will Be Facing Extinction by the End of the Century*, THE GUARDIAN (Feb. 25, 2017, 3:37 PM), https://www.theguardian.com/environment/2017/feb/25/half-all-species-extinct-end-century-vatican-conference [https://perma.cc/4QZ8-GQT4].

[7] *See* Scott A. Kulp & Benjamin H. Strauss, *New Elevation Data Triple Estimates of Global Vulnerability to Sea-Level Rise and Coastal Flooding*, NATURE COMMC'NS, Oct. 2019, at 1, 2–3; Denise Lu & Christopher Flavelle, *Rising Seas Will Erase More Cities by 2050, New Research Shows*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/interactive/2019/10/29/climate/coastal-cities-underwater.html [https://perma.cc/44UG-NQJW].

[8] John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS INST. (July 25, 2019), https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees [https://perma.cc/U6HC-4HFH].

[9] Or, perhaps more accurately, it looks like investing in a diversified portfolio of steamroller companies and then picking up pennies in front of a steamroller.

[10] STAFF OF S. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 6 (Comm. Print 1984); *accord* Webber, *supra* note 5, at 2123.

common law of trusts, a centuries-old body of law designed to prevent such abuses.[11] Section 403 of ERISA requires that plan assets be held in trust,[12] and section 404 then imports duties from trust law, requiring fiduciaries to administer plans "solely in the interest of the participants and beneficiaries."[13]

Because of trust law's role in ERISA's development, courts frequently turn to trust law when interpreting ERISA.[14] The Supreme Court has long recognized this, stating in *Tibble v. Edison International*[15] that "courts often must look to the law of trusts" when "determining the contours of an ERISA fiduciary's duty."[16] Trust law is therefore both the foundation of ERISA's fiduciary responsibilities and the obvious source for resolving the statute's ambiguities.

But the common law of trusts is ill-equipped to govern the complicated relationships between asset managers, retirement plan trustees, and millions of American workers with diverging preferences. The fiduciary relationship in trust law, at its core, is a relationship between two parties: a trustee, who holds title to property, and a beneficiary, for whose benefit the property is held.[17] When there are multiple beneficiaries, trust law instructs trustees to act impartially with respect to each beneficiary.[18] Modern retirement plans stretch trust law to its extremes. The California Public Employees' Retirement System (CalPERS) manages more than $400 billion to provide benefits for more than two million people.[19] CalPERS trustees are thus faced with a problem: How are they supposed to act "solely in the interest" of two million people with diverging interests?[20]

The prevailing judicial approach to this problem is to require trustees to maximize returns of the *fund*, collapsing the various interests of plan beneficiaries into a single monetary goal. Professor David Webber

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[11] *See* Daniel R. Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107–10 (1988).

[12] 29 U.S.C. § 1103.

[13] *Id.* § 1104(a)(1).

[14] *See, e.g.*, Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000) ("The common law of trusts . . . offers a 'starting point for analysis [of ERISA].'" (alteration in original) (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (internal quotation marks omitted))); Iwans v. Aetna Life Ins. Corp., 855 F. Supp. 579, 585 (D. Conn. 1994) ("ERISA must be interpreted in the context of the common law trust principles upon which the statute is predicated.").

[15] 135 S. Ct. 1823 (2015).

[16] *Id.* at 1828.

[17] RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003).

[18] RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. L. INST. 2007).

[19] Megan White, *CalPERS Issues Two Requests for Information Seeking Research on Climate Change Risk and Human Capital Management*, CALPERS (Dec. 2, 2020), https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/calpers-issues-two-rfis-for-sustainable-investment-research-initiative [https://perma.cc/6WPP-GNRC].

[20] Note that CalPERS is governed not by ERISA but by its California state law analog. *See* Webber, *supra* note 5, at 2132–33.

calls this the "fund-first" interpretation of fiduciary duty.[21] Under this view, trustees cannot consider the preferences of beneficiaries as *individuals* — they must "evaluat[e] the best interests of beneficiaries in the abstract as beneficiaries."[22] Their duty is to maximize the value of the fund, regardless of the consequences to current beneficiaries.

The "fund-first" interpretation of fiduciary duty effectively eliminates the potential to invest retirement savings in ways that advance environmental, social, and governance (ESG) goals. Under current case law and executive guidance, ERISA fiduciaries can consider ESG criteria only if they are doing so in pursuit of higher risk-adjusted returns.[23] The same holds true for participant-controlled retirement plans, such as 401(k)s, in which participants can choose from a menu of investment options designated by the plan administrators. In these participant-controlled plans, plan administrators can add ESG funds as options only if they are doing so based "only on pecuniary factors."[24] The current regime has been remarkably effective at thwarting ESG investing: just 0.03% of 401(k) assets are held in ESG funds.[25]

The $35 trillion in Americans' retirement accounts has thus been corralled into a limited field of investments. In 2019, nearly half of the assets of the average public pension fund were held in public equities, with the remainder distributed among fixed income, real estate, cash, and alternative investments, such as private equity.[26] Pension funds are now the largest investors in private funds, including private equity buyout funds, hedge funds, and venture capital funds.[27]

But while ERISA directs institutional investors to minimize risk in their individual portfolios, it neglects the *systemic* risks created by asset

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[21] *Id.* at 2111.

[22] Danaher Corp. v. Chi. Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986).

[23] *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 389 (2020). President Trump's Department of Labor recently published a final rule that strengthens ERISA's hostility toward ESG investing (including the local and justice-oriented investing that we advocate for) by mandating that fiduciaries consider financial factors only when investing plan assets or when designating investment alternatives for participant-controlled plans such as 401(k)s. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550). For a companion rule that ensures that ERISA fiduciaries consider only financial factors in proxy voting, see Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55,219 (Sept. 4, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550).

[24] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,884 (to be codified at 29 C.F.R. § 2550.404a-1(c)(1)).

[25] Greg Iacurci, *401(k) Plans Lag in ESG Investing*, INVESTMENTNEWS (Oct. 5, 2019), https://www.investmentnews.com/401k-plans-lag-in-esg-investing-2-170334 [https://perma.cc/UJQ7-EW7Y].

[26] *See* Keith Brainard & Alex Brown, *Public Fund Survey*, NAT'L ASS'N OF STATE RET. ADM'RS (Nov. 2020), www.nasra.org/publicfundsurvey [https://perma.cc/5MZN-YNUK].

[27] MICHAEL DOHERTY ET AL., ROPES & GRAY, RETAIL INVESTMENTS IN PRIVATE FUNDS: REGULATORY OBSTACLES AND OPPORTUNITIES 3 (2019).

managers' decisions. This oversight has had two major consequences for beneficiaries. First, because ERISA trustees have invested heavily in private equity, they have subsidized an economic climate that is increasingly hostile to workers.[28] Private equity firms typically force target companies to acquire outsized debt to finance their own acquisition;[29] the firms then extract wealth from the target company, often by firing workers, cutting wages, and reducing or eliminating retirement benefits.[30] Occasionally, pension fund investments help finance acquisitions that cause plan participants to lose their jobs.[31]

If trustees instead try to use plan assets to directly save participants' jobs, they may face liability for violating their fiduciary duties. That is exactly what happened in two federal cases involving pension trustees' attempts to use fund assets to fight hostile takeover attempts.[32] In both cases, the trustees refused to sell their shares to the would-be acquirer, even though the acquiring firm was offering a hefty premium.[33] The trustees justified their actions because they believed the takeover would result in mass firing and wage cuts among current employees, so the best way to ensure the economic security of plan participants was to prevent the takeover from occurring, even if it meant potentially sacrificing fund returns.[34] But in both cases, courts rejected the trustees' positions, holding that their duties flowed to the fund rather than to individual beneficiaries — effectively subordinating employees' real-world economic interests to the abstracted interests of a pile of money.[35]

The second significant consequence of ERISA's fund-maximization mandate has led to global harms. ERISA has all but required trustees to invest plan assets in industries that have been the primary drivers of the climate crisis. Until a few years ago, the oil and gas sector consistently outperformed the market. From 2000 to 2015, the Arca Oil and

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28 In recent years, private equity funds have directed more of their assets into "marginalized debt," including high-interest-rate subprime debt and small-dollar installment loans. Private equity's returns thus depend on extracting wealth not only from workers but also from the marginalized borrowers targeted by this kind of predatory lending. For an in-depth analysis of this relationship and how it is fueled by public pension fund investment, see Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE L.J. (forthcoming 2022).

29 *See* Wolf Richter, *The Retail Apocalypse Is Being Fueled by Private Equity Firms Adding to Debt Loads*, BUS. INSIDER (Aug. 2, 2017, 4:29 PM), https://www.businessinsider.com/brick-and-mortar-retail-private-equity-debt-financing-lbo-2017-8 [https://perma.cc/G6VY-JWK9].

30 *See* Mayra Rodriguez Valladares, *Chase for Yield Has Fueled Private Equity with Significant Consequences for Americans*, FORBES (July 23, 2019, 8:49 PM), https://www.forbes.com/sites/mayrarodriguezvalladares/2019/07/23/chase-for-yield-has-fueled-private-equity-with-significant-consequences-for-americans [https://perma.cc/JP29-VRC9].

31 *See* Webber, *supra* note 5, at 2108.

32 *See* Donovan v. Bierwirth, 680 F.2d 263, 276 (2d Cir. 1982); Danaher Corp. v. Chi. Pneumatic Tool Co., 635 F. Supp. 246, 250 (S.D.N.Y. 1986).

33 *Bierwirth*, 680 F.2d at 265–66; *Danaher*, 635 F. Supp. at 247, 249.

34 *Bierwirth*, 680 F.2d at 267, 271; *Danaher*, 635 F. Supp. at 249–50.

35 For a lengthier discussion of these cases, see Fischel & Langbein, *supra* note 11, at 1138–42.

Gas Index more than quadrupled the S&P 500's returns, growing by 168% compared with the latter's 40%.[36] Given ERISA's fund-maximization mandate, pension fund trustees are effectively required to invest in the oil and gas industry, as choosing not to do so would expose them to liability.[37] Trustees have dutifully complied. A 2014 study found that 47% of all U.S.-based oil and gas company shares were held in retirement accounts.[38] The study's authors observed that "large numbers of Americans"[39] have benefited from the returns generated by the oil industry and that "middle-class households dominate the ownership" of oil and natural gas companies, overwhelmingly through their pension and retirement accounts.[40]

A discussion of the oil industry's systematic efforts to hide evidence of climate risk from its activities and block federal attempts to fight climate change is beyond the scope of this Commentary.[41] What is notable for our purposes is the extent to which the retirement assets of everyday Americans have helped finance the industries primarily responsible for climate change, not because of an explicit mandate in ERISA, but simply because of a supposedly value-agnostic rule to maximize returns.

On the surface, it is not unreasonable to design a retirement-savings regime around maximizing fund returns. Although investment gains are an imperfect proxy for economic well-being, they are certainly related — when workers' retirement accounts grow, their liquid net worth rises as

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[36] *Compare NYSE ARCA OIL and GAS INDEX (^XOI)*, YAHOO! FIN. (Mar. 10, 2021, 5:01 PM), https://finance.yahoo.com/quote/%5EXOI/chart [https://perma.cc/9HAJ-MD6V] (select the date range; then modify the date range to "1/1/2000" and "1/1/2015"; then hover over the far right side of the chart), *with S&P 500 (^GSPC)*, YAHOO! FIN. (Mar. 10, 2021, 5:01 PM), https://finance.yahoo.com/quote/%5EGSPC/chart [https://perma.cc/ZG2H-C5ZL] (same).

[37] Funds that avoid entire sectors — such as fossil fuels — for social or environmental reasons tend to experience lower risk-adjusted returns due to the loss of diversification. *See* Gunther Capelle-Blancard & Stéphanie Monjon, *The Performance of Socially Responsible Funds: Does the Screening Process Matter?*, 20 EUR. FIN. MGMT. 494, 496, 515 (2014).

[38] ROBERT J. SHAPIRO & NAM D. PHAM, SONECON, WHO OWNS AMERICA'S OIL AND NATURAL GAS COMPANIES: A 2014 UPDATE 2 (2014), https://www.sonecon.com/docs/studies/Who_Owns_Americas_Oil_and_Natural_Gas_Companies-Shapiro-Pham-October2014.pdf [https://perma.cc/HWA6-7CBJ].

[39] *Id.* at 1.

[40] *Id.* at 2.

[41] *See, e.g.*, JOHN COOK ET AL., AMERICA MISLED: HOW THE FOSSIL FUEL INDUSTRY DELIBERATELY MISLED AMERICANS ABOUT CLIMATE CHANGE (2019), https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America_Misled.pdf [https://perma.cc/EG5N-PMTA]. It is also important to note that the fossil fuel industry's deregulatory efforts help account for the industry's outsized returns. These firms have been able to externalize social and environmental costs that must then be internalized by comparable ESG firms, skewing profitability analyses in favor of the former. *See* Ronald Cohen & George Serafeim, *How to Measure a Company's Real Impact*, HARV. BUS. REV. (Sept. 3, 2020), https://hbr.org/2020/09/how-to-measure-a-companys-real-impact [https://perma.cc/2TEQ-ZHF5] (introducing a new firm valuation method that accounts for social and environmental costs).

well. President Trump's Department of Labor adopted this reasoning in recent executive actions. While pursuing social and environmental goals might be worthwhile in other instances, they have no place in retirement savings: maximizing retirement plan assets is itself an "eminently worthy social goal," so ERISA fiduciaries should consider only pecuniary factors that affect risk-adjusted return when investing workers' retirement assets.[42]

However, there is a strong case to be made that a fund-maximization mandate, pursued at scale, is not the best way to achieve economic security for the greatest number of workers. The systemic risks imparted by investment managers who follow a fund-maximization approach might in fact exceed the portfolio risks that such an approach promises to minimize. In addition, even if the benefits of a fund's capital accumulation are equitably distributed among shareholders, the *burdens* are not. The communities most affected by climate change are those that are already the most marginalized to begin with.[43] It is likely that the workers who benefit most from a nationwide mandate to maximize returns in retirement accounts are those whose retirement accounts are the least in need of protection, while the workers who have suffered the most under America's structural racism and feudal inequality will also bear the brunt of the societal consequences of such an approach.

In short, ERISA's fund-maximization mandate, pursued at scale, is placing American workers in front of an economic and environmental steamroller moving at full speed. Of course, there are still pennies to collect: as millions of people who lost their jobs during the pandemic are still out of work,[44] and as thousands of families continue to deal with the loss of family members and homes in climate change–fueled wildfires,[45] the S&P 500 has breached yet another all-time high.[46] We would prefer a regime that prioritizes people's jobs and homes, even if that means sacrificing a few additional basis points of alpha in their retirement accounts.

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[42] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,848 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550) (internal quotation marks and punctuation omitted).

[43] *See generally* S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* (U.N. Dep't of Econ. & Soc. Affs., DESA Working Paper No. 152, 2017).

[44] Megan Cassella, *A Growing Side Effect of the Pandemic: Permanent Job Loss*, POLITICO (Aug. 6, 2020, 10:28 AM), https://www.politico.com/news/2020/08/06/coronavirus-permanent-unemployment-392022 [https://perma.cc/5L2V-PNTV].

[45] Hollie Silverman, *California Wildfires Have Burned an Area Almost the Size of Connecticut*, CNN (Sept. 14, 2020, 11:49 PM), https://www.cnn.com/2020/09/14/us/california-wildfires-monday/index.html [https://perma.cc/VJ9B-9QWW].

[46] Yun Li & Jesse Pound, *S&P 500 Jumps 1% to a Record as Biden Signs New Stimulus, Nasdaq Rallies 2.5%*, CNBC (Mar. 11, 2021, 4:11 PM), https://www.cnbc.com/2021/03/10/stock-market-open-to-close-news.html [https://perma.cc/J5ZC-F97T].

II. REVERSING THE PATH OF THE STEAMROLLER: USING RETIREMENT SAVINGS TO FOSTER ECONOMIC AND ENVIRONMENTAL RESILIENCE

Building a better regime first involves reimagining what retirement assets can do. What if Americans' $35 trillion in retirement savings could be reoriented to both support individuals and protect the world into which they will retire? What if the $35 trillion could finance renewable energy, regenerative agriculture, reforestation, and other projects that cool the planet and ensure that there are still beaches to lie on when the next generation of workers retires?[47] What if our retirement savings could provide affordable financing for Black-owned homes and businesses — which have closed at twice the rate of white-owned businesses during the pandemic — and help close the racial wealth gap that has left Black families with less than one-tenth the wealth of white families?[48]

Even under the current regime, there are ways for workers to use their retirement assets to invest in their own communities. In 2019, the Sustainable Economies Law Center helped launch The Next Egg[49] to explore such possibilities. First, we supported twenty-three self-employed individuals to become trustees and administrators of their own "solo 401(k)s." Each signed a 401(k) plan document, which contains around 100 pages of IRS-approved rules for the management of their funds. They each opened a checking account at a local bank or credit union, made tax-deferred contributions from their self-employment income or made a rollover from a preexisting retirement plan, and they now manage their retirement savings with no involvement by a custodian or financial intermediary.[50]

Aside from administrative costs, there is nothing preventing employers from similarly making each employee a trustee and administrator of their own portion of a 401(k) plan. Our partners at LIFT Economy,[51] a worker-owned impact consulting firm, established such a plan. Now,

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[47] *See* Denise Chow, *Disappearing Beaches: Climate Change Could Wipe Out Half of the World's Sandy Shorelines*, NBC NEWS (Mar. 5, 2020, 3:41 PM), https://www.nbcnews.com/science/environment/disappearing-beaches-climate-change-could-wipe-out-half-world-s-n1150841 [https://perma.cc/QU7B-67ED].

[48] Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020, 9:19 AM), https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households [https://perma.cc/MDE9-Q8WJ].

[49] NEXT EGG, https://www.thenextegg.org [https://perma.cc/LX4J-L23W]. We created The Next Egg in partnership with LIFT Economy and author Michael Shuman.

[50] *See generally id.*; SUSTAINABLE ECONS. L. CTR., HOW TO INVEST YOUR RETIREMENT SAVINGS LOCALLY (2019), https://docs.google.com/document/d/1PWjZSOGpJHBhnhTJYNcbDXvQBzKdLTu-qDw1ON1uL2Q [https://perma.cc/A923-XX2N].

[51] LIFT ECON., https://www.lifteconomy.com [https://perma.cc/666Q-36WP].

each worker has a separate checking account for their portion of the 401(k), and each worker manages their own investments.

This Commentary's co-author, Janelle Orsi, did the same with her 401(k). Janelle's natural instinct is to use her 401(k) to buy shares of the Oakland-based People Power Solar Cooperative,[52] thereby financing solar and battery projects in her neighborhood. For her community, this means job creation, lower-cost electricity, reduced emissions, climate resilience, and supporting a worker-driven alternative to the corporate-controlled utility responsible for significant wildfire destruction and rolling blackouts in California.[53]

From Janelle's perspective, such an investment in her surrounding community is certainly prudent. But under ERISA, if this investment underperforms market-rate alternatives, it is not. One problem The Next Egg has run into is that ERISA is a statute with long fingers — even self-directed 401(k)s that are entirely controlled outside of conventional financial intermediaries might still be within ERISA's grasp, which could result in taxes and penalties for those who want to use their retirement assets to support the communities in which they reside.[54]

Because of this, conscientious investors may instead want to free their assets from the restrictive confines of 401(k)s and IRAs. The tax advantages of these plans might not outweigh the positive impacts that directed investments could have in one's own community. Investors may want to avoid contributing money to these plans going forward, or they may look for ways to remove money from existing plans, including by taking revolving personal loans from the account or by taking an early withdrawal or a hardship withdrawal.[55]

Of course, many American workers do not have the financial literacy to manage their retirement accounts effectively, and many lack the financial cushion to sacrifice returns on their account or absorb taxes and

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[52] PEOPLE POWER SOLAR COOP., https://www.peoplepowersolar.org [https://perma.cc/B6U5-S48Q].

[53] Katie Worth & Karen Pinchin, *After Deadly Fire, Regulators and Consumers Question PG&E Blackouts*, PBS: FRONTLINE (Nov. 15, 2019), https://www.pbs.org/wgbh/frontline/article/deadly-paradise-fire-regulators-consumers-pge-blackouts-pge-outage [https://perma.cc/HB8F-ESCS].

[54] Every IRS-approved 401(k) plan document that we've reviewed includes ERISA's prudence standard, but there is some indication that it would be possible to omit that standard in creating solo 401(k) plans for self-employed individuals. One IRS publication states in a footnote that "Solo/self-employed 401(k) plans are non-ERISA plans and don't fall under DOL rules." INTERNAL REVENUE SERV., RETIREMENT PLANS FOR SMALL BUSINESS (SEP, SIMPLE, AND QUALIFIED PLANS) 3 n.4 (2020), https://www.irs.gov/pub/irs-pdf/p560.pdf [https://perma.cc/U6GP-TKN9]. However, 401(k) plans are, by definition, plans created by an "employer," 26 U.S.C. § 401, and ERISA applies to any plan established by an "employer," 29 U.S.C. § 1003, so we are hesitant to confirm that solo 401(k)s are not subject to ERISA.

[55] *See Hardships, Early Withdrawals and Loans*, IRS, https://www.irs.gov/retirement-plans/hardships-early-withdrawals-and-loans [https://perma.cc/T9UV-SJAZ].

penalties associated with opting out of the current system.[56] We need systemic reforms to remove the burden from individual workers. Accordingly, we can imagine a regime that incentivizes people to use their retirement assets to foster climate resilience, stable local economies, and social justice — rather than one that penalizes them for doing so. There is already a growing movement in this direction. The past decade has seen a rise in the creation of local community investment funds that provide returns to investors while financing local businesses, nonprofits, and cooperatives.[57] Such funds have recently been launched in more than a dozen cities across the country.[58]

The current infrastructure of local investment funds is not ready to absorb more than a small fraction of the retirement assets that can be deployed as usable capital. However, state and federal governments can help facilitate, incentivize, and stabilize investments that build thriving communities and environments. The Treasury Department already oversees more than 1,000 community development financial institutions (CDFIs), which seek to serve as engines of local economic development.[59] Many CDFIs raise money by offering notes to individual investors.[60] Government agencies could serve as intermediaries, investing in several CDFIs and then offering securities to individual investors — and retirement plan trustees — that provide exposure to a diversified portfolio of local investments made by CDFIs or community loan funds.[61] Governments can also facilitate investment in larger-scale projects, such as updating America's outdated and generally shoddy infrastructure.[62] If some investments are riskier than their capital-market

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[56] *Cf.* Gillian B. White, *Not All Money Troubles Are Created Equal*, THE ATLANTIC (Apr. 21, 2016), https://www.theatlantic.com/business/archive/2016/04/racial-inequality-money-problems/479349 [https://perma.cc/Q3ZD-FJ28] (noting that, in 2013, the median white household had ten times the wealth of the median Hispanic household and twelve times the wealth of the median Black household).

[57] *See generally* BRIAN BECKON ET AL., NAT'L COAL. FOR CMTY. CAP. & SOLIDAGO FOUND., COMMUNITY INVESTMENT FUNDS (2020), https://comcapcoalition.org/wp-content/uploads/2020/03/Community-Investment-Funds-Final.pdf [https://perma.cc/G62K-8SJC].

[58] *Id.* at 15–16.

[59] CDFI FUND, U.S. DEP'T OF TREASURY, WHAT ARE CDFIS?, https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi_infographic_v08a.pdf [https://perma.cc/V8JV-GT4H].

[60] California FarmLink, for example, made a direct public offering of promissory notes in California in 2019, with legal support from the Sustainable Economies Law Center. *See* CAL. FARMLINK, https://www.californiafarmlink.org [https://perma.cc/AX8B-SS3L].

[61] See Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 WASH. U. L. REV. 103, 124 (2015), for a discussion of ways the government is particularly well suited to serve this market-making role as a financial intermediary.

[62] See generally *id.* for Professors Robert Hockett and Saule Omarova's vision for a "developmental finance state," which applies well here.

alternatives, the government can step in as guarantor.[63] And to further incentivize such investments and supplement returns, governments can offer tax incentives. For example, California previously provided a twenty percent tax credit on qualified investments of $50,000 or more in CDFIs.[64] Both state and federal tax credits could be used to incentivize investing in regenerative enterprises such as farms, solar cooperatives, and worker cooperatives.[65]

Using the above and many other strategies, everyday Americans, employers, and emerging enterprises can take action now to enable investment in economic and environmental resilience. As this movement gains momentum and demonstrates potential impact, it will add to the growing pressure to redesign our retirement savings regime to support the well-being of American workers now and into the future.

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[63] For a discussion of the tradition of the state as guarantor of primary market debt, see *id.* at 129.

[64] *See* Subarna Mitra et al., Social Impact Investing and Job Creation 9–10 (2013) (unpublished working paper), http://www.pacificcommunityventures.org/wp-content/uploads/sites/6/COIN-A-Big-Idea-for-Job-Creation.pdf [https://perma.cc/E3EQ-EFHA]; DAVE JONES, CAL. ORGANIZED INV. NETWORK & CAL. DEP'T OF INS., COIN'S IMPACT 2011–2018, at 9 (2018), http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr004-19COINReportDecember01-03-19-2.pdf [https://perma.cc/4SHE-JRR9].

[65] See Chelsea Eddy, *Can Tax Incentives Jumpstart the JOBS Act?*, LOCAVESTING (Jan. 24, 2017), https://www.locavesting.com/new-economy/can-tax-incentives-jumpstart-jobs-act [https://perma.cc/Q6K3-XT68], for examples of other tax credits incentivizing local investment in Canada.