

## HOPE WE DIE BEFORE WE GET OLD: THE ATTACK ON RETIREMENT

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*The American institution of retirement has sustained numerous attacks over the last twenty years, to the extent that it may cease to exist by the time most of today's workers reach their midsixties. Professor Patricia Dilley describes how all of the components of the "three-legged stool" that represents private pensions, personal savings, and Social Security, have declined so significantly in recent years that the combination may not be able to provide support for the elderly in the future, particularly those retired seniors who are in the lower and middle classes. Changes in employment policies, the markets for retirement savings investment, and the public policy surrounding the Social Security debate threaten the mainstays of golden years income upon which Americans have come to rely. Professor Dilley explains that previous civilizations were able to sustain the elderly members of their populations*

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before retirement became the entitlement that it is today, but that the older members of those societies worked long past what is now deemed appropriate retirement ages and often relied upon family members or charity for support after they could no longer remain actively employed. She warns that unless retirement systems focus on a greater redistribution of resources from wealthy workers to poor ones, the lower- and middle-income work force will not be able to survive a retirement from work in their later years. Further, Professor Dilley argues that modern society need not declare a particular “retirement age” and that the system may work better if the elderly work as long as they can before retiring to certain financial support for their final years. She concludes by suggesting a two-part, citizen-based reform program in which Social Security and social insurance would expand to fill in the gap left by shrinking employer-based pension plans while allowing individual decisions about when retirement is most appropriate for each worker.

“People try to put us down  
Just because we get around  
Things they do look awful cold  
Hope I die before I get old”

“My Generation”  
The Who<sup>1</sup>

When The Who sang “My Generation” in 1965, they expressed the defiance of the baby boom generation in the face of what seemed to be their parents’ generation’s post-war complacency and love of conformity. Thirty-five years later, however, these words have considerable resonance in quite another context—in a nutshell, “hope I die before I get old” is the default retirement strategy for millions of their baby boomer compeers.

The United States is in a rapid retreat from the fifty-year-old institution of retirement as a right for workers at virtually all income levels. The combination of the implosion of the private pension system, the failure of market regulation to prevent corruption and self-dealing in the management of retirement savings in company plans, as well as in mutual funds, and proposals to “privatize” Social Security, may spell the end of retirement as Americans have come to know it in the post-World War II era. Adding to the mix are the precipitous rise in health care costs, the concomitant precariousness of the Medicare system’s financing, and the repeated rounds of tax cuts that have lead to increasing deficits and mounting national debt that will be-

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1. The Who, *My Generation*, on MY GENERATION (Brunswick Records 1965).

come particularly critical at just the time of the scheduled retirement of the baby boom generation.<sup>2</sup>

Taken together, most of the trends in retirement policy and legislation over the last twenty years coalesce toward one end: elimination of public and private entitlement to a stream of income in retirement, in favor of preretirement accumulation of assets that are supposed to sustain the retiree until the end of life.<sup>3</sup> The change from traditional defined benefit (DB) plans to various types of employer-sponsored employee savings plans, such as § 401(k) cash or deferred arrangements, leads inexorably to a transfer of risk from groups to individuals, and to a reliance on advance capital accumulation, rather than on transfer payments, to fund maintenance in old age.

It is critically necessary to reexamine the realities behind this current national fantasy of individual self-financed retirement for all workers. If current trends continue, today's workers will find themselves back in the pre-Social Security era—when older workers of moderate to modest means did not retire because they could not afford to, and once they could no longer work, lived in old age on the sufferance of family members or public charity, once their own meager savings were exhausted.<sup>4</sup>

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2. See Michael Aneiro, *Rising Health Care Costs Could Ease in 2005*, INC, Oct. 7, 2004, available at <http://www.inc.com/criticalnews/articles/200410/healthcare.html>; Jonathan Weisman, *\$2.3 Trillion in New Debt Expected by 2014*, WASH. POST, Sept. 8, 2004, at A2; Robert E. Moffit & Brian M. Riedl, *Medicare's Deepening Financial Crisis: The High Price of Fiscal Irresponsibility*, THE HERITAGE FOUND. POL'Y RES. & ANALYSIS, Mar. 25, 2004, at <http://www.heritage.org/research/healthcare/bg1740.cfm>.

3. The latest statistics from the Department of Labor's Form 5500 report shows that between 1975 and 1998, defined contribution plans (which are essentially employer sponsored savings accounts and provide the employee only the accumulated amounts plus or minus investment increases or losses) as a percentage of all pension arrangements grew from accounting for less than thirty percent of active participants to almost seventy percent. Similarly, § 401(k) plans, the most popular form of defined contribution plans, increased from about twenty-five percent of active participants in 1975 to over seventy percent in 1998. See Alicia Munnell et al., *An Update on Employer-Sponsored Pensions*, Address at the . . . Conversation on Coverage: National Policy Forum at the National Press Club 7-9 (July 22, 2004) (transcript on file with author).

4. See generally CAROLE HABER & BRIAN GRATTON, *OLD AGE AND THE SEARCH FOR SECURITY: AN AMERICAN SOCIAL HISTORY* 88-89 (1994).

In the history of work, as in the history of economic well-being, Social Security emerges as the decisive catalyst of change. Until this legislation was enacted, most men and women retained occupational roles well into old age. . . . Hidden in the obscure labor markets of the pre-industrial period, unemployed or underemployed older workers emerged as a distinct social problem in urban, industrial America.

In fact, there has never been any real possibility that individual middle- and low-income workers could finance their own financially comfortable retirements at what most people consider a normal retirement age. Retirement as we know it today did not exist in America prior to the institution of Social Security in 1935, and no industrialized nation has ever maintained a broad-based retirement system for workers at all income levels without some sort of social insurance system that spreads the risk of poverty in old age across the working population through the tax system.<sup>5</sup> What really distinguishes modern retirement and care for the aging from the experience of civilizations during the rest of human history, stretching at least back to Mesopotamia five thousand years ago, is the socialization of the aging dependency burden, the de-personalization of financial support for the elderly, and the expansion of work-based retirement benefits to provide basic old-age income support for most of the elderly.<sup>6</sup>

The spreading of the risk of inability to work in old age has, intentionally or not, created retirement as a sustained period of leisure in advance of physical and mental disability. The greater the degree of socialization of the financial responsibility for providing for the elderly, the greater the degree of independence of elderly individuals, both from their children and other relatives, and from the need to

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*Id.*; see also ANN S. ORLOFF, *THE POLITICS OF PENSIONS: A COMPARATIVE ANALYSIS OF BRITAIN, CANADA AND THE UNITED STATES 1880-1940*, at 7 (1993).

In theory, the elderly [in the period between 1880 and WWII] could be aided in their own homes; this practice was called outdoor relief. In North America, and in England by the 1870s, outdoor relief would not be offered until any possible support from relatives was extracted, and recipients often might be required to pay back their doles out of any estates they might leave after their deaths. Toward the end of the nineteenth century, institutionalization within public poor relief institutions—so-called indoor relief—became more and more common for the aged poor, particularly for those who had no kin or whose relatives could not be coerced into supporting them by poor law authorities.

5. I discuss later in this article the origins of the American public redistributive pension program in the form of the Civil War pension system for Union soldiers. For the European experience, see generally PAT THANE, *OLD AGE IN ENGLISH HISTORY: PAST EXPERIENCES, PRESENT ISSUES* 194-235 (2000). "As formal pension schemes gradually became a normal feature of the life-courses of most English people, they changed these lives by, for the first time, guaranteeing a right to a secure, if small, income at a fixed age." *Id.* at 236; see also ORLOFF, *supra* note 4, at 7-11 (analyzing replacement of poor relief with social insurance approaches).

6. See generally RIVKAH HARRIS, *GENDER AND AGING IN MESOPOTAMIA: THE GILGAMESH EPIC AND OTHER ANCIENT LITERATURE* 50-66 (2000).

work even if they are still physically and mentally able.<sup>7</sup> Retirement has become our way of caring for the elderly, with work no longer expected of the old, and charity care for the very needy occupying a despised place as an option of last resort.

In this article, I explore the degree to which the institution of voluntary retirement at a relatively young age—the midsixties—is viable in the wake of changes now occurring in the public and private systems, and whether it is possible to eliminate our current retirement income systems without reintroducing widespread poverty in old age. There is more at stake in this change, however, than simply the future of retirement. To a substantial extent, the entire middle-class culture of the United States in the latter half of the twentieth century was based on the premise of a secure and independent old age for middle- and working-class people, based on the certainty of monthly income from Social Security and private pension plans.<sup>8</sup>

This article examines the different manifestations of this attack on retirement, beginning with current problems with our employment-based retirement system, including employer-sponsored pension plans, employer-based and individual retirement savings arrangements, and proposals to privatize Social Security. I argue that in all of these areas, the push away from group redistributive arrangements and toward individual capital accumulation would, if successful, mean the end of middle- and working-class retirement as the expectation, and realized goal, of most workers.

I then turn to the historical record to examine what the future of aging in America might look like in the absence of redistributive public retirement pension systems. Contrary to popular belief, aging has been viewed as beginning at around age sixty for thousands of years and the elderly have comprised a more than insignificant portion of the population, at least back to classical Roman times.<sup>9</sup> Historically,

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7. See generally Aaron Lucchetti, *Tough Sell: Lighten up on Employer Stock*, WALL ST. J., Apr. 11, 2003.

8. See generally MELISSA A. HARDY, AM. SOC'Y ON AGING, THE TRANSFORMATION OF RETIREMENT IN TWENTIETH CENTURY AMERICA: FROM DISCONTENT TO SATISFACTION (2002), at <http://www.generationsjournal.org/gen26-2/article.html>.

9. See KAREN COKAYNE, EXPERIENCING OLD AGE IN ANCIENT ROME 1 (2003).

The ages of life were theoretical, but could have a practical application . . . . From these age divisions, it can be seen that what was considered old varied . . . . But from around the first century BC onwards, the age of sixty or sixty-five was commonly mentioned as the threshold of old age. Sixty (or sometimes sixty-five) was also the age at

however, retirement was the preserve of the wealthy and politically powerful—old people of the laboring classes were expected to work, and if not able to work, to survive on charity or the largesse of family members.<sup>10</sup>

The great innovation of the twentieth century was the democratization of retirement and the substitution of broad based retirement systems for the historical pattern of work and poverty in the elderly working population coupled with retirement only for the well off.<sup>11</sup> The revolution in aging in the last century was the extension of the retirement choice, along with continued independence in living arrangements, to those at all or at least most economic levels.<sup>12</sup> The question Americans now face is whether the attack on twentieth century retirement institutions will mean a return to the historic pattern of inequality in access to retirement.

## I. The Current Attack on Retirement

Amidst all the public hand-wringing about how we will pay for the retirement of the baby boom, a quiet undermining of the major pillars of retirement over the last seventy years—employer provided pension plans and Social Security—has been taking place both in the private marketplace and in Congress. The attack on Social Security has so far been more theoretical than real,<sup>13</sup> but President Bush has

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which one could be exempted from certain legal and public obligations . . . . However, the threshold for allowances was much lower if the activity, or duty, depended primarily on physical vigour . . . . [A] man was thought to be no longer fit for military purposes at the age of 50, unless there was a crisis.

*Id.* Not much has changed in the succeeding 2100 years. For example, the Florida state retirement plan for police and firefighters sets the normal retirement age at fifty-five with ten years of service or fifty-two with twenty-five years of service. See FLA. DEP'T OF MGMT. SERVS. DIV. OF RET., MPF OVERVIEW, at <http://www.frs.state.fl.us/frs/mpf/MPF-Overview.html>.

10. See discussion *infra* notes 168–96.

11. Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 981–82 (2000).

12. *Id.*

13. Privatization proposals have proliferated since the mid-1970s, with the beginning of the predictions of Social Security's financial downfall, but little action has been taken on any of them. See generally Martin S. Feldstein, *Toward a Reform of Social Security*, 40 PUB. INT. (1975) (one of the earliest salvos). See also MARTIN S. FELDMAN, THE MISSING PIECE IN POLICY ANALYSIS: SOCIAL SECURITY REFORM 24 (Nat'l Bureau of Econ. Research, Working Paper No. 5413, 1996); PETER J. FERRARA, SOCIAL SECURITY: THE INHERENT CONTRADICTION 311 (1980); Laurence J. Kotlikoff, *Privatizing Social Security at Home and Abroad*, 86 AM. ECON. REV. 368, 370 (1996); Lewis D. Solomon & Geoffrey A. Barrow, *National Issues: Privatization of Social Se-*

made privatization a top priority for his second term and 2005 will see at least substantial discussion of the idea, if not congressional action on legislation establishing private accounts.<sup>14</sup> However, congressional actions taken over the past decade under the guise of strengthening retirement savings<sup>15</sup> have in fact encouraged employers to abandon traditional pension plans in favor of savings plans that put all the onus of financing retirement on the employee.<sup>16</sup> Even legislation ostensibly designed to promote retirement savings turns out, on closer examination, to encourage tax-favored savings for short-term needs, like education or housing, in a way that inevitably favors higher income workers.<sup>17</sup>

It is important to separate reality from rhetoric about increasing savings for retirement that is used to promote legislation like the Portman-Carding pension reform bills<sup>18</sup> and “pension” arrangements like cash balance plans. While the stated goal of most of these plans is to improve the retirement prospects for all Americans, the reality is that they inevitably undermine the possibility of stable retirement income for lower- and middle-income workers, making it much more likely that retirement simply will not be possible for those groups.

#### A. Undermining the Private Pension System

Public media expressions of the baby boom generation’s fear about whether they will be able to retire the way their parents’ generation did has for the last decade or more centered on Social Security and predictions of its failure or inadequacy.<sup>19</sup> However, the most im-

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*curity: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL’Y 9, 23 (1995); Sylvester J. Schieber & John B. Shoven, *Social Security Reform: Around the World in 80 Ways*, 86 AM. ECON. REV. 373, 376 (1996).

14. See Editorial, *The Social Security Fear Factor*, N.Y. TIMES, Jan. 3, 2005, available at <http://www.nytimes.com/2005/01/03/opinion/03monl.html> [hereinafter *Social Security Fear*].

15. See Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. (2003).

16. See discussion *supra* Part I.A.1.

17. See *infra* note 42.

18. The most recent version of this legislation, and the one to which this article refers throughout, is the Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. (2003).

19. *Campaigning on Social Security*, N.Y. TIMES, May 29, 2000, at A14; Lou Dobbs, *Time to Touch the Third Rail*, U.S. NEWS & WORLD REP., Sept. 13, 2004, at 45; Don Ezra, *Social Security Could Leave Many Stranded on the Road to Retirement*, INSIGHT ON THE NEWS, Apr. 30, 2001, at 46; Andrew Goldstein, *Social Security: Does the Nation’s Oldest, Most Successful Social Program Need a Complete Overhaul—or Just*

mediate crisis is in the private employer-provided pension system, which is suffering both from legislative attack in the guise of reform and abandonment by employers who are reluctant to commit to long-term pension promises for their employees.

Modern retirement was structured beginning early in the twentieth century around a tripartite system of private pensions, personal savings, and Social Security—the traditional “three-legged stool” metaphor widely used by pension analysts.<sup>20</sup> The private pension leg of this stool has morphed into two general types of employer provided retirement plans. The first is the traditional pension plan, which relies primarily on employer funding.<sup>21</sup> The second is the now more common employer-sponsored individual savings plans, such as 401(k) plans or employer-sponsored individual retirement accounts (IRAs), which include simplified employer plans (SEPs), based primarily on employee savings through salary deduction.<sup>22</sup>

The traditional defined benefit pension plan was based on the principle of risk-spreading across a pool of employees; an employer’s pension plan was usually completely funded by employer contributions, earnings on the investment of those contributions, and forfeitures of accrued benefits by employees who left the employer before becoming vested in those benefits.<sup>23</sup> Defined contribution (DC) plans, on the other hand, place all risk of loss in the individual employee, be-

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*an Infusion of Money?*, TIME MAG., Oct. 9, 2000, at 54; Carolyn Lochhead, *Greenspan Urges Fast Action to Save Social Security*, S. F. CHRON., Nov. 21, 1997, at A3; *Retirement Age May Go Up; Official Blames Baby Boomers’ Good Health*, HOUSING CHRON., Nov. 4, 1993, at A9; Charles E. Rounds, Jr., *You Have No Legal Right to Social Security*, CONSUMER RES. MAG., June 1, 2000, at 22; *Social Insecurity*, PUB. PERSP., Nov./Dec. 2002, at 47; Walter Upgrave, *Your Greatest Retirement Fear; Can You Count on Social Security? We Size up the Health of the System and Look at What the Proposals to Fix it Would Mean to You*, MONEY, Fall 2002, at 112.

20. See Regina Jefferson, *Rethinking the Risk of Defined Contribution Plans* 4 FLA. TAX REV. 607, 683 n.17 (2000).

21. *Id.* at 610.

22. A cash or deferred arrangement provides employees the option of receiving a certain amount as income or electing to have the employer make a contribution to the plan on behalf of the employee. I.R.C. § 401(k)(2) (2004). Employees of § 501(c)(3) tax exempt organizations and § 170(b)(1)(A)(ii) education organizations can have § 401(k)-type plans under § 403(b). I.R.C. § 403(b). Under a Simplified Employee Pension, the employer sets up IRAs for each employee. I.R.C. § 408(k)(2). Then, following a written allocation formula, the employer makes contributions to each employee’s account which bear a uniform relationship to each employee’s compensation that is not in excess of \$200,000. *Id.*

23. For an exhaustive discussion of plan funding methods and elements, see DAN M. MCGILL et al., FUNDAMENTALS OF PRIVATE PENSIONS 201–336 (7th ed. 1996).



cause no specific benefit has been promised, and employees are only entitled to whatever amounts are in their accounts when they retire, or otherwise terminate participation in the plan.<sup>24</sup>

The twentieth century retirement model served the purposes of employers and workers alike. Employers used the promise of pensions to retain valuable employees, stabilize their work force and, in some cases, stave off union organization.<sup>25</sup> The pension promise induced employees to stay until retirement, and then move on, without the need for morale-lowering layoffs or individual firings.<sup>26</sup> Employees received both a stable source of income in retirement, for themselves and their surviving spouses, and the ability to plan when to stop working, instead of simply working until they either lost their job or became unable to work because of infirmity or illness.<sup>27</sup>

As we move further into the twenty-first century, however, that model appears to be collapsing. Changes in the structure of employment and of businesses have led to employers who do not particularly care about keeping long-term employees or maintaining good relations with employees, and to employees who do not value pension promises and who do not anticipate staying in any one job long enough for those promises to mean anything in the long run.

Actions by Congress and the executive branch have accelerated the tendency of employers to shy away from establishing traditionally defined benefit plans, and move toward less secure, less expensive defined contribution plans.<sup>28</sup> Private consultants have aided employers in developing alternatives to true pension plans that provide lower benefits to employees at lower cost to the company.<sup>29</sup> As a bonus, these new arrangements satisfy a younger, more mobile work force with account balances that they can control and easily cash out when moving to a new job.<sup>30</sup>

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24. *Id.* at 247.

25. See COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920–1935*, at 242–53 (1994).

26. *Id.* “Employment benefits and wages deferred to pensions, savings or company stock encouraged workers to equate their own economic future with the prosperity and good favor of their employers.” *Id.* at 243.

27. *Id.*

28. Edward N. Wolff, *The Unraveling of the American Pension System 1983–2001*, in NAT’L ACAD. OF SOC. INS., *IN SEARCH OF RETIREMENT SECURITY: THE CHANGING MIX OF SOCIAL INSURANCE, EMPLOYEE BENEFITS AND PERSONAL RESPONSIBILITY* 16 (Nelly Ganesan & Teresa Ghilarducci eds.) (forthcoming).

29. *Id.* at 17.

30. *Id.* at 16.

This section examines what is happening to the employer-provided pension system, and the various factors that might be responsible for its disintegration. Changes in the American workplace might well have forced changes in the defined benefit lifetime annuity model in any event—but clearly employers, consultants, and legislators have contributed to the effort.

#### 1. CURRENT TRENDS IN PENSION SYSTEMS

The change from defined benefit pension plans to various types of defined contribution, or essentially employee savings plans, has been underway for decades, but has probably greatly accelerated in the last twenty years. Some of the possible causes for the transition are discussed below, but first it is necessary to see what the change has actually been, and what the effects of the turn away from traditional pension plans are on actual worker pensions.

Recent studies have found that the percentage of households with workers age forty-seven to sixty-four participating or vested in some way in defined benefit plans dropped from sixty-nine percent in 1983 to forty-five percent in 2001, while the same age group's percentage participating in defined contribution plans increased from twelve percent to sixty-two percent.<sup>31</sup> Overall pension participation in all types of plans for nonagricultural wage and salary workers in the private sector aged twenty-five to sixty-four, declined from fifty-one percent in 1979 to forty-six percent in 2002.<sup>32</sup> In 2003, while fifty-seven percent of American workers were employed by companies sponsoring some sort of pension plan, only forty-nine percent of workers were participating in these plans.<sup>33</sup>

Just as important as the raw numbers for participation, however, is the effect of the decline of the defined benefit plan and overall pension participation on the retirement prospects of American workers at lower income levels. Edward Wolff's study, in particular, focuses on "pension wealth" and the effect of the switch to defined contribution plans on the distribution of wealth and income generally.<sup>34</sup> He found that when looking at overall pension wealth, the decrease in defined

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31. *Id.* at 1, 10.

32. Munnell et al., *supra* note 3, at 2.

33. *Id.* § 6 at 1. (noting the very large gap in coverage between full-time workers—fifty-three percent—and part-time workers—eighteen percent).

34. Wolff, *supra* note 28, at 1.

benefit plans was more or less compensated for by the increase in defined contribution plans.<sup>35</sup> However,

[t]he story looks somewhat different when we look at the trend in median values, the trends experienced by most people who do not have extreme amounts of wealth. Among age group forty-seven to sixty-four, median pension wealth increased by a much more modest eighteen percent, from \$42,400 to \$50,000. Moreover, median net worth excluding DC pension plans fell by 4.3% between 1983 and 2001. Altogether, median Private Accumulations fell by 2.2% for those aged forty-seven to sixty-four.

The inequality of total pension wealth increased sharply between 1983 and 2001. This trend is traceable to the switchover from DB plans to DC accounts.<sup>36</sup>

Wolff's study reveals that while traditional defined benefit plans had an equalizing effect on overall household wealth, the switch to defined contribution plans has had the opposite effect. As he points out, this occurred even as the switch was taking place during a historically long and vigorous bull market, when one might have expected that the proliferation of 401(k) plans for middle-income workers would have allowed them to participate more fully in the market's gains. Nonetheless, "the wealth holdings of middle-aged households did not improve. Indeed, median Private Accumulations actually deteriorated slightly over the 1983–2001 period."<sup>37</sup> Wolff concludes:

Indeed, the devolution of the traditional pension system of the 1980s and 1990s has left many families unprepared to meet [the] challenges of retirement. Despite the hype, the switchover from DB to DC has not benefited the average family—it has hurt the average family instead. The shift from DB to DC plans is part of the general unraveling of the "worker safety net."<sup>38</sup>

Similar alarms are sounded in the coverage study by Alicia Munnell and her coauthors. They found that pension plan participation for all workers is concentrated among workers in the top forty percent of earnings—over sixty percent of male workers in the top two quintiles of earnings participated in pension plans in 2002 (down from almost or over seventy percent in 1979), while only somewhat more than thirty percent of workers in the fourth quintile, and less than twenty percent of workers in the bottom quintile participated in plans.<sup>39</sup> The figures for women are similar—sixty percent of female

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35. *Id.*

36. *Id.* at 14.

37. *Id.* at 15.

38. *Id.*

39. Munnell et al., *supra* note 3, at fig. 2a.

workers in the top quintile participated in pension plans in 2002, while about ten percent of women in the bottom quintile were covered.<sup>40</sup>

Even for those who are already retired, the private pension system is clearly skewed in favor of higher-income retirees, a result that comes as no surprise to anyone who looks at the structure of tax incentives designed to encourage employers to establish private pensions. The private system is based on a set of tax inducements which give a deduction to employers for current contributions to pension plans, and exclusion of those contributions from income for the employees participating in those plans until they actually receive their benefits in retirement.<sup>41</sup> Given the progressive income tax structure

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40. *Id.* at 2–4. These figures are a slight increase from the 1979 figures for women, apparently caused by women's greater entry into the paid labor force over this period and the greater prevalence of part-time work for women. This study also found somewhat higher numbers for pension coverage rates, under some type of plan either DB or DC, on a lifetime and household basis—for households aged fifty-nine to sixty-nine, about sixty percent had some sort of coverage in 2000. But the disparity between high- and low-income households is stark—about seventy-seven percent in the top two quintiles in income were covered, compared to less than twenty-five percent for the bottom quintile. *Id.* at 4–5.

41. As part of the rules for a plan to qualify for preferential tax treatment, employers are provided a current deduction for contributions on behalf of each employee which is expressed as a percentage of the employee's overall compensation. I.R.C. § 404(a)(3) (2004) and I.R.C. § 401(k)(11). For a plan to qualify, the limits on the annual benefits in a defined benefit plan is expressed as the lesser of \$160,000 or the average compensation for the employee participant's three highest years of compensation. I.R.C. § 415(b). For a 401(k) plan, the limit for acceptable employer contributions is the lesser of \$40,000 or one hundred percent of the employee's compensation. I.R.C. § 415(c). In absence of specific legislation, the doctrine of constructive receipt would apply to cause the employer contributions on behalf of the employee to be included in the employee's gross income. The constructive receipt doctrine is set out in the regulations. In the regulation § 1.446-1(c)(1)(i) cash method, the taxpayer must include amounts in her gross income when they are actually or constructively received. Treas. Reg. § 1.446-1(c)(1)(i) (as amended in 2003). The regulations later go on to describe the constructive receipt of income as “[i]ncome although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given.” Treas. Reg. § 1.451-2(a) (as amended in 1979). The “made available” language in the regulation does not apply to amounts held in a qualified plan under 402(a) after it was amended by the Economic Recovery Act of 1981. According to the Joint Committee on Taxation, section 402(a) was amended so as to prevent the application of the constructive receipt doctrine to cause the inclusion of unpaid, but eligible for distribution, amounts in the retired employee's gross income. Joint Comm. on Taxation, 97th Cong., 1st Sess., General Explanation of the Economic Recovery Act of 1981 214 (Comm. Print. 1981), *cited with approval in* Clayton v. United States, 33 Fed. Cl. 628,

still in place, the higher an individual's income is, the more valuable that tax deferral is for them. For low-income workers, the deferral is of little value; most low-income workers would rather have that deferred income now to pay for current needs.<sup>42</sup>

As a result of this skewed distribution of the benefit of pension plans, lower-income retirees have far less pension income than workers at higher income levels do.

As of now, however, the private retirement system has failed the lower earners. In reality, at any one time, at best no more than fifty percent of the workforce is participating in employer-based plans. Importantly, for those who end up in the bottom forty percent of the income distribution after retirement, employer-based plans are largely irrelevant. For those over age sixty-five in 1996, pensions accounted for only three percent of the retirement income of the lowest quintile, and seven percent of the income of the second-lowest quintile.<sup>43</sup>

Daniel Halperin attributes this result to many factors—limited coverage of pension plans even at their peak years of coverage, accrued benefits forfeited because of changing employers, premature loss of pension benefits through early cash-outs and subsequent investment losses, and inadequate benefit amounts even for those covered by plans, among other factors.<sup>44</sup> The factors he cites all apply to both defined benefit and defined contribution plans, but the risk of loss of benefits is much higher for the defined contribution plans now dominating the pension landscape. Thus, the future adequacy of pension savings for workers at or below the median earning level is unlikely to show improvement.

Clearly, the decline of traditional pension plans is real, and the growth in defined contribution plans—essentially employer-provided employee savings plans—has not compensated for the decline for workers below the median income level. While higher income workers have probably benefited to some extent from the ability to invest

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636 (Fed. Cl. 1995). The amended § 402(a) causes distributions from a § 401(a) qualified trust to be taxed under § 72 when actually distributed. I.R.C. § 402(a).

42. Sondra G. Beverly & Michael Sherraden, *Institutional Determinates of Savings: Implications for Low-Income Households and Public Policy*, 28 J. SOCIO-ECON. 457 (1999); STEVEN F. VENTI & DAVID A. WISE, CHOICE, CHANCE, AND WEALTH DISPERSION AT RETIREMENT (Nat'l Bureau of Econ. Research, Working Paper No. 7521, 2000); Edward N. Wolff, *How the Pie Is Sliced: America's Growing Concentration of Wealth*, AM. PROSPECT, Summer 1995, at 58; James P. Ziliak, *Income Transfers and Assets of the Poor*, REV. ECON. & STAT., Feb. 2003, at 63.

43. Daniel Halperin, *Employer-Based Retirement Income—The Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37, 43 (2003).

44. *Id.*

their deferred wages in the stock market during its boom years, that advantage has apparently not trickled down to the average or low income worker.

## 2. CHANGING WORK FORCE, DECLINING PENSION COVERAGE

Pension analysts have presented a multitude of possible causes for the decline in pension coverage—desire of employers to cut costs, reluctance of employers to commit to a long-term pension promise that younger employees do not value particularly highly, and an increasing regulatory burden placed particularly on defined benefit plans by provisions in the tax code.<sup>45</sup> All of these factors undoubtedly play a role; what they all have in common is the change in employer goals. Many employers have gone from wanting, early in the last century, to retain employees for the long term to wanting, early in this century, no ties or commitments to employees beyond the current paycheck.

The traditional pension was used, beginning in the late nineteenth century and continuing into the twentieth, for a variety of employer purposes—to reward long-term valuable employees and keep

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45. See Daniel Halperin, *Special Tax Treatment for Employer-Based Retirement Programs: Is It "Still" Viable as a Means of Increasing Retirement Income? Should It Continue?*, 49 TAX L. REV. 1 (1993).

The qualified plan, however, has another string to its bow. As explained, to qualify for this special treatment, plans must provide coverage to at least some non-highly paid employees. Since the highly paid would be expected to save for retirement and would obviously prefer to do so in a tax-favored form, they can be expected, as the decisionmakers, to force coverage throughout the workforce. Involuntary coverage of employees, who may not desire deferred compensation is not, however, without its costs. These employees may attribute little or no value to plan contributions (even with tax benefits attached). Employees may expect to leave before benefits become non-forfeitable. More generally, they may not feel that this is the time to provide for retirement. Lower income employees cannot be expected to provide for the future when current income is barely adequate for a minimum standard of living. In these situations, employees would be unwilling to accept a reduction in current wages. They would seek work elsewhere or remain unemployed. In fact, those groups whose labor supply is most elastic, teenagers and second earners in particular, might have the least interest in retirement savings.

*Id.* at 14; see also Norman Stein & Patricia Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate*, 58 WASH. & LEE L. REV. 1369, 1378–81 (2001); Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683, 704–05 (2000) (discussing reasons why employers would switch from traditional defined benefit plans to cash balance plans which are based on defined contribution concepts).

them with the company until retirement, to prevent unionization drives, and to “rationalize” the process of easing older employees out of the work force.<sup>46</sup> As unions came to represent a large portion of manufacturing workers in large companies in the immediate post-World War II era, pensions became a principal bargaining issue, a degree of financial security which workers highly valued and were willing to sacrifice some current compensation to maintain.<sup>47</sup> Workers who expected to work for one employer for most of their lives were more willing to rely on future pension promises, and those promises were more valuable for such workers given the structure of typical defined benefit pension plan formulae.<sup>48</sup>

At the beginning of the twenty-first century, patterns of employment look very different. The large stable manufacturing work forces still exist in selected industries such as automobile manufacturing. But, as heavy manufacturing jobs have shifted overseas over the past thirty years, union representation has declined and with it, so has much of the pressure for stable defined benefit pension plan coverage.<sup>49</sup> Workers no longer expect to work for one employer for longer than five years, at least until they reach their late forties and early fifties, the point at which changing jobs is no longer as easy.<sup>50</sup>

A complete analysis of the changing nature of work in America is beyond the scope of this essay. For example, the overseas outsourcing of jobs ranging from low-skilled manufacturing to highly skilled

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46. See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 6–10 (3d ed. 2000) (citing WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY (1976)).

47. *Id.*

48. *Id.*

49. According to the Bureau of Labor Statistics, union membership for wage and salary workers fell to 12.9% of the total workforce in 2003. This represents a 7.2% decrease from just twenty years earlier in 1983 when 20.1% of wage and salary workers were union members. While union membership for government workers has remained relatively constant since 1983, this decline in union membership is attributable to the decrease in union membership of workers in the private sector. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., UNION MEMBERSHIP IN 2003 (2004), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

50. Daniel Polsky, *Changing Consequences of Job Separation in the United States*, 52 INDUS. & LAB. REL. REV. 565 (1999) (discussing the increase of involuntary job loss for older employees and a decreased rate of reemployment for these employees); Daniel Rodriguez & Madeline Zavodny, *Are Displaced Workers Now Finished at Forty?*, 85 ECON. REV. 33 (2000); Madeline Zavodny, *Technology and Job Separation Among Young Adults*, 41 ECON. INQUIRY, 264–65, 276 (2003) (concluding that technology causes job separation of young adults (defined as late teens to midthirties) to be more often voluntary than involuntary by remaining at the same job for less than two years).

technical and professional work is likely to have a serious impact on pension coverage of American workers in the future as even lower-paid service jobs substitute for the jobs lost.<sup>51</sup> The overall pattern, however, is clear—at least part of the reason for the decline in pension coverage is the change in the pattern of employment itself. I venture to suggest that this is not a “natural” evolution, but rather a strategic response. As workers came to demand and expect benefits in the post–World War II era, employers began to explore avenues for avoiding those demands, and the changing patterns we see are at least in part a result of employer efforts to undermine the benefit structure previously established, in order to reduce costs and limit employee bargaining ability.

### 3. ECONOMIC SEGREGATION OF EXISTING PENSION ARRANGEMENTS

The structure of labor and employment relationships has changed greatly over the last forty years, leading to less employer interest in the pension function of employee retention, and less employee interest in pension arrangements predicated on long-term employment with one employer.<sup>52</sup> Defined benefit plans, in particular, are far less likely to be adopted by employers, and the employers who already have such plans have been attempting to reduce their liabilities under them without actual termination.<sup>53</sup> Because the defined benefit plan requires an employer to promise a specific level of benefits and fund those benefits for the life of the covered employee, defined benefit liabilities are unpredictable in amount and stretch far into the future.<sup>54</sup> As a result, creative arrangements have been de-

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51. For the GAO’s most recent examination of outsourcing’s effects on the U.S. economy see GOV’T ACCOUNTABILITY OFFICE, INTERNATIONAL TRADE: CURRENT GOVERNMENT DATA PROVIDE LIMITED INSIGHT INTO OFFSHORING OF SERVICES, GAO-04-932 (2004); Joseph R. Meisenheimer II, *The Services Industry in the ‘Good’ Verses ‘Bad’ Jobs Debate*, 1998 MONTHLY LAB. REV. 22, available at <http://www.bls.gov/opub/mlr/1998/02/art3full.pdf> (discussing evidence demonstrating that service jobs are not necessarily worse than manufacturing jobs and analyzing the shift from manufacturing to service jobs through the lens of relative job quality); see, e.g., John Cassidy, *Winners and Losers; The Truth About Free Trade*, NEW YORKER, Aug. 2, 2004, at 26; Lou Dobbs, *Is Outsourcing Killing Jobs?*, OPTIMIZE, Sept. 1, 2004, at 19; Daniel W. Drezner, *The Outsourcing Bogyman*, FOREIGN AFF. 22 (2004). *But cf.* Joellen Perry et al., *Made in America*, U.S. NEWS & WORLD REP., May 17, 2004, at 50 (discussing three firms who intentionally maintain their businesses in the United States rather than overseas outsourcing).

52. See generally Wolff, *supra* note 28.

53. See Munnell et al., *supra* note 3, at 10.

54. *Id.* at 6.



signed to increase benefits for the highly paid and reduce pension commitments for most other workers.

An example of how employers satisfy the latter goal is the invention and adoption of the “cash balance plan,”<sup>55</sup> which enables employers to reduce pension liabilities and future benefits under existing defined benefit plans.<sup>56</sup> The former goal is met through adoption of nonqualified executive compensation plans for their highest paid employees who can, as a result, be excluded from the rank and file’s pension arrangements, which can then be greatly reduced or eliminated.<sup>57</sup>

Taken together, these devices are pushing existing pension arrangements back into a segregated world in which highly paid workers receive generous retirement income plans while lower-paid workers are left with little or no coverage,<sup>58</sup> something that ERISA and the tax qualification rules in effect for pension trusts since the late 1930s were intended to prevent.<sup>59</sup> Instead of one big tent for all employees, we are now seeing an army of smaller tents—large, roomy ones for the highly paid, and virtual pup tents for the rank and file.

In the mid-1980s, pension consultants devised a new type of replacement for defined benefit plans to meet the requests of their employer clients who were locked into long-term defined benefit plan

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55. See Zelinsky, *supra* note 45, at 685; see also Regina Jefferson, *Striking a Balance in the Cash Balance Plan Debate*, 49 BUFF. L. REV. 513, 514 (2001).

56. See Zelinsky, *supra* note 45, at 685–86.

57. Halperin, *supra* note 45, at 23–24.

Under a nonqualified plan, if no special funding occurs, the employee’s tax is deferred until payment is received, as is the employer’s deduction. As a result, investment income is effectively taxed at the employer’s rate, which should be close to the employee’s. Thus, while shifting to a nonqualified plan loses the tax advantage of tax-free investment income (unless the employer is tax-exempt or has otherwise unusable tax deductions), the tax result as to investment income is still comparable to the result under current compensation. . . . [I]n order to achieve the tax treatment just described, payment must depend upon the continued solvency of the employer. Thus, nonqualified deferred compensation may be less secure than individual savings. Further, unlike funded nonqualified plans, such unfunded arrangements must be limited to a select group of management or highly compensated employees, which apparently does not include all employees who are deemed highly compensated under the Code.

*Id.* The tax rules governing nonqualified deferred compensation arrangements, most of which involve what are popularly known as “rabbi trusts” are contained in *Minor v. United States*, 772 F.2d 1472 (9th Cir. 1985); Rev. Proc. 92-64, 1992-2 C.B. 422; Rev. Rul. 60-31, 1960-1 C.B. 174.

58. Halperin, *supra* note 45, at 24.

59. *Id.*

liabilities.<sup>60</sup> These employers wanted to reduce costs associated with those liabilities without actually terminating plans, which would require full funding of currently promised benefits.<sup>61</sup> Cash balance plans, first devised in the mid-1980s, were designed to reduce promised future payments under a defined benefit plan, thus achieving reduced pension obligations for the employer, while convincing younger workers that they are better off with a cash account balance than with a traditional defined benefit plan.<sup>62</sup> Older workers have by and large not bought into this message, but their efforts to attack cash balance plans as discriminatory against them, or as violating ERISA's rules against reducing already accrued benefits, have met with limited success.<sup>63</sup>

Employers have also used creative ways to devise executive compensation arrangements that satisfy the most highly paid employees' desire to defer large portions of their salary for tax purposes, far in excess of what would be allowed under the qualified plan rules applicable to both DC and DB plans.<sup>64</sup> These arrangements are nomi-

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60. See Jefferson, *supra* note 55, at 522.

61. *Id.* at 522-23. See generally Zelinsky, *supra* note 45.

62. See Jefferson, *supra* note 55, at 543.

63. Under the minimum vesting rules, accrued benefits cannot be reduced by an amendment to the plan. I.R.C. § 411(d)(6) (2004). Under ERISA's benefit accrual requirements, an employee's accrued benefits cannot be reduced because of a plan amendment. 29 U.S.C. § 1054(g) (2004). ERISA also contains an age discrimination provision which prohibits the reduction in an employee's benefit accrual rate or the cessation of benefit accrual. *Id.* § 1054(b)(1)(H). In *Campbell v. BankBoston*, the First Circuit held that by switching from a defined benefit plan to a cash balance plan, the switch only resulted in a reduction in expected benefits not accrued benefits. Since the reduction was only in expected and not accrued benefits, the switch did not violate 29 U.S.C. § 1054(g) according to the First Circuit. *Campbell v. BankBoston*, 327 F.3d 1, 8 (1st Cir. 2003). In *Eaton v. Onan Corp.*, the district court held that cash balance plans are not illegal as a matter of law and do not violate 29 U.S.C. § 1054(b)(1)(H). *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 815 (S.D. Ind. 2000). The district court found that the age-discrimination provisions of the ADEA and ERISA do not apply to anyone who has not reached the normal retirement age. *Id.* The court went on to say that even if the pension age discrimination provisions applied to all participants, the cash balance plan would not violate these provisions because the cash balance plan's rate of accrual does not depend on age. *Id.* at 816.

64. For a plan to qualify, the limits on the annual benefits in a defined benefit plan are expressed as the lesser of \$160,000 or the average compensation for the employee participant's three highest years of compensation. I.R.C. § 415(b)(1). For a defined contribution plan, the limit for acceptable employer contributions is the lesser of \$40,000 or 100% of the employee's compensation. *Id.* § 415(c)(1). For a plan to be qualified, the contributions or benefits cannot discriminate in favor of the highly compensated employees (as defined in § 414(q)). *Id.* § 401(a)(4). Whether or not the contributions or benefits discriminate in favor of the highly compensated employees depends on the form of the plan and its effect in opera-

nally “unsecured,” meaning the employer has only a contractual obligation to pay the amounts deferred under the plan at some point in the future, which allows the employee to delay taking the amounts deferred into income until he actually withdraws the cash in the future.<sup>65</sup>

In fact, however, executives are virtually assured of receiving this deferred compensation, either because they control the employing company’s financial operations, or because they have insured the arrangements through a third-party insurer.<sup>66</sup> This advantageous

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tion. 26 C.F.R. § 1.401(a)(4)-1(a) (1993). The § 401(a)(4) regulations set out the exclusive rules for determining whether or not a plan satisfies the nondiscrimination requirement of § 401(a)(4). *Id.* Whether or not a defined contribution plan is nondiscriminatory in amount is analyzed under § 1.401(a)(4)-2. *Id.* § 1.401(a)(4)-1(b)(2)(ii). Whether or not a defined benefit plan satisfies the nondiscrimination requirement is analyzed under § 1.401(a)(4)-3. Treas. Reg. § 1.401(a)(4)-1(b)(2)(iii) (as amended in 1993). These regulations also say that a plan must not only satisfy § 404(a)(4), but must also satisfy the requirements of § 410(b). *Id.* § 1.401(a)(4)-1(c)(4)(i). Section 410(b) contains the minimum coverage requirements for a qualified plan. I.R.C. § 410(b). For a plan to satisfy the minimum coverage requirements of § 410(b), the plan must either cover a percentage of the nonhighly compensated employees which is at least seventy percent of the percent of covered highly compensated employees or meet the average benefit percentage test. *Id.*

65. While the doctrine of constructive receipt, *see* *Minor v. United States*, 772 F.2d 1472, 1473–74 (9th Cir. 1985), potentially applies to rabbi trusts, the Service has repeatedly ruled that the creation and funding of a correctly structured rabbi trust will not cause inclusion in the beneficiary’s gross income until actually distributed. *See, e.g.*, Rev. Rul. 60-31, 1960-1 C.B. 174, 178 (In which the Service stated that the doctrine of constructive receipt is to be used sparingly and its application in the deferred compensation context is to be made on the specific factual situation.); Rev. Proc. 92-64, 1992-2 C.B. 422 (In which the Service provided a safe-harbor model rabbi trust that if the employer follows its terms, neither the constructive receipt doctrine nor the economic benefit doctrine will apply to the employee solely because of the adoption and maintenance of the rabbi trust.); Priv. Ltr. Rul. 81-12-107 (Dec. 31, 1980) (Original rabbi trust ruling where IRS ruled that the constructive receipt doctrine does not apply to the funding of the trust since substantial limitations or restrictions were placed on receipt. The Service found the fact that the trust amounts could be reached by the employer’s creditors and that since the amounts were not actually paid or made available to the employee were substantial enough restrictions to only cause inclusion in the employee’s gross income when actually paid or made available.); Gen. Couns. Mem. 39, 230 (May 7, 1984) (In which the Service concluded that the payment of funds into a rabbi trust would not be included in the employee’s gross income until actually distributed and that the constructive receipt doctrine would not apply to cause inclusion in gross income.).

66. *See, e.g.*, Priv. Let. Rul. 83-29-070 (Apr. 21, 1983) (In which the Service allowed the employer to purchase a single premium deferred annuity policy on the lives of the employee and his spouse to fund the rabbi trust without causing inclusion in the employee’s gross income at the time of purchase and contribution to the trust.); Priv. Let. Rul. 93-44-038 (Aug. 2, 1993) (A rabbi trust beneficiary/employee purchased insurance against potential unpaid deferred compensation. Then the employer increased the employee’s compensation by the amount of

treatment for executives enables the employer to essentially leave them out of qualified plans applicable to all other employees, thus reducing any pressure to keep benefits generous for workers at all wage levels. If taken to the extreme, employers are able to set up nonqualified deferred arrangements for the highest paid workers and provide little or nothing in the way of pension benefits for the rest of their employees.

The ability of highly paid executives to opt out of the qualified retirement plan structure applicable to rank and file employees has a corrosive effect on the retirement plans available to most employees. The retirement of the baby boom generation is clearly endangered by the weaknesses in the private pension system that have been exacerbated by the ability of executives to provide for themselves while leaving their employees inadequately prepared for retirement.

#### 4. IMPACT OF LEGISLATION—DESTROYING THE VILLAGE IN ORDER TO SAVE IT

As American workers have continued to lose pension coverage, it might be reasonable to expect Congress and the executive branch to respond in ways designed to increase or at least stabilize pension coverage, if a stable retirement expectation was accepted as a social good and a national goal. However, over the last decade, the actions of Congress in particular appear to be designed, at best, to do nothing to stop the weakening of the private pension system, and at worst, to actively encourage its demise.

A prime example of congressional failure to stop or at least slow down the disintegration of the traditional pension structure is the legislation introduced and reintroduced over the last several years by Representatives Portman and Cardin, known in the pension press as “Portman-Cardin.”<sup>67</sup> While the bill’s proponents assert that their ef-

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premiums to be paid by the employee. This increase in compensation would be included in the employee’s gross income under § 61(a)(1). The Service ruled the issuance of the policy to the employee would not cause the deferred compensation amount to be included in the employee’s gross income until actually paid to the employee.); Michael G. Goldstein, *The Uses of Insurance in Non-Qualified Deferred Compensation Planning*, SC35 A.L.I.-A.B.A. Continuing Legal Education Course of Study Materials 363 (1998). New §409A of the Code enacted as part of the American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 885 (2004), is intended to restrict the use of nonqualified arrangements to avoid current taxation of effectively secured deferred compensation. Time will tell if the new law actually has that effect.

67. See *Campaigning on Social Security*, *supra* note 19.

forts are designed to help American workers provide for their retirement, and preserve the private pension system, most of the bill's provisions would in fact do substantially the opposite.

For example, one of the costliest provisions in the bill would weaken the current "minimum distribution" rules, at a cost of \$24 billion over the next ten years and more than \$4 billion in 2013 alone.<sup>68</sup> The current law minimum distribution rules are designed to ensure that private pensions and tax-favored retirement savings are used for consumption needs in retirement, rather than for building an estate to be passed along to heirs.<sup>69</sup> Since one of the main reasons for the tax advantages extended to pensions and retirement savings arrangements is to encourage saving for retirement,<sup>70</sup> it is only appropriate that the tax rules encourage use of those tax-advantaged savings for that purpose. Thus, most types of pension arrangements, as well as individual arrangements such as IRAs, require that distributions out of the tax-exempt trust begin no later than age 70.5.<sup>71</sup>

The Portman-Cardin bill would substantially undermine this purpose by raising the age for required minimum distributions to seventy-five.<sup>72</sup> On the surface, this proposal could be argued to be a

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68. Section 401(a)(9) requires the employee's entire interest be distributed either no later than the required distribution date or, beginning on the required beginning date, distributed ratably over the remaining life of the employee and the designated beneficiary in accordance with the regulations. I.R.C. § 401(a)(9)(A). The required beginning date is April 1 of the calendar year, which is the later of either the employee attaining the age 70.5 or retiring. I.R.C. § 401(a)(9)(C)(i). The Portman-Cardin legislation would increase the required age for distributions to seventy-five by the year 2010; while changing April 1 to December 31 and stating that an employee who retires in December is considered to retire in the next calendar year. Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. § 201(a), (b) (2003).

69. For a clear statement of these current law purposes, see Jay A. Soled & Bruce A. Wolk, *The Minimum Distribution Rules and Their Critical Role in Controlling the Flood Gates of Qualified Plan Wealth*, *BYU L. REV.* 587, 616 (2000); see also Mark J. Warshawsky, *Further Reform of Minimum Distribution Requirements for Retirement Plans*, *TAX NOTES*, Apr. 9, 2001, at 297.

70. Warshawsky, *supra* note 69, at 297 ("The public policy purpose of the minimum distribution requirements . . . is to ensure that tax-qualified retirement plans serve primarily as vehicles for providing income during the retirement of the plan participant and his or her spouse.").

71. I.R.C. § 401(a)(9). The regulations provide detailed requirements for meeting the requirements of § 401(a)(9). 26 C.F.R. § 1.401(a)(9)-1 (2003). The required distribution rules for a defined contribution plan are contained in § 1.401(a)(9)-5. 26 C.F.R. § 1.401(a)(9)-5. The required minimum distribution rules for a defined benefit plan are contained in § 1.401(a)(9)-6. 26 C.F.R. § 1.401(a)(9)-6.

72. Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. § 201(a)(2) (2003).

response to lengthening life-spans, allowing workers to retain their accumulated equity in a tax free trust for a longer period of time and thus helping to ensure that their reserves are sufficient to last their entire lifetime. The reality, however, is somewhat less benign.

Only those who have sufficient other means to maintain themselves in retirement, and who wish to preserve their tax-favored savings as part of their overall estate planning, would actually benefit from such a delay in required distributions. Lower-income Americans, in contrast, continue to retire long before age seventy-five and need to begin withdrawals from whatever retirement savings they have in order to meet everyday household needs. Moreover, allowing a delay in distributions would, in effect, give more years of tax-free build-up in account balances, thus reducing the ultimate effective tax rate on those accounts.<sup>73</sup> Thus, a provision nominally neutral in design has a strong bias in favor of higher-income workers and retirees.

Another provision of the Portman-Cardin legislation would allow tax-free withdrawals from retirement accounts, up to \$2000 per year for the first five years, as long as the withdrawals take the form of a lifetime annuity.<sup>74</sup> “The legislation would phase this tax-free preference out for couples with incomes above \$120,000.”<sup>75</sup> On its face, this provision appears designed to encourage withdrawals from retirement accounts in the form of monthly benefits, better designed to provide for recurring living expenses and more likely than a lump-sum withdrawal to last until the end of the retiree’s life.

The problem with exempting annuity payments from tax is that the amounts in the account have already been greatly tax advantaged—the contributions to the account were either made on behalf of the employee and thus were not taxed to her, or were deductible by her, if the account is a traditional IRA.<sup>76</sup> Furthermore, the earnings on

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73. See PETER R. ORSZAG & ROBERT GREENSTEIN, CTR. ON BUDGET AND POLICY PRIORITIES, *THE WAYS & MEANS COMMITTEE PENSION TAX-CUT LEGISLATION: UNSOUND POLICY THAT DIGS THE NATION’S FISCAL HOLE DEEPER* (2003).

74. *Id.*

75. *Id.*

76. Under a § 401(k) plan, the employer gives the employee the election of whether to receive an amount in cash or have it contributed to the plan on behalf of the employee. I.R.C. § 401(k)(2). Even though the employee has the election to receive the contributed amount in cash, this option will not cause the contributed amount to be considered “distributed or made available” to the employee. *Id.* § 402(e)(3). The employer is then able to deduct the contributed amount in the year when paid, so long as the total amount of contributions do not exceed twenty-five percent of the covered employees’ total compensation. *Id.* § 404(a)(3)(A)(i).

the principal deposited in the account would not previously have been subject to tax under the normal rules of tax treatment of pension trusts.<sup>77</sup> Standard principles of good tax policy require that income be taxed once to the same taxpayer at some point—under this proposal, pension income received as an annuity under these circumstances (but not others) would not be taxed at all.

My main concern here, however, is not tax policy so much as it is retirement policy. The distributional effects of both of these provisions are clear—higher-income taxpayers would benefit much more than lower-income taxpayers who, by definition, benefit much less from tax exclusions. One analysis estimates that two-thirds of the elderly would save at most \$300 a year in taxes.<sup>78</sup> Not only would this provision do little to encourage retirees to take distributions from retirement savings accounts as annuities, it would most benefit those who least need it—the upper one-third in income.

This kind of provision is a clear example of favoring the well-off through the use of ostensibly neutral tax provisions. The rest of the Portman-Cardin Bill contains provisions similarly designed to provide additional tax benefits to higher-income workers. For example, the bill would accelerate the schedule that was enacted as part of the Economic Growth and Tax Relief and Reconciliation Act of 2001 for future increases in the yearly amounts employees are allowed to contribute on a tax-favored basis to a § 401(k) plan.<sup>79</sup> While higher-income workers with sufficient excess income to finance additional contributions will benefit from the higher contribution limits, it seems unlikely that lower- to middle-income workers will ever see any expansion of their opportunity to retire based on such changes.

Portman-Cardin is one example of the various relatively minor pieces of legislation proposed or enacted over the last fifteen years that center on incentives to increase savings rates, and essentially ig-

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When an individual makes a contribution to an IRA, the contribution is an above the line deduction to the individual. *Id.* § 62(a)(7). This deductible contribution for 2005–2007 is \$4000 per year. *Id.* § 219(b)(5)(A). This deductible contribution amount increases to \$5000 per year for the years 2008–2010 and then reverts back to \$2000 per year beginning in 2011. *Id.*; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 105 Stat. 50, 50 (2001). If the contributing employee is fifty or older, then small catch-up contributions are allowed in addition to the normal deductible amount. I.R.C. § 219(b)(5)(B).

77. See I.R.C. § 62(a)(7).

78. ORSZAG & GREENSTEIN, *supra* note 73.

79. Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. § 402(a) (2003).

nore the ongoing demise of the defined benefit plan.<sup>80</sup> Various types of individual retirement account rules allowing for early, penalty-free withdrawals to pay for education or first-home down payments, further weaken the already meager retirement income value of IRAs, and of the lump-sum distributions from other types of pension plans that are frequently rolled over into IRAs.<sup>81</sup>

Congress has focused its attention almost solely on measures advertised as increasing incentives for retirement savings, while doing nothing to stop the disintegration of the defined benefit pension plan system.<sup>82</sup> What, then, does the system of retirement savings plans, both employer-based and IRAs, contribute to the overall retirement system for low- and moderate-wage workers? I would argue not nearly enough.

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80. See Retirement Security for All Americans Act, H.R. 5190, 107th Cong. § 2 (2002); Comprehensive Retirement Security and Pension Reform Act of 2001, H.R. 10, 107th Cong. (2001); Comprehensive Retirement Security and Pension Reform Act, H.R. 4843, 106th Cong. (1999); Retirement Account Portability Act of 1999, H.R. 739, 106th Cong. (1999); Retirement Security for the 21st Century Act, H.R. 3788, 105th Cong. (1998); Comprehensive Pension and Retirement Security Act of 1997, H.R. 83, 105th Cong. (1997); Retirement Savings and Security Act, S. 1818, 104th Cong., (1996).

81. Under I.R.C. §§ 408 and 219, individual retirement accounts (IRAs) may receive deductible contributions of funds up to \$4000 per year for 2005–2007, and \$5000 for 2008 and afterward; individuals may also roll over unlimited amounts from qualified plans that are eligible to be distributed to them under I.R.C. § 72 (2000). Account holders may withdraw sums from traditional IRAs prior to retirement under § 408(d) for any reason, and pay a ten-percent penalty as well as including the amount withdrawn in taxable income. Moreover, changes made in the Taxpayer Relief Act of 1997 allow account holders to withdraw up to \$10,000 for buying a first home with no penalty, *id.* § 72(t)(2)(F); similarly early, penalty-free withdrawals are allowed for higher education costs. *Id.* § 72(t)(2)(E), (F). For the failure of IRAs to make much difference for low income workers, see Halperin, *supra* note 45, at 40:

There are tax incentives for employer-based pension plans and, to a lesser extent, for Individual Retirement Accounts (IRAs). In essence, these arrangements allow assets to grow tax-free while other investments are subject to tax. Still, many workers have little, if any, private savings. Given their immediate needs and low tax bracket, even a tax preference will not sufficiently encourage savings among low-and moderate-income workers. For example, only a small minority of households earning less than \$25,000 have taken advantage of the opportunity to establish an IRA.

*Id.* For example, in 1995, only fifteen percent of households earning between \$10,000 and \$25,000 established an IRA. See Daniel I. Halperin & Alicia H. Munnell, *How the Pension System Should be Reformed* 54 (Sept. 17, 1999), available at <http://www.brook.edu/dybdocroot/es/events/erisa/99papers/erisa10.pdf> (last visited Feb. 10, 2003).

82. There have been no legislative changes to the basic tax treatment of defined benefit plans since the 1986 Tax Reform Act.



## B. False Promises: Employer-Based and Individual Retirement Savings Plans

The disintegration of the private pension system has received relatively little public attention, perhaps in part because of the unending stream of articles and financial advice columns focused on how people can save and invest for their own retirement. The standard framing of the issue is that if Social Security will not be there when the baby boom retires, how can that and later generations invest their way to a financially secure old age?<sup>83</sup>

Leaving aside for the moment the truth of assertions about Social Security's imminent demise, we need to carefully examine the assumption that individual savings and investment can support retirement for individuals at all levels of income. We also need to examine what people are thinking of when they talk about their own retirement, and how those images have evolved from genteel poverty in a mobile home in Florida or Arizona to, perhaps, an unsupportable level of leisure consumption for a very substantial portion of life.

### 1. EMPLOYER PROVIDED RETIREMENT SAVINGS

Before examining the prospects for self-financing retirement in the future, we should look at current patterns of savings, especially within employer sponsored tax-favored savings plans, like § 401(k) cash or deferred arrangements (CODAs),<sup>84</sup> to determine whether all

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83. See Dave Barry, *Uh-Oh, Silver, It Just Won't Go Away*, ORLANDO SENTINEL (Florida), June 16, 2000, at E1; Martin Crutsinger, THE NATION; *Fed Chief Urges Cuts in Retirement Benefits*; Alan Greenspan Says Choices Will Be Painful Because the U.S. Will Be Unable to Provide Levels Received by Parents of Baby Boomers, L.A. TIMES, Aug. 29, 2004, at A23; GAO: *Fix Needed in Social Security*, SAN DIEGO UNION-TRIB., July 30, 2003, at A7; Jeffrey Sheban, *Many Save for Retirement; Social Security Viewed as Weak Link*, COLUMBUS DISPATCH (Ohio), Mar. 22, 1996, at 1F; *Soon to Be Entitled to Bankruptcy; Entitlement Panel Does the Scary Math*, L.A. TIMES, Aug. 14, 1994, at M4; Jonathan Weisman, *Fixing Social Security No Longer the Third Rail of U.S. Politics; Powerful Voting Bloc of Seniors Ready for Reform, Though Wary*, THE SUN (Baltimore), Mar. 1, 1998, at 1A.

84. Other employer provided retirement savings devices include I.R.C. § 403(b) plans, which allow tax-exempt organizations and public educational organizations to contribute a portion of an employee's salary to certain custodial accounts or purchase annuities for their employees. Some employers will match a portion of the employee contributions. LANGBEIN & WOLK, *supra* note 46, at 223-24. Another form of employer provided retirement savings is a simplified employment pension (SEP) under I.R.C. § 408(k), permitting an employer to make contributions to an IRA established on behalf of an employee in amounts above the traditional and Roth IRA limits. See I.R.C. §§ 415(c), 219(g)(5)(A). Finally, simple retirement accounts, under I.R.C. § 408(p), are individual retirement plans

the current savings incentive provisions are working to boost the retirement income prospects for most American workers. Current patterns are not encouraging.

The overall national savings rate is still at historically low levels, despite decades of savings incentives in the tax code and constant nagging from economists and financial experts.<sup>85</sup> Moreover, the special incentives for retirement savings, such as IRAs and § 401(k) plans, appear to be used primarily by those who need them least.<sup>86</sup> Recent studies have found that younger workers are least likely to participate in § 401(k) plans, as are workers with less than \$50,000 per year in earnings.<sup>87</sup> Furthermore, the amounts held in § 401(k) plan accounts are far too small to provide substantial income in retirement when converted into a lifetime income stream—according to recent surveys, the average dollar amount held in a § 401(k) plan is only around \$51,000.<sup>88</sup>

In addition, the investment patterns for § 401(k) accounts, in combination with lenient plan rules allowing borrowing against plan accounts, present serious problems for the argument that individual accounts offer a viable path for retirement security for middle- to lower-income workers. The debacle of Enron employees losing their entire retirement savings because their § 401(k) accounts were invested primarily or wholly in the stock of their bankrupt employer is, sad to say, not an exceptional case. According to recent surveys, most companies allow employees to invest their § 401(k) account balances

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whereby employees make contributions under a qualified salary reduction arrangement and the employer is required to match the contribution up to a specified amount. *Id.* §§ 408(p)(1)–(2).

85. Personal saving, defined as the amount of aggregate disposable personal income remaining after personal spending on goods and services, has declined to 0.1% of GDP in 2000 and is at its lowest point in over sixty-five years. U. S. GEN. ACCOUNTING OFFICE, NATIONAL SAVING ANSWERS TO KEY QUESTIONS (GAO-01-591SP, June 2001), available at <http://www.gao.gov/new.items/d01591sp.pdf>.

86. See Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 65–66 (2004).

87. *Id.*

88. See SARAH HOLDEN & JACK VANDERHEI, INV. CO. INST. PERSPECTIVE, 401(k) PLAN ASSET ALLOCATION, ACCOUNT BALANCES, AND LOAN ACTIVITY IN 2003, at <http://www.ici.org/home/per10-02.pdf> (Aug. 21, 2004). This report also shows that for plans with fewer participants, the amounts are substantially lower, ranging from \$29,544 for eleven to twenty-five participants, to \$33,918 for 251 to 500 participants. *Id.* Wolff's study further shows that for workers age forty-seven to sixty-four, median pension wealth (including both defined contribution and defined benefit plans) increased from 1983 to 1998 by only eighteen percent, from \$42,500 to \$50,000. See Wolff, *supra* note 28, at 14.

in the employer's stock, and almost ninety percent of those employers place no limits on the amount of their account balances invested in the company's stock.<sup>89</sup>

The importance of diversifying investments is common wisdom among investment counselors, and the behavior of employees who put all or most of their retirement funds into their own employers' stock seems irrational, at best.<sup>90</sup> However, employees are frequently given substantial incentives to put their retirement money where their paycheck comes from. For example, many companies will offer only employer stock as an investment option for § 401(k) contributions; others may match an employee's contribution to the § 401(k) plan but only in the form of company stock, or offer purchase discounts or similar incentives to induce the employee to invest her account balance in her employer's stock.<sup>91</sup> One recent estimate is that thirty percent of all § 401(k) account balances are invested in the employer's own stock.<sup>92</sup> In addition, investing in the employer has substantial intangible value to many employees—it expresses faith in one's employer, and it is probably at least in part a case of investing in “the devil you know” rather than plunging into the great unknown of the stock market.<sup>93</sup>

The experience of the Enron employees, who lost not only their salaries and benefits such as health insurance, but their retirement savings as well when the company declared bankruptcy, is likely to be repeated.<sup>94</sup> Even if the employer merely suffers financial reverses, the

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89. See Kaplan, *supra* note 86, at 71–72. The ICI-EBRI survey found that at the end of 2003, sixteen percent of 401(k) account balances were invested in company stock; but in those plans offering company stock as an investment option, twenty-five to almost twenty-nine percent of account balances were invested in such stock; see also HOLDEN & VANDERHEI, *supra* note 88, at 8 fig.5. Because few plans limit the amount of any individual account that can be invested in the employer's stock if that option is allowed at all, there are likely still substantial numbers of employees with most of their portfolios in employer stock.

90. See Arron Lucchetti, *Tough Sell: Lighten Up on Employer Stock—Despite the Scandals, Advisors Have Hard Time Getting Investors to Diversify Their Holdings*, WALL ST. J., Apr. 11, 2003, at C1; *Retirement Risk; A Second Lesson from Enron*, MINNEAPOLIS-ST. PAUL STAR TRIB., Jan. 5, 2004 at 12A.

91. See Lucchetti, *supra* note 90, at C1.

92. See Kaplan, *supra* note 86, at 71.

93. *Id.* at 75. For another excellent discussion of the problem, see also Susan Stabile, *Another Look at 401(k) Plan Investments in Employer Securities*, 35 J. MARSHALL L. REV. 539 (2002).

94. Even more highly paid Enron employees lost millions in retirement deferred compensation accounts when the company filed for bankruptcy, because nonqualified plans are by definition unsecured. See Kaplan, *supra* note 86.

impact on the value of its stock, and therefore on the employees' retirement accounts, can be devastating; poor stock performance can have a snowball effect leading to contraction of the business and then to employee layoffs, putting employees in almost as bad a position as a bankruptcy would have.<sup>95</sup>

Employer-sponsored savings plans are thus likely to be inadequate as the principal or only retirement pension vehicle for most employees because of inadequate account levels accumulated by the time the employee reaches retirement age. At that point, the other part of the problem with relying on defined contribution accounts for retirement security emerges—the risk of loss of value is still extremely high, and now will be borne solely by the retiree at a time when the retiree is usually not in a position to replace any investment losses through additional earnings.

During the market boom of the 1990s, many workers were optimistic about the prospect of retiring on the amounts held in their § 401(k) plans; stocks were booming, and those increases, combined with a hot real estate market that greatly increased home values, convinced many middle-income Americans that their retirement was

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Enron Corp. retiree Mary Wyatt says she's learned never to say, "It can't get worse than this." Diagnosed with multiple sclerosis in 1992, she retired with a medical disability in 1998. Last June, her Braes Heights home flooded in Tropical Storm Allison. She was forced to sell the house at a substantial loss. And in December, Enron filed for bankruptcy. That meant Wyatt, fifty-two, will likely lose \$500,000 locked up in a deferred-compensation program. Along with Wyatt, hundreds of ex-Enron executives, many at retirement age, may have lost tens of millions of dollars in deferred-salary plans.

Dan Feldstein & Eric Berger, *Enron's Retired Get Burned, Too; Deferred Salary Plan Fizzles*, THE HOUSTON CHRON., Feb. 16, 2002, at A1.

<sup>95</sup> See Kaplan, *supra* note 86, at 76. Resistance to legislative measures that would limit investment in employer stock is very strong:

Sens. Barbara Boxer (D-Calif.) and John Corzine (D-N.J.) have announced legislation that would limit to twenty percent the investment an employee can have in any one stock in their individual account plans [among other limitations] . . . The bill would also halve the employer deduction for matching contributions made in stock . . . PSCA's Ferrigno noted that there would likely be grass-roots opposition to telling people they cannot buy a certain amount of company stock with Section 401(k) plan money. ERIC's Ugoretz agreed, and recalled participant opposition to a 1996 Boxer-sponsored bill which was very similar to her recent offering. Ugoretz said one factor is that, for many employees, their own company's stock is that with which they are most familiar and comfortable.

Kurt Ritterpusch, *Retirement Policy: Enron, Enron, Enron: Retirement Issues From Fallout Expected To Dominate Agenda*, BNA PENSION & BENEFITS DAILY, Feb. 12, 2002.

adequately, indeed generously, funded through their retirement savings. Unfortunately, as the market downturn took stock prices down with it, retirees have begun to discover that their retirement is far from secure.

For example, *The New York Times* recently reported the story of Concetta McGrath, age seventy-six, a widow who invested the proceeds from the sale of her family home in the stock market in 2001, in the hopes that the gains she expected would generate enough income to allow her to live comfortably, in combination with her Social Security monthly check of \$800.<sup>96</sup> She invested in a mutual fund, was neither foolish nor risky nor too concentrated in her investment—nonetheless, the market downturn caused the fund to lose a third of its value within a few months.<sup>97</sup> Even though Mrs. McGrath took her money out of the fund before she could lose any more, she had to use \$15,000 for living expenses, leaving only \$45,000 invested in bank stocks for security's sake.<sup>98</sup> In August 2004, her account's value was down to \$28,000, and "she worries about outliving her money."<sup>99</sup>

Mrs. McGrath's story exemplifies the dilemma of basing retirement on accumulated equity, whether in the form of a § 401(k) plan, built up value in the family home, or other types of savings—no matter how large the accumulated savings, it is impossible to know whether they will be enough to last until death. Her attempts to make a prudent investment were foiled through no fault of her own, but through the natural workings of the market, which is based on risk, and results in the rise and fall of value of any given investment. The actual amount of stocks or property accumulated does not matter; what matters is the value of what has been accumulated, at the time the retiree needs to liquidate it to provide funds to live on.

Investors became accustomed, in the 1980s and 1990s, to market downturns that might be severe in the short term, but that were followed by robust growth in the market. In the stock market crash of 1987, for example, the market lost almost thirty percent of its value in a single two-week period, but regained half of those losses within a

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96. See Gretchen Morgenson & Jennifer Bayot, *Older Investors More Jittery as U.S. Markets Disappoint*, N.Y. TIMES, Aug. 24, 2004, at C1.

97. See *id.*

98. See *id.*

99. See *id.*

year.<sup>100</sup> Succeeding short downturns were followed by rebounds in prices and further upward growth.<sup>101</sup> This time, however, the market has not fully recovered, and analysts do not expect it to for some time. A recent Employee Benefit Research Institute study found that investors in their sixties, at or near or in retirement, “are still down 8.7 percent on average in their accounts for the four-year period beginning December 31, 1999, and lasting through the end of [2003]. Participants in their sixties with more than thirty years of tenure on the job are even worse off; their account balances fell 15.5 percent on average during the period.”<sup>102</sup>

The stock market has recovered some of the losses suffered during the worst downturn in 2001 and 2002—but as of this writing, the Dow Jones Industrial Average is still below its peak in 2000, and stock analysts “expect the market to tread water for some time to come, [and] that stock prices will remain flat for a couple of years even as earnings rise.”<sup>103</sup> Investors, on the other hand, appear to expect much greater things—in an August 2004 poll conducted by UBS, eighteen percent of investors said they expected profits of ten to fifteen percent over the next year, while another twenty-eight percent expected gains of five to nine percent.<sup>104</sup>

That last finding explains a great deal about the continued popularity of § 401(k) plans with workers who are at best ill-served by them. The triumph of hope over experience seems to characterize many American workers’ thinking about how they will be able to retire on the demonstrably inadequate sums held in their plan accounts. The reality, however, is that the gradual shift from defined benefit

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100. During the month of October 1987, the highest recorded close on the Dow Jones Industrial Average was 2640.99 recorded on October 2, 1987. From that date the Dow steadily declined until Friday, October 16, 1987, when the Dow Jones Industrial Average closed at 2246.73. On the following Monday, October 19, 1987, the Dow opened at 2164.16 and eventually closed the day at 1738.74 recording a one-day point loss of over nineteen percent. The Dow quickly rebounded and closed at 2027.85 only two days later on October 21, 1987; however, the Dow did not close above 2164.16 (the opening price on October 19, 1987) until October 20, 1988 (closing at 2181.19), a full year after the crash on October 19, 1987. Further the Dow did not close above 2246.73 (the close the day before the crash) until January 24, 1989, when the Dow closed at 2256.43. The Dow closed the year in 1989 at 2753.20. Commodity Systems, Inc., *Historical Prices* (2004), at <http://finance.yahoo.com/q/hp?s=%5EDJI&a=09&b=1&c=1987&d=11&e=31&f=1989&g=d>.

101. *Id.*

102. Morgenson & Bayot, *supra* note 96, at 2.

103. *Id.*

104. *Id.*

plans to defined contribution plans has left American workers drastically underprepared for retirement, and almost wholly dependent on future Social Security benefits and personal savings to support them in old age.

## 2. WOULD INDIVIDUAL SAVINGS BE ENOUGH?

Of course, workers are not limited to employer-provided savings plans—Congress has been anxious to use the Internal Revenue Code (Code) to encourage savings for retirement and other purposes over the last twenty-five years, and the preferred vehicle for these incentives has been the individual retirement account.<sup>105</sup> However, IRAs have not proven particularly useful for retirement savings for most workers, probably partly because of the extremely low limits on how much can be contributed each year on a deductible basis, but more likely because low- and middle-income workers are unlikely to have \$3,000 each year in excess income for such contributions.<sup>106</sup>

Interestingly, the concept of IRAs originated in Nixon administration proposals in 1970 to allow workers other than self-employed business owners to establish Keogh-type individual deferred savings arrangements.<sup>107</sup> Thus, IRAs were seen by their proponents as tax-favored savings opportunities for those without pension coverage, and by their critics as primarily aiding doctors, lawyers, and other high-income professionals with enough excess earned income to save \$1500 per year with or without tax incentives.<sup>108</sup> As enacted in 1978,

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105. I.R.C. § 408 (2003).

106. The Economic Growth and Tax Relief Reconciliation Act of 2001 amended I.R.C. § 408(a)(1) and replaced the \$2000 contribution limitation with a reference to I.R.C. § 219(b)(1)(A). Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 601(b)(1), 115 Stat. 38, 95 (2001). Under I.R.C. § 219(b)(1)(A), the amount allowable as a deduction, on the qualified retirement contributions of an individual, is limited to the lesser of the deductible amount or the compensation includible in the individual's gross income for the taxable year. I.R.C. § 219(b)(5) further defines the deductible amount as \$3000 for taxable years 2002 through 2004, \$4000 for 2005 through 2007, and \$5000 for 2008 and thereafter. Practitioners need to remember that the provisions of the Economic Growth and Tax Relief Reconciliation Act sunset on December 31, 2010, and the prior version of I.R.C. § 408(a)(1) will then be applied again. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901(a)–(b), 115 Stat. at 150. For some realistic examples of how narrow the economic margin is for working class people, see generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

107. See Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 420–21 (1998–99).

108. *Id.* at 422–23.

IRAs represented an alternative to employer-provided pension trusts, one that emphasized individual choice and responsibility for saving out of the worker's own excess income, an alternative to proposals for expansion of employer responsibility for funding and paying retirement benefits which formed the basis for ERISA enacted four years before.<sup>109</sup>

A traditional IRA can be distinguished from an unrestricted savings account in several ways. These distinctions are primarily intended to limit the size of the tax benefit inuring to the taxpayer as a result of the deferral of taxation on deductible contributions and interest earnings on accumulations in the account. However, the restrictions on early withdrawals from the account are not actual restrictions, but rather penalty mechanisms that have the effect of requiring repayment of some or all of the tax subsidy inherent in the deferral of tax on amounts contributed and held in the IRA. Because there is no annuity payment requirement, and no actual restrictions that force payouts only in retirement, IRAs are inadequate as a substitute for true retirement plans.<sup>110</sup>

The risks inherent in all defined contribution arrangements adhere to IRAs as well. Amounts in an IRA trust must be invested in something associated with some risk in order to earn any substantial rate of return. Thus, the risks of investment loss and of inability to determine whether the value of the equity held in the IRA will be sufficient to support the worker until death are as applicable to IRAs as they are to employer-sponsored defined contribution plans such as § 401(k) plans. In addition, the ease with which IRAs can be drawn upon for consumption before retirement, albeit subject to a percentage penalty and inclusion in taxable income of the amount withdrawn, make them extremely frail vessels for true retirement income support.<sup>111</sup>

The many recent changes made to traditional IRAs, as well as the enactment of new "education IRAs" and Roth IRAs, were promoted by claims that such measures would improve the national savings rate while bolstering American workers' retirement income op-

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109. See LANGBEIN & WOLK, *supra* note 46, at 73-83 (citing Michael Gordon's account of the development of ERISA).

110. See Dilley, *supra* note 107.

111. See Regina T. Jefferson, *A Farewell to Pension Policy: The Impact of Flexible IRAs on Current Tax Policy*, 69 TEMP. L. REV. 1451, 1459-61 (1996).



tions.<sup>112</sup> However, no evidence supports any real increase in the national savings rate over the last twenty years, and certainly none connects any improvement to IRAs.<sup>113</sup> The enactment of the Roth IRA, allowing permanently tax-free build-up of earnings on already taxed contributions that may subsequently be withdrawn for several purposes after as few as five years, once again reveals Congress's predilection for using tax incentives to improve retirement savings vehicles for primarily upper-middle-income taxpayers who are more likely to have substantial retirement income options through their employers.<sup>114</sup>

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112. See JOINT ECON. COMM., U.S. CONG., EXPANDING IRA BENEFITS (Dec. 1997), available at <http://www.house.gov/jec/fiscal/tx-grwth/ira/ira.htm>.

Under the current tax code, income used for consumption is taxed only once, but income used for saving is taxed at least twice. This bias discourages families from saving for future expenses. It also impedes economic growth by limiting the amount of domestic resources available for investment. Eliminating or reducing this bias through enhanced saving incentives would make the tax code fairer and more efficient. . . . Raising the contribution limit would enhance IRA tax benefits and the associated saving incentives. This, in turn, would boost the level of personal saving in the United States.

113. For example, an analysis from the National Center for Policy Analysis, shows the U.S. savings rate steadily declining: "[T]he personal saving rate in the United States has fallen from more than 8 percent in the early 1980s to about half that level today." BRUCE BARTLETT, NAT'L CTR. FOR POL'Y ANALYSIS, THE CASE FOR EXPANDED IRAS, BRIEF ANALYSIS NO. 139 (2001), available at <http://www.ncpa.org/ba/ba139.html>.

114. The treatment of contributions to Roth IRAs is governed under I.R.C. § 408A(c). Under this code section, deductions are not allowed for contributions made to Roth IRAs and contributions are limited to the maximum contribution that would be allowed under I.R.C. § 219 for the taxable year over the aggregate amount of contributions made to all other individual retirement plans maintained for the individual's benefit, other than Roth IRAs, in the taxable year. I.R.C. §§ 408A(c)(1)–(2). Additionally, some taxpayers may not be permitted to contribute to a Roth IRA because their modified adjusted gross incomes exceed the dollar limits established. *Id.* §§ 408A(c)(3), 219(g)(2)(B)–(C). Finally, contributions are still permitted to Roth IRAs after a taxpayer reaches the age of 70.5. *Id.* § 408A(c)(4). The contributions made to a Roth IRA are coming from a taxpayer's modified adjusted gross income and these contributions were subject to taxation even though they were made to a Roth IRA. However, if these contributions were properly made to a Roth IRA, then they enjoy a tax-free build-up of earnings as long as the contributions and earnings are distributed in a qualified distribution. *Id.* § 408A(d)(1). A qualified distribution generally occurs if the distribution is: (1) made on or after the date the taxpayer attains the age of 59.5; (2) made to a beneficiary or the individual's estate on or after the individual's death; (3) attributable to the individual's being disabled as defined in I.R.C. § 72(m)(7); or (4) due to a qualified special purpose as defined in I.R.C. § 408A(d)(5). *Id.* § 408A(d)(2)(A). Nevertheless, a distribution qualifying under the above definition may still be excluded from the definition of a qualified distribution if a payment or distribution is made from the Roth IRA within the five-taxable-year period that begins with the first taxable year the taxpayer made a contribution to the Roth IRA. *Id.* § 408A(d)(2)(B).

Finally, the underlying weakness of reliance on even tax-subsidized individual savings to completely fund retirement for low- and moderate-income workers is the inability of workers with little or no marginal income during their working lives to save in any substantial amount. A recent *Business Week* article puts in perspective the problem of requiring people to save for their own retirement without any public redistribution:

Katrina Gill, a thirty-six year-old certified nursing aide, worked in one of the premiere long-term care facilities near Portland, Ore. From 10:30 p.m. to 7 a.m., she was on duty alone, performing three rounds on the dementia ward, where she took care of up to twenty-eight patients a night for \$9.32 an hour. She monitored vitals, turned for bedsores, and changed adult diapers. Last month, Gill quit and took another job for 68 cents an hour more, bringing her salary to \$14,400 a year. But like so many health-care workers, she has no health-care benefits from her job. So she and her garage mechanic husband pay \$640 monthly for a policy and have racked up \$160,000 in medical debts from their youngest son Brandyn's cancer care . . . . In New York City, Joseph Schiraldi, 41, guards one of the biggest terrorist targets in the world: the Empire State Building. For eight hours a day, he X-rays packages, checks visitors' IDs, and patrols the concourse. But on \$7.50 an hour in the priciest city in the U.S., he's a security officer without security—no pension, no health care, and no paid sick days, typical for a nonunion guard.

Today more than twenty-eight million people, about a quarter of the workforce between the ages of eighteen and sixty-four, earn less than \$9.04 an hour, which translates into a full-time salary of \$18,800 a year—the income that marks the federal poverty line for a family of four (table). Any definition of the working poor, of course, involves some blurry lines. Some, like Gill, who make just above the \$9.04 wage, often bounce around the threshold with their chaotic hours, slippery job security, and tumultuous lives. . . . Overall, sixty-three percent of U.S. families below the federal poverty line have one or more workers, according to the Census Bureau. They're not just minorities, either; nearly sixty percent are white. About a fifth of the working poor are foreign-born, mostly from Mexico. And the majority possess high school diplomas and even some college . . . .<sup>115</sup>

Clearly, it is a ludicrous notion that workers like these, at or below the poverty level, and struggling to stay even there, could find enough surplus income to fully fund even a \$3000 per year IRA contribution for their eventual retirement. Moreover, these low-wage

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115. See Michelle Conlin & Aaron Bernstein, *Working . . . And Poor*, BUS. WK., May 31, 2004, available at [http://www.businessweek.com/magazine/content/104\\_22/b3885001\\_m2001.htm](http://www.businessweek.com/magazine/content/104_22/b3885001_m2001.htm).

workers make up a fourth of the work force—the working poor are not an insubstantial fraction at the bottom of the wage ladder. The call for working people to save for their care in old age is not new—but, as is discussed below, the historical record reveals no pattern of ordinary working people without substantial property or status being able to save their way into retirement at all, let alone at the ages currently considered reasonable for retirement.

### C. Attack on Social Security

Thus far, I have examined the crumbling support for two of the three legs of the traditional pension model. Private pension plans, that is, defined benefit annuity plans funded by employers and guaranteeing monthly income in retirement, are fading and being replaced by defined contribution plans, primarily § 401(k) plans that for all practical purposes are indistinguishable from individual savings through IRAs, the second leg of that three-legged stool. The third leg is Social Security, which has withstood years of efforts to seriously engage the public and policymakers in efforts to “privatize” the system. These efforts seem likely to reach a crescendo in 2005 as the Bush administration has made partial (at least) privatization of Social Security its principal domestic priority in its second term.<sup>116</sup>

The crash and subsequent depression of stock prices beginning in 2000 initially dampened enthusiasm for transforming all or part of the Social Security system into an individual private account system, similar to a § 401(k) plan.<sup>117</sup> However, the 2004 presidential campaign prompted new calls for privatization as a way to address the retirement of the baby boom generation and beyond, and to resolve Social Security’s long-term financial shortfalls.<sup>118</sup> This is the third prong of the attack on retirement, although those advocating privatization maintain that it is a viable way to maintain the retirement option for all American workers. This claim does not withstand serious scrutiny.

There have been dozens of articles in law reviews and elsewhere over the last few years addressing the Social Security privatization

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116. See *Social Security Fear*, *supra* note 14.

117. See Daniel Hager, *Think Tanks Wrap-Up*, UNITED PRESS INT’L., July 22, 2002.

118. THE PLATFORM COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA, at <http://www.gopconvention.com/platform/2004platform.pdf>.

debate,<sup>119</sup> and there is no need here to revisit the debate in its entirety. I will focus, instead, on the main characteristics of Social Security that are most important in extending the opportunity to retire to the majority of American workers, as well as the salient points of the most popular privatization proposals. An analysis of these proposals demonstrates that it is not just Social Security that is under attack, but retirement itself.

#### 1. SOCIAL SECURITY: THE SOCIAL INSURANCE PRINCIPLE

The popular view of Social Security is that it is a pension plan for all working Americans, to which they and their employers contribute, and from which they are entitled to draw the benefits they have paid for when they reach retirement age, set at sixty-five for full benefits since the inception of the program but currently rising to age sixty-seven by 2022.<sup>120</sup> In fact, Social Security is quite different from the private pension model, primarily in ways that allow it to support retirement for workers at all income levels.

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119. See Daniel Halperin, *The Case Against Privatization*, 65 OHIO ST. L.J. 75 (2004); Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effects on Women, Minorities, and Lower-Income Workers*, 64 MO. L. REV. 341 (2000); Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131 (1998); Daniel Shaviro, *Social Security Privatization and the Fiscal Gap*, 65 OHIO ST. L.J. 95 (2004).

120. See Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1130–31 (1997).

The original CES plan contemplated a program in which the benefits in the future would be completely financed by worker and employer contributions and earnings thereon, somewhat like a defined benefit private pension plan in which definite levels of benefits are promised and financed by sufficient funds that are set aside and invested for that purpose. However, because benefits would begin to be paid out to older workers before benefits were fully funded in advance, the program would inevitably require either advance infusion of general revenues, representing a “funding” contribution for future benefits, or reliance on a “pay as you go” financing scheme. The latter course was chosen.

*Id.*; see Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 107, 107–09 (1983). The age for receipt of unreduced Social Security Benefits was amended in the 1983 Social Security Amendments which provided that the age for eligibility for full benefits would increase by two months a year for people reaching age sixty-two in 2000–2005; the age is maintained at age sixty-six for people reaching age sixty-two in 2005–2016, increases by two months a year the retirement age for people reaching age sixty-two in 2017–2022, and then maintains age sixty-seven for people reaching age sixty-two after 2022. See Pub. L. No. 98-21, 97 Stat. 67 (1983).

Social Security constitutes, for each person who becomes eligible for benefits, a direct claim to a portion of the nation's production of goods and services. This claim takes the form of a stream of income in retirement, and is cashed in at the point each individual chooses to stop working once they reach the age, or otherwise satisfy the condition, of eligibility for benefits.<sup>121</sup> The form of payment obviously resembles the classic life annuity under a defined benefit pension plan, but there are important differences that further Social Security's purpose in providing a basis for retirement for workers even at low income levels.

For one thing, Social Security's benefit structure is weighted in favor of lower-earning workers, through the benefit formula; for another, benefits are increased each year through an automatic cost of living increase.<sup>122</sup> Finally, the initial benefit amount is calculated using earnings that are indexed to increases in wages, to put them in current dollars at the point of the worker's retirement, so that the initial benefit reflects increases in productivity in the economy over the worker's career.<sup>123</sup> Wage indexing is one of the most significant, yet

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121. As I have put it elsewhere, "The current formulation of the Social Security benefit calculation, based on a wage-indexed earnings record that brings old wages to current dollar levels at the time the calculation is made, guarantees that the retired worker's share of GNP in retirement will reflect her income position at the point immediately before retirement." Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C.L. REV. 975, 979 (2000).

122. In general, the primary insurance amount (PIA) an individual can expect to receive is calculated under 42 U.S.C. § 415(a)(1)(A) (1994). Using the 2004 benefit formula "bend points" the first ninety percent of the individual's average indexed monthly earnings are included in the PIA up to \$612, the next thirty-two percent of the individual's average indexed monthly earnings are included in the PIA up to \$3689, finally, fifteen percent of the individual's remaining average indexed monthly earnings are included in the PIA. Social Security Online, Benefit Formula "Bend Points", at <http://www.ssa.gov/OACT/COLA/bendpoints.html> (last visited Oct. 13, 2004). Further, for people drawing benefits from the Social Security system, the benefits increase automatically as a result of the cost of living adjustment established in 42 U.S.C. § 415(i). Of course, recent increases in the cost of Medicare premiums have cancelled out the inflation-proofing value of the cost of living increases. Leigh Strope, *Social Security Checks to Bump Up 2.1% in 2004; But Rising Medicare Premiums Will Eat into Increase*, CHI. SUN-TIMES, Oct. 17, 2003, at 42.

123. An individual's primary insurance amount (PIA) is calculated based on the individual's average indexed monthly earnings. 42 U.S.C. § 415(a)(1)(A). The average indexed monthly earnings of an individual are calculated by using the formula contained in 42 U.S.C. § 415(b). In general, an individual's thirty-five highest indexed wage earning years are used to calculate the average indexed monthly earnings. Indexing prior years wages brings past earnings to near current wage levels. Social Security Online, Examples of Benefit Calculations for Workers

least well-known, features of Social Security that underwrites low and average workers' retirement incomes because it in effect insures those workers—and the Social Security system as a whole—a fixed share of the nation's economic growth. Before wage indexing was put in place in 1977, the thirty years of earnings used to calculate benefits (after dropping the five years of lowest earnings) included the earliest years of outdated earnings, which depressed the initial benefit level.<sup>124</sup>

As a result of this benefit structure, Social Security provides a stable source of income that keeps pace with inflation and thus protects the beneficiary's spending power throughout retirement. In contrast, a private defined benefit pension annuity is usually based on selected highest years of earnings (the highest five, or something similar), which are not indexed, and very few pensions have anything like a cost of living increase. As a result, as the typical retiree ages, her Social Security benefits become a higher and higher percentage of her total income; in 1996, for persons aged sixty-five to sixty-nine, Social Security comprised less than thirty percent of total income, while for persons aged seventy-five to seventy-nine, Social Security made up almost half of total income.<sup>125</sup> These indexing features are of course much more important to average- and low-wage workers with fewer alternative sources of retirement income, and are key to the role Social Security has played in decreasing the poverty rate among the elderly.

Social Security's financing is also distinctly different from the funding pattern for private defined benefit pensions, for a number of reasons. Private pensions are sponsored and funded by a given employer, for the benefit of that company's employees, and the promised

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Attaining Age Sixty-Two in 2004, at <http://www.ssa.gov/OACT/ProgData/nominalEarn.html>. The indexing factor results from dividing the average wage index for the year the individual attains sixty by the average wage index for the year in question. *Id.* Once the highest thirty-five indexed wage years are determined, they are added together and then divided by thirty-five to come up with an average indexed yearly earnings. *Id.* These average indexed yearly earnings are then divided by twelve to finally arrive at the average indexed monthly earnings which will then be used to calculate the individuals PIA. *Id.*

124. For some background on the volatility in Social Security benefit levels that led to wage indexing, see Marilyn Moon, *Are Social Security Benefits Too High or Too Low?*, in *SOCIAL SECURITY IN THE 21ST CENTURY* 62, 62-75 (Eric Kingson & James Schulz, eds., 1997).

125. See NAT'L BIPARTISAN COMM'N ON THE FUTURE OF MEDICARE, INCOME AND ASSETS OF THE ELDERLY AND NEAR ELDERLY fig.4 (from Social Security Administration Office of Research and Statistics) (1999), at <http://medicare.commission.gov/medicare/dowdal1.html>.

benefits must be funded by the individual employer.<sup>126</sup> There is something of an insurance element in a private pension, because not all employees will eventually receive benefits, and thus forfeitures of their accrued but nonvested benefits inure to the benefit of all other participants in the plan.<sup>127</sup> Nonetheless, private pensions are essentially the responsibility of the individual sponsoring employer, and thus must be funded in advance, under ERISA, to insure ultimate payment of benefits when employees retire.<sup>128</sup>

Social Security, in contrast, spreads the cost of paying individual benefits across the entire generation of producing workers—resulting not only in redistribution of income from high-wage to low-wage workers, but also from the working to the nonworking generation. Under the “pay as you go” financing structure, current payroll tax revenues are generally used to pay benefits in current pay status.<sup>129</sup> The surpluses the system has generated each year since the late 1980s are accounted for as reserves in the Social Security trust funds, which are held in the form of U.S. government bond obligations and constitute a degree of pre-funding of benefit obligations. However, because benefit obligations are supported by the taxing power of the federal government, there is no need to require advance funding, as there is for private pensions.<sup>130</sup>

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126. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, SOCIAL SECURITY REFORM, IMPLICATIONS FOR PRIVATE PENSIONS (2000), at <http://www.gao.gov/new.items/d02225.pdf>.

127. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, PRIVATE PENSIONS IMPROVING WORKER COVERAGE AND BENEFITS (2002).

128. See *id.* at 11 (stating that employers make decisions regarding how pension benefits will accrue and be distributed, while ERISA sets limits on annual contributions and benefits that qualified retirement plans provide for each participant).

129. See Barry Bosworth, *What Economic Role for the Trust Funds?*, in SOCIAL SECURITY IN THE 21ST CENTURY, *supra* note 124, at 156, 162–63.

130. The argument for “pay as you go” financing is elegantly stated by J. Douglas Brown, who was a member of President Roosevelt’s Committee on Economic Security that developed the original Social Security legislation in 1934–35, and amendments in 1939:

To survive, a sovereign government must depend upon the continuing flow of goods and services from period to period. But unlike the private individual, its power of taxation is a more effective means of obtaining the resources it needs than the claims of any [private] bondholder. Taxation as a source of income can be spread over the whole range of economic activity and the income it produces. A sovereign government, therefore, does not need to acquire claims . . . against future income as does the private individ-

The Social Security benefit and financing structure have both come under attack as not sufficiently redistributive, fiscally unsound, not providing sufficient return on investment, and posing an insurmountable financial burden for generations to come.<sup>131</sup> My purpose here is not to provide a comprehensive answer for these criticisms, as those are readily available elsewhere.<sup>132</sup> What I want to address here is why these critiques should be seen not just as questioning Social Security, but as attacking the extension of retirement itself to middle- and lower-income workers.

The critiques of Social Security based on its long-term financing problems generally come back to a criticism of the pay as you go financing principle. Critics argue that, like private pension plans, Social Security's financing should be analyzed as a set of unfunded future liabilities, in order to correctly state the future burden on taxpayers.<sup>133</sup> If Social Security were required to finance all benefit obligations in advance, as if it were a private pension, the future unfunded liabilities would certainly be staggering in appearance. Moreover, even under the current financing structure, the system faces exhaustion of accumulated trust funds and about a twenty-five-percent shortfall sometime in the third quarter of the century, depending on what economic assumptions are used for the calculation.<sup>134</sup>

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ual . . . [T]he OASDI system is not a private insurance enterprise. As an integral part of the United States government, its claims upon future income are made good by the sovereign power of taxation.

J. DOUGLAS BROWN, *ESSAYS ON SOCIAL SECURITY* 37-38 (1977).

131. For critiques of Social Security's insufficient income redistribution, see C. Eugene Steuerle & Jon M. Bakija, *How Social Security Redistributes Income*, 62 *TAX NOTES* 1763, 1764 (1994). For discussion of Social Security's "unfunded liabilities," see Howell E. Jackson, *Accounting for Social Security and Its Reform*, 41 *HARV. J. ON LEGIS.* 59, 101-29 (arguing for an "unfunded liability" analysis of Social Security). *Contra* Robert L. Clark, *Liabilities, Debts, Revenues, and Expenditures: Accounting for the Actuarial Balance of Social Security*, 41 *HARV. J. ON LEGIS.* 161, 170-71 (arguing that Jackson's perspective ignores actuarial analysis which is more appropriate for Social Security).

132. See, e.g., Bosworth, *supra* note 129, at 156-77; Karen C. Burke & Grayson M.P. McCouch, *Privatizing Social Security: Eight Myths*, 97 *TAX NOTES TODAY* 41-81 (1997); Dilley, *supra* note 121, at 984-1026; Colleen E. Medill, *Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(K) Plans*, 81 *N.C. L. REV.* 901, 974-75; Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 *TEMP. L. REV.* 131, 132 (1998); Symposium, *Public Policy for Retirement Security in the 21st Century: Assuring the Future of Social Security*, 65 *OHIO ST. L.J.* 75 (2004).

133. See generally Jackson, *supra* note 131.

134. See John W. Snow et al., *Status of the Social Security and Medicare Programs: A Summary of the 2004 Annual Reports, Social Security and Medicare Boards of Trustees*, at <http://www.ssa.gov/OACT/TRSUM/trsummary.html>. The annual cost of



In posing the financing issue as a crushing financial burden on future taxpayers, these critics have effectively undermined public and policymaker confidence in Social Security—but perhaps as importantly, they have set the stage for questioning the broad-based retirement that Social Security makes possible. If Social Security is “too expensive,” which is what these criticisms add up to, the possible responses must involve cutting benefits or eliminating the program altogether—and either of those answers would, of course, affect lower- and middle-income beneficiaries the most, and inevitably make retirement difficult or impossible for many of them.<sup>135</sup>

Another way to look at the financing issue is to look at the generational equation. As explored in a later section of this article, historically, the aging who can no longer produce goods and services for themselves have *always* relied on their children and grandchildren to support them; it is in the nature of things that the working must, in addition to supporting themselves and their children, provide support for their nonworking parents and grandparents. To some extent, the argument that Social Security is too expensive can be reduced to a complaint that there are just going to be too many old people to be supported in the future at a price the critic is willing to pay.

There is no real question that the American economy can produce enough goods and services for all its citizens, both working and nonworking—the question is how those goods and services are to be distributed. Social Security redistributes income between generations, and between income classes; therefore, the answer to the financing problems of the system could involve either increased redistribution—higher taxes on higher-paid workers, for example—or decreased redistribution—lower or complete elimination of benefits. This is a political and social issue, not an economic one, and the an-

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Social Security benefits represents 4.3% of Gross Domestic Product (GDP) today and is projected to rise to 6.6% of GDP in 2078. The projected seventy-five-year actuarial deficit in the combined Old Age and Survivors Insurance (OASI) and Disability Insurance (DI) Trust Funds is 1.89% of taxable payroll, down slightly from 1.92% in last year's report. The program continues to fail our long-range test of close actuarial balance by a wide margin. Projected OASDI tax income will begin to fall short of outlays in 2018 and will be sufficient to finance only 73% of scheduled annual benefits by 2042, when the combined OASDI trust fund is projected to be exhausted.

135. See Moon, *supra* note 124, at 66. Table 4.2 shows that Social Security provides over eighty percent of income for persons aged sixty-five and over in the lowest income quintile, and even for the elderly in the fourth highest quintile, Social Security made up over forty-six percent of income. *Id.*

swer we devise will directly determine whether retirement continues to be an option for working- and middle-class Americans.<sup>136</sup>

The other major criticism voiced about Social Security's financing and benefit structure is the "bad deal" issue—that is, that the benefits workers receive in return for their payroll tax contributions do not constitute a good investment. This is the "rate of return" argument, which typically maintains that someone could take their payroll taxes, invest them in the stock market, and end up with more accumulated funds for retirement than they would get in benefits.<sup>137</sup> This argument has been exhaustively dissected elsewhere,<sup>138</sup> from both an economic and a political perspective, and I will not reiterate those discussions in detail here.

I would note, however, that the idea that Social Security payroll taxes constitute an "investment" and that expected benefits are the "return" on that investment, in itself reveals a fundamental misunderstanding of Social Security and its financing structure. Payroll taxes are a financing mechanism, not an investment, and the amount of payroll taxes an individual pays has nothing whatsoever to do with the amount of benefits received by any beneficiary.<sup>139</sup> Benefits are based on the individual's earnings record, which is quite separate from the individual's tax payments;<sup>140</sup> in my view, therefore, the entire "bad investment" argument is a straw man.

Here, however, I will focus on one other important aspect of the "better deal" argument that directly relates to the idea of broad-based retirement as the solution to old-age income support. Whether stated or not, the underlying assumption of the rate of return argument is that everyone who is smart enough will be a winner in the long run in private investments. Of course, it is not enough to say Social Security gives a bad rate of return on investment—the alternative offered is some sort of private account system, which intelligent investment can

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136. The work of Nobel Prize winning economist Amartya Sen cogently makes the argument for distribution, not production, as the source of poverty in the modern age. See AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 1–8 (1982).

137. For a recent iteration of this argument, see David C. John, *Using Social Security Personal Retirement Account to Create Family Nest Eggs*, TAX NOTES TODAY, Sept. 10, 2004.

138. See Dilley, *supra* note 121.

139. The Social Security Act entitles all who meet the eligibility criteria to benefits based on earnings recorded through the payroll tax withholding system. See 42 U.S.C. §§ 402, 413–415 (1994).

140. I.R.C. §§ 3101–3328 (1994).

turn, in the view of proponents, into an adequate retirement system for all Americans.

The question that usually goes unanswered, of course, is “what happens to the ones who lose money?” Since the Enron debacle that question surfaces more readily in any privatization discussion, but it deserves more focus in a discussion of why alternatives to social insurance are likely to spell the end of retirement as the modern approach to prevention of poverty in old age.

## 2. WHY PRIVATE ACCOUNTS?

The drive to privatize Social Security, whether wholly or in part, has many different versions, but the generic version would allow workers to divert at least part of their Social Security tax payments into private accounts, to be invested either under their individual direction, or, more frequently, in some sort of approved arrangement with one or more investment advising firms.<sup>141</sup> One major problem with privatization, of course, is its effect on the financing of currently promised Social Security benefits. There is really no way to privatize the system without one generation paying for retirement twice, once for Social Security benefits already promised, and again, in advance, for its own retirement. This double-pay transition poses an almost insurmountable issue, as it would require enormous income tax increases to continue financing current benefits.

The more central problem, however, is the nature of the private account system itself, which raises all of the same issues of insecurity and risk as current employer-provided savings plans like § 401(k) plans.<sup>142</sup> Individual accounts are assumed to give workers a better return on investment than their payroll tax contributions to Social Security only because of the risk that inevitably accompanies such investments.<sup>143</sup> Yet the precise reason for a social insurance system, which

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141. See PRESIDENT’S COMM’N, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS (2001), available at <http://www.ourfuture.org/docUploads/2002031131141023.pdf>; see also THE PLATFORM COMM., *supra* note 118.

142. See discussion *supra* notes 86–96.

143. See, e.g., AMERICAN CENTURY INVESTMENTS ASSET ALLOCATION HELPS BALANCE RISK AND REWARD, at [http://www.americancentury.com/workshop/articles/asset\\_allocation.jsp](http://www.americancentury.com/workshop/articles/asset_allocation.jsp) :

Next, consider the various types of investments available to you and their risks and rewards. Higher risk is associated with the possibility of higher reward and the inverse also is true. While it may seem attractive to chase the return of the latest hot stock, you’re more likely

developed in the twentieth century after millennia of experience with individuals' coping with their own old-age income needs through private savings, is to induce retirement by providing certainty of income until the retiree's death.

The purpose of a retirement system is to ensure that workers can and will retire, leaving the work force before they are forced to by physical or mental impairment without being reduced to desperate privation. Modern public retirement systems should be seen as mechanisms for maintaining consumption and supporting individual spending power throughout a working population's lifetime, as well as stabilizing income levels and preventing large disparities in the economic condition of the elderly.<sup>144</sup> The social insurance approach thus combines retirement provision with social stabilization, and annuities based on a life of work with antipoverty features, in order to make retirement the default system for income support in old age for workers at all income levels.

In contrast, a system of private accounts, despite the claims made for it by its advocates, can only accidentally provide retirement security, and then only for the fortunate few:

The private account system has a fundamentally different purpose, as well as a different ethos, from that of Social Security. All of the advantages claimed by the private account system over the public system derive from individual risk, trading the surety of at least moderate income that has underwritten the modern institution of retirement for the possibility of greater wealth in retirement (and in inheritance). Adequate retirement income is assumed as a necessary byproduct of the superior capital accumulation of the private account system, and the risk of not having sufficient equity to last until death is deemed worth taking for the sake of greater potential returns.<sup>145</sup>

The problem with risky investments, as discussed above in connection with the problems of § 401(k) plans, is that there are always losers along with the winners. That concept may be a necessary element in the capitalist market system, which requires investment risk to promote capital accumulation and thus further investment and economic expansion. But risk is not compatible with the retirement choice, which necessarily involves giving up income-producing activ-

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to come out ahead with balanced investments in stocks, bonds and money markets. For long-term growth, stocks are hard to beat . . . . But stocks also carry the highest risk.

144. See BROWN, *supra* note 130, at 20–24.

145. See Dilley, *supra* note 121, at 1015.

ity on the assumption that one's retirement income will be sufficient to the end of one's life.

The real difference between retirement systems based on social insurance and retirement systems based on individual savings and investment is that the former evens out the income distribution, while the latter accentuates the differences between the poor and the rich in old age:

Unless one disagrees with Alan Greenspan's assessment that the cyclical nature of capitalism has not been repealed, the same risks of loss and failure of private equity that overwhelmed private resources during the Great Depression will continue to apply to a private account system. . . . In addition, while the stock market can affect the distribution of wealth between winners and losers, it does not, over the long run, itself create real economic wealth. In general the market can be expected to keep pace with national economic growth, just as indexed Social Security benefits do . . . . Thus, while a system of private accounts is likely to produce some differences in the distribution of wealth between winners and losers, there is no reason to expect a higher level of income for everyone when compared with payments under Social Security.<sup>146</sup>

Private accounts may be wonderful devices for building individual wealth, but they are not an adequate retirement system for the majority of workers, particularly those at low- and middle-income levels who have much less margin for error and bad luck in investment.

Recent studies have revealed that, in the end, even those with decent luck in their investment experience may not do better with private accounts than they would under the current Social Security system because of the costs associated with investment management. Advocates for private accounts tend to downplay both the transition costs, discussed above, and the transaction costs of running such a system.<sup>147</sup> However, almost all of the most likely versions of a privatized Social Security system include mechanisms to moderate the risk of individual investors by having the investments managed by professional investment firms, through one sort of mutual fund or another.<sup>148</sup> The tradeoff for this lessening of risk, of course, is the lower-

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146. *Id.* at 1016.

147. See generally Laurence J. Kotlikoff, *Privatizing Social Security at Home and Abroad*, 86 AM. ECON. REV. 368, 370 (1996); Schieber & Shoven, *supra* note 13, at 376; Lewis D. Solomon & Geoffrey A. Barrow, *National Issues: Privatization of Social Security: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 9, 23 (1995).

148. See PRESIDENT'S COMM'N, *supra* note 141.

ing of the possible upside of return on investment, as well as the cost of management itself.

This cost is not highlighted in general, either by advocates of privatization or by investment firms themselves. But the administrative costs for a private investment system would clearly be much higher than the costs of administering the Social Security system, which is about one-half of one percent of the total outlay in benefits each year.<sup>149</sup> This figure covers salaries of Social Security Administration employees, maintenance of field offices, computer systems, and other costs.<sup>150</sup> Moreover, because management and investment of the trust funds generally require little activity beyond purchase and sale of government bonds, the investment costs of the public system are minimal.<sup>151</sup>

The same cannot be said for the administrative costs of personal accounts, which could amount to as much as ten to twenty-five percent of the amounts deposited in fees paid to investment advisors, stock brokers, and various types of investment and transaction fees. A recent study which analyzed one privatization proposal from President Bush's Commission on Social Security concludes that the expenses that would be paid to investment managers would be equal to more than twenty-five percent of the existing deficit in Social Security, and equal to the amount of savings that would be realized by raising the retirement age by six months.<sup>152</sup>

Transferring even a part of Social Security payroll tax revenues to private accounts would "be the largest windfall gain [to investment managers] in American financial history. The \$940 billion

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149. See SOC. SEC. ADMIN., PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2003, at 58 (2003), available at [http://www.ssa.gov/finance/2003/FY03\\_PAR.pdf](http://www.ssa.gov/finance/2003/FY03_PAR.pdf).

150. See SOC. SEC. ADMIN., THE FISCAL YEAR 2005 BUDGET PRESS RELEASE (Feb. 2, 2004), available at <http://www.ssa.gov/budget/2005bud.html>.

151. In 2003, the administrative costs for the Old-Age and Survivor's Insurance Programs were \$2.6 billion, compared to benefit payments of \$400 billion—about 0.5% of outlays. See 2004 Trustees' Trust Fund Financial Operations in 2003 tbl.II.B.1., available at [http://www.ssa.gov/OACT/TR/TR04/II\\_cyoper.html#wp94983](http://www.ssa.gov/OACT/TR/TR04/II_cyoper.html#wp94983). Interestingly, the administrative costs for the Disability Insurance program, which requires substantive individual determinations of eligibility for benefits through a state-federal partnership arrangement, cost \$2 billion to administer for \$70.9 billion in benefits. *Id.* This comparison demonstrates the administrative efficiency of the retirement entitlement program that requires no income or other type of eligibility investigation.

152. Austan Goolsbee, *The Fees of Private Accounts and the Impact of Social Security Privatization on Financial Managers*, Sept. 2004 (on file with *The Elder Law Journal*).

payment to financial companies would be an increase more than eight times larger than the decrease in revenue from the 2000–2002 collapse of the [stock market] bubble . . . . For a worker at the average income level, the higher fees in privately managed accounts are likely to reduce the retirement value of their individual accounts by twenty percent . . . .”<sup>153</sup>

The attraction of private accounts to many Americans is undeniable, particularly to younger workers who have been convinced that Social Security will not be available to them when they retire. When the particulars of the private account alternative are examined, however, it seems clear that the advantages are more imagined than real for most workers, particularly those with lower incomes and accumulated wealth, and thus lower margin for error.

### 3. THE IMPORTANCE OF IDEOLOGY

The power of marketing and imagery in the campaign for privatization cannot be underestimated. The campaign against a truly secure retirement grounded in private pension annuities, Social Security benefits, and private savings has been accompanied by an aggressive advertising blitz by investment advisors aimed at convincing Americans that surrendering their retirement system to private experts will insure a halcyon old age.<sup>154</sup> It is remarkable that those most negatively affected by this trend away from redistribution and toward individually financed old-age poverty have somehow been convinced that this change is in their own best interests.<sup>155</sup> This ideological campaign has succeeded in making acceptable the increasing disparity in wealth distribution in the United States, recently demonstrated by U.S. Census data as substantially more unequal in 2000 than in 1973.<sup>156</sup>

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153. *Id.*

154. See, e.g., Brooke Southall, *Schwab Employing Snob Appeal in Ads Courting Affluent Investors; Firm Wants Bigger Piece of 401(k) Pie*, INVESTMENT NEWS, Jan. 19, 2004.

155. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES—INCOME EQUALITY, TABLE IE-3, HOUSEHOLD SHARES OF AGGREGATE INCOME BY FIFTHS OF THE INCOME DISTRIBUTION: 1967 to 2001, available at <http://www.census.gov/hhes/income/histinc/ie3.html>.

156. In 1973, the households which made up the bottom forty percent of the share of aggregate income earned approximately 14.7% of the total income, while households encompassing the top five percent of the share of aggregate income earned approximately 15.9% of the income. In 2000, the inequality in income rates had substantially grown with the households which made up the bottom forty percent of the share of aggregate income earning approximately 12.5% of the total income, while households encompassing the top five percent of the share of aggregate income earned approximately 22.1% of the total income. *Id.* Another telling figure is to examine the mean income received by households adjusted for in-

With increasing gaps between the wealthy and the poor has come increasing economic insecurity for working-class Americans, yet those workers are apparently expected to believe that they can save their way to financial security and a comfortable retirement, all economic and personal experience to the contrary notwithstanding.<sup>157</sup>

The public image of retirement, as presented by television, radio and print ads, is one of prosperous leisure, at the beach preferably, with the young-looking middle-aged retirees clearly enjoying good health and no financial problems.<sup>158</sup> These campaigns are aimed at luring private investors with sufficient means to justify the fees of the investment firms sponsoring the advertising, but they reinforce the public perception that controlling one's own investments for retirement (with the wise advice of investment firms as a guide) will lead to a sort of "retirement heaven" for everyone.

However, there is a more insidious message embedded in these optimistic predictions that working people can save enough to finance a comfortable, and even early, retirement. What if investments do not produce enough income? What if there are family emergencies (for example, catastrophic health issues or layoffs) that prevent sufficient savings? The not particularly subtle subtext of the private savings argument is that if you arrive at retirement without sufficient income or assets, it must be your fault—you have been improvident, careless, lazy, or not quite clever enough in your investment strategy.

All of these factors are really "risks" that are insured against under the insurance model, whether for private pensions or for Social Security. For those advocating individual savings as an adequate substitute for employer-provided pensions, however, they are something akin to moral failings, and those who exhibit such failings perhaps de-

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flation. From 1973 until 2000, the mean income received by households in the bottom forty percent increased by approximately twenty-five percent while the mean income received by households in the top five percent nearly doubled. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES—HOUSEHOLDS, TABLE H-3, MEAN INCOME RECEIVED BY EACH FIFTH AND TOP 5 PERCENT OF HOUSEHOLDS (ALL RACES): 1967 to 2001, available at <http://www.census.gov/hhes/income/histinc/h03.html>.

157. See, e.g., Southall, *supra* note 154.

158. For example, Charles Schwab Corp. has focused its 2004 ad campaign, "This is where we come in," more towards retirement investing and § 401(k) business. *Id.* Additionally, other financial services firms, including Fidelity, Merrill and TD Waterhouse have launched services and ad campaigns aimed at managing retirement accounts. Ruth Simon, *Wall Street Targets Retiring Boomers—Fidelity, Merrill, Others Launch Services Aimed at Managing Funds Rolled Over from 401(k)s*, WALL ST. J., July 14, 2004, at D1.



serve charity but nothing more—an approach much closer to the fourteenth century’s way of aging than its advocates would care to admit.

#### D. Prospects for Retirement: Brave New World or Impoverished Old One?

The current structure that has supported retirement in America for seventy years is clearly weaker than it has been at any time since the Great Depression of the 1930s.<sup>159</sup> Far from crumbling under its own weight, as privatization and other advocates for individual savings systems would argue,<sup>160</sup> it is clear that the various elements of the system are under deliberate attack.<sup>161</sup> Employers have revolted against bearing the costs of retirement systems, and making the long-term commitment to the traditional defined benefit pension. Conservative economists and politicians have mounted a determined campaign against redistribution through the public retirement system and have for three decades worn away public confidence in the idea of social insurance.

These advocates argue that a retirement system based on individual savings and investment is preferable for most workers to the current one, primarily because of the looming cost of maintaining retirement for the larger future aging population.<sup>162</sup> The problem of supporting the aging baby boom is presented as an unprecedented burden, one that can only be addressed by an “every man for himself” approach. The generally unstated assumption of this approach is that those who lose in the market, who do not manage to save enough for their old age, will constitute a small minority, and will be forced back onto various systems of public and private charity for maintenance at some publicly acceptable level of poverty.

This view, I argue, is ahistoric and ignores the experience of generations in the past who, contrary to popular belief, did have to develop some sort of system for maintaining a significant population of

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159. See discussion *supra* notes 30–114.

160. See, e.g., Kotlikoff, *supra* note 13.

161. See discussion, *supra* notes 40–151; see also *Social Security Fear*, *supra* note 14. “If the \$10 trillion figure [claimed to be the Social Security Shortfall] is essentially bogus, so is the claim that Social Security is in crisis . . . . In effect, the administration’s plan would get rid of the financial burden of Social Security by getting rid of Social Security.”

162. See Christopher T. Kelley, *Uncertainty in the Golden Years: The Growing Demands upon the American Retirement Security System*, 2 *ELDER L.J.* 225, 225–27 (1994).

the old and frail who could no longer work. It also inflates the problem of supporting the admittedly larger population of elderly expected in the future by ignoring the dramatic progress in economic productivity over the last century. We are facing, with the future aging of the large post-war baby boom generation, not a question of adequate production of goods and services, but of equitable distribution of those goods and services, which will almost certainly require increased redistribution from rich to poor.

In order to fully understand the basis for our current retirement system, both public and private, and to put the future problems of our aging population in perspective, it is necessary to look at least briefly at the history of aging and of human societies' approaches to caring for the elderly. The truth is that old age is not new; what is different about the modern era is the development of middle- and lower-class access to retirement as the way to provide for most people in their old age.

## II. Old-Age Support Versus Retirement Support: The Historical Record

The ongoing attack on the American way of retirement is justified by some as necessary to adapt to demographic realities, namely that people are living longer, we will have far more elderly people alive in the coming decades than ever before in human history, and our current retirement system was designed for a population that before the twentieth century never lived much past age fifty-five or sixty anyway.<sup>163</sup> But is the modern era so different from the human past? Have human societies never faced the issue of supporting substantial numbers of aged people who could no longer work productively? The answer, according to the historical record, is that of course they have.

A brief examination of the history of aging and retirement reveals that some of the most enduring structures of human social organization are centered on mechanisms to ensure that the elderly are taken care of, either through control and inheritance of property, or, for those without property, through social welfare mechanisms of one sort or another. The old have always been with us, but retirement and public pension systems have not. If public and private pension pro-

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163. See LANGBEIN & WOLK, *supra* note 46, at 5.

grams were to be eliminated or greatly diminished in favor of individual savings plans of some sort, what kind of world would the elderly face? The past gives some clues for the future.

### A. The Premodern Old-Age Experience

Most analyses of retirement in America begin with Chancellor Bismarck's identification in the late 1800s of age sixty-five as the most appropriate retirement age upon which to base receipt of public pensions.<sup>164</sup> However, ages between sixty and seventy have apparently been thought of as the beginning of old age since at least the days of the Roman Empire and probably before.<sup>165</sup> Modern pension analysts tend to begin our examination of retirement and old-age issues with the rise of industrialization in the eighteenth and nineteenth centuries.<sup>166</sup> We also tend to assume that old age itself is essentially a modern phenomenon, and that low life expectancy rates in the pre-industrial era must have precluded people in earlier eras from worrying about supporting the exceptional few who lived beyond age fifty or so.<sup>167</sup>

Yet an examination of the historical evidence reveals that even from the beginning of recorded human history in Mesopotamia, a substantial portion of the population in every era lived into old age, and the issue of how the elderly were to live and work was always present.<sup>168</sup> In this section, I will look at the historical evidence about how past societies have dealt with the fundamental questions that are at the core of current debates about retirement—how long should

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164. See WILLIAM GRAEBNER, *A HISTORY OF RETIREMENT* 249 (1981). More recent historical works, however, particularly on aging in Europe and Britain, present a richer and surely more accurate picture of the demographics and social experience of aging. See *infra* notes 197–204 and accompanying text.

165. See COKAYNE, *supra* note 9, at 1.

166. See generally DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880–1990* (1998).

167. See, e.g., LANGBEIN & WOLK, *supra* note 46, at 5.

Bismarck popularized the notion of age 65 as the appropriate retirement age when he set that age for benefits to commence in the state pension program he introduced in Germany in 1889. Notice, however, that age 65 was well beyond the then-normal life expectancy. Translated to modern life expectancies, Bismarck's plan was roughly equivalent to a pension program whose benefits would commence when the participants reached their mid-80s.

*Id.* As will be seen in the discussion below, the last statement may be a bit off the mark.

168. See HARRIS, *supra* note 6.

humans be expected to work productively, and how should they be provided for once they can no longer work productively?

Prior to the public redistributive pension systems instituted in the Western industrialized countries beginning in the late nineteenth centuries, retirement was available only for the elite. Nonetheless, some old people of all economic classes have always lived beyond their ability to support themselves, becoming dependent on others for care and support until death. Their anxiety about how best to insure continued control of their resources and maximum independence has apparently been part of the human condition since ancient times.

### 1. GROWING OLD IN THE ANCIENT WORLD

It is commonplace for modern analysts to assume that premodern humans had extremely short life-spans, and that old age would therefore have been an extremely unusual experience if not an impossible goal.<sup>169</sup> Our knowledge of prehistoric human life-spans and possible cultural structures for aging care is essentially limited to speculation—but at least as far back as written records can be researched, family relations and how the elderly should support themselves, or be supported, were matters of concern. Most importantly for my purpose here, it is possible to see the roots of the strong cultural dynamic of family organization as a way of caring for the weak—the young and the old—and as a way for the elderly to control resources to insure their own care until death.

*a. Ancient Mesopotamia* In ancient Mesopotamia, for example, the sources are primarily literary and indirect; nonetheless, scholars have concluded that while chronological age was not important to Mesopotamians, “age-appropriate” behavioral norms can be discerned from

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169. I would note that some paleontologists have questioned conclusions about typical life-spans drawn from analysis of ancient skeletons, asserting that “biases in the deposition, recovery or aging of skeletons” make drawing conclusions about average life-spans extremely problematic. Robert McCaa, *Calibrating Paleodemography: The Uniformitarian Challenge Turned*, paper presented at the American Association of Physical Anthropology Annual Meeting, Apr. 2, 1998, at <http://www.hist.umn.edu/~rmcaa/paleo98/index0.htm>. McCaa suggests that our view that prehistoric and ancient people lived only to their early thirties may be skewed by problems with the skeletal data itself: “[T]he constancy of the patterns [for skeletal data sets] revealed here points to bias as the likely answer—that the collections are not representative of any once-living population, stable or otherwise, and that skeletal aging procedures distort true age structures.” *Id.*

the language itself and from written sources such as the epic *Gilgamesh*.<sup>170</sup> These ancient writings reveal the importance ancient people placed on having children who would care for their parents in old age and would carry out required offerings for them after their death.<sup>171</sup> Such a finding is hardly unexpected—but how many such elderly parents would have lived long enough to require such care?

Again, demographic data on ancient cultures is in short supply, but at least in the millennia before the Christian era (B.C.E.), maturity was thought to have been reached somewhere in the fifties or sixties, and old age somewhere in the eighties.<sup>172</sup> While we have no way of estimating how many people reached the age of sixty or beyond in the biblical era Mediterranean world, there are numerous references in the surviving literature fragments to aged men as wise counselors who held political and military offices for life, in a hereditary system. Other types of ancient sources also support the idea that being “old” was not exceptional or even highly unusual:

The old appear in numerous work lists throughout Mesopotamian history. Their participation in the work force not only indicates that there was not an institutionalized retirement age, but also may suggest a fear of dependency, although ideally one looked to sons for support when working was no longer possible . . . In the hierarchy of workers, the head worker was the father; lower ranks were held by sons in order of seniority.<sup>173</sup>

Even though aged men and women probably did not comprise a large percentage of the population, living beyond one's capacity to provide for oneself was clearly not uncommon, given the ancient Mesopotamian practice of “giving” old people, along with others who could not care for themselves such as children and disabled people, to the temple, to be cared for by the priests.<sup>174</sup> It seems likely that the older generation used its control over property and resources, through an inheritance system in which the father retained control

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170. See generally HARRIS, *supra* note 6.

171. *Id.* at 5–6 (“Descendants vouchsafed support in old age and for a generation or two the promise of offerings and prayers to the dead, though it is doubtful whether a long-term cult of dead ancestors existed except for royalty. . . . The most horrific of curses was the decimation of descendants so that ‘one’s brazier was extinguished’ . . .”); see also *id.* at 66 (“Poignant is the Old Babylonian letter a woman sent to her brother in which she says: ‘Now I have [acquired and] am raising a boy, telling myself: Let him grow up, so that there will be somebody to bury me.’”).

172. *Id.* at 28.

173. *Id.* at 64.

174. *Id.* at 64–65.

over land until his death, in order to insure care in old age. In fact, men appear to have normally married somewhat late in life, in their midthirties, after the death of their fathers, the point at which they would come into control of the family property.<sup>175</sup>

Thus, while perhaps not as frequently as in later times, people did live into old age even in the preclassical period, and often enough that their inability to care for themselves gave rise to social structures like inheritance patterns giving parents control over adult children, and some form of social welfare that allowed helpless or perhaps impoverished elderly to be cared for in religious institutions. Clearly, the old were expected to work until death if they were able to—there is no suggestion in the literature that even the elderly were excused from service because of age alone.

*b. Ancient Rome and Greece* Somewhat more extensive indications of how aging individuals fit into society are available for ancient Greece and Rome; in fact, it is startling to find attitudes and mores in Roman letters and speeches that would not be out of place in twenty-first century America.<sup>176</sup> The notion of retirement from public life had, by the time of the Roman Empire, become an accepted course of action for men of means and standing who would never have had to work to support themselves economically even when young.<sup>177</sup> Pliny the Younger summarized the possible ancient consensus on retirement:

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175. *Id.* at 69–70.

176. For example, “Plato has the elderly Cephalus remark to Socrates: ‘Men of my age flock together and at our meeting the tale of my acquaintance commonly is, I cannot eat, I cannot drink; the pleasures of youth and love are fled. Some complain of the slights that are put upon them by relatives, and they will tell you sadly of how many evils their old age is the cause.’ . . . Cicero . . . believed that [old men] imagined themselves ‘ignored, despised and mocked at’ . . .” COKAYNE, *supra* note 9, at 79.

177. TIM G. PARKIN, OLD AGE IN THE ROMAN WORLD: A CULTURAL AND SOCIAL HISTORY 125 (2003).

The only sorts of retirement we tend to hear of are basically voluntary ones, such as individuals from political life . . . or the cessation of campaigning for soldiers. Any other ancient reference to retirement, if it does not mean a gradual process of withdrawal and cessation of labor through inability to perform (in which case ‘retirement’ is a euphemism), is simply the situation of someone with the required means choosing to withdraw from earlier activities, or wishing it could happen.

*Id.*

This is the right way to grow old for a man who has held the highest civil offices, commanded armies, and devoted himself entirely to the service of the state for as long as it was proper for him to do so. For it is our duty to give up our youth and manhood to our country, but our last years should be our own; this the laws themselves suggest in permitting the older man to withdraw to leisure.<sup>178</sup>

For ancient Romans, old age appears to have been considered to begin around age sixty, although there is no indication of categorization of those over that age as a specific group with common interests. Moreover, aging was considered to be a matter of diminishing ability to function, not of simply reaching an age and being no longer expected to function.<sup>179</sup> Peasant Romans, far from being able to choose a “graceful retirement,” like Pliny, were apparently, despite aging, expected to continue to labor as long as they were physically able and needed earnings to support themselves.<sup>180</sup>

It appears that substantial numbers of ancient Romans lived long enough for aging to become a public, as well as a private issue. Life expectancy, once a Roman survived infancy, was not much lower than it would later be for Europeans and Americans at the turn of the twentieth century.<sup>181</sup> Parkin estimates, from a variety of types of evidence, that at least six to eight percent of the population of the Roman Empire was over age sixty—in contrast, the percentage of those aged thirty to thirty-four was probably around seven to eight percent at the

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178. *Id.* at 128. Pliny went on to express his hopes for himself: “I wonder when this will be permitted to me—when shall I reach the age which will allow me to follow your noble example of a graceful retirement, when my withdrawal will not be termed laziness but rather a desire for *tranquillitas*?”

179. *Id.* at 25.

180. *Id.* at 224–25 (“The dread of a combination of old age and poverty is one strongly expressed in the extant literature, even though for [noble and literate] writers no such combination would have been a realistic prospect . . . [E]ven Cicero, in his consolation for old age, has Cato admit . . . that . . . an old age of extreme poverty cannot be tolerable even for a wise man . . . . But the literary sources . . . fail to furnish us with reliable and realistic depictions of the life of the elderly poor, despite the fact that we may assume that some 5 to 10 percent of the overall population of the Roman world at any one time would have been over the age of 60 years and that the vast majority of them would not have been affluent . . . . The poor could of course turn to mendicancy in old age. . . [as of late in the fourth century] the only ‘legal’ sort of beggar came to be one who was old and/or physically handicapped.”); see also COKAYNE, *supra* note 9, at 6–7 (“[Ancient texts reveal that a] physically and mentally fit old man was still able to fulfill a useful function in society and had status and prestige. Only the old who were weak and decrepit—and who were therefore no longer socially useful—had a marginal status in society.”).

181. See PARKIN, *supra* note 177, at 124.

same time.<sup>182</sup> By way of comparison, about fifteen percent of the population in the United States is over age sixty-five today, supported by a vastly more productive and efficient economy. The big difference in percentages is largely accounted for by differences in birth rates, not longevity—lower birth rates since the 1970s in the U.S. and Europe have led to a lower percentage of youth and a higher percentage of the elderly in the total population.<sup>183</sup>

In the ancient world, people seem to have expected to live into their sixties and many Romans lived into their seventies and eighties, even though it was probably not the norm.<sup>184</sup> Still, it must have been a common enough occurrence for public regulations to excuse men over age seventy from a variety of public obligations, ranging from physical labor to local governing obligations.<sup>185</sup>

There was no system of general public pensions in the ancient world, but as in ancient Mesopotamia, the parent-child compact lasted throughout life.

The precept of honoring one's parents is an ancient one, common to most civilizations and to most periods of history. Among the Romans *pietas* expressed the virtue very well. . . . *Pietas*, it must be remembered, was a reciprocal arrangement: parents had the duty of bringing up their children, and the children in return were expected to repay this 'debt', of both life and nurture, by providing support for their parents when they in their turn were in need—in their old age. . . .<sup>186</sup>

However, there appears to have been no legal requirement imposed upon adult children to support their parents—as in history before and after the Roman Empire, the older generation controlled family property and therefore controlled the condition of its care by the younger generation.<sup>187</sup>

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182. *Id.* at 49.

183. *Id.* at 47–48.

184. *Id.* at 44.

There is ample historical evidence from the classical period . . . of people surviving into their nineties and beyond . . . . It is important to remember that, despite the demographic transition following the industrial revolution and the advances in medicine in the twentieth century, people do not live significantly longer today than they did in the historical past. In classical times, dying when one was in one's sixties or beyond was regarded—at least officially—as natural; to die younger was usually seen as a harsh and unnatural fate.

185. See generally *id.* at 93–137 (“[T]he age of 70 years is explicitly stated several times as excusing the individual from undertaking the burdens of the tutorship and curatorship.”).

186. *Id.* at 205.

187. *Id.* at 215.



The care of older people who had no living children to care for them, and no property in their control upon which they could depend for support was apparently not a major subject of public concern.<sup>188</sup> The written sources reveal only isolated instances of public support for certain citizens, such as athletes or military veterans who might be entitled to land or some type of economic support in old age.<sup>189</sup> The elderly were entitled to the same public charity as all other Romans—free grain distributions, for example—but apart from occasional charitable bequests for the benefit of those unable to care for themselves (children and the aged), the elderly poor were forced to rely on the generosity of friends or frequently a surviving younger spouse for support.<sup>190</sup> Elderly slaves were cared for by responsible owners, and abandoned to die by less responsible ones.<sup>191</sup>

It seems that while the ancient world had a substantial older population, there was little or no awareness of any special public welfare need for older people.<sup>192</sup> Older people were expected to continue in productive work as long as they were able, unless they had the means to voluntarily retire, an option open only to the wealthy upper classes.<sup>193</sup> When older persons were no longer able to work or care for themselves, their children were expected to care for them; those who had no children were essentially at the mercy of friends or casual charity.<sup>194</sup> Thus, we see a clear bifurcation in income maintenance of the elderly—retirement for those with means, work and reliance on family for everyone else, and haphazard charity for those with neither wealth nor family.

## 2. PREMODERN EUROPE—ORIGINS OF WORK-BASED PENSIONS

In the two thousand years since Pliny longed for a quiet retirement from public life, Western society has developed several successive models for dealing with the elderly, who at all times have comprised a more than insignificant portion of the population. A complete exploration of the treatment of aging up to the changes wrought by the Industrial Revolution is beyond the scope of this es-

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188. *Id.* at 216–17.

189. *Id.* at 217.

190. *Id.* at 218.

191. *Id.*

192. *Id.* at 217–18.

193. *Id.* at 219.

194. *See id.* at 169, 201, 276.

say, but a few major approaches are important to note, both for their consistency and continuity with the ancient world's treatment of the elderly, and for the evolving notions of social welfare that can be seen developing even during the middle ages.

First, it is important to note that throughout the medieval period and into the later premodern period up to the eighteenth century, old age was considered to begin, as it had been for thousands of years, some time around the age of sixty.<sup>195</sup> The devastation of the Black Death plague, beginning in the 1340s in Europe and recurring sporadically through the next century, probably skewed adult life expectancy downward, but over the medieval and renaissance period as a whole, "those who survived childhood had a fair chance of living to be fifty or sixty, even seventy years of age."<sup>196</sup>

Second, in the predominantly agrarian premodern world of Europe and later North America, as had been true in ancient societies, old age was not in itself associated with cessation of work. The old were a part of society generally at whatever social level they had been born to, so that the elderly of the laboring classes were expected to continue to work,<sup>197</sup> while those with some property or other means had better options in old age, primarily continued control of property and family power until death and transfer of both to the next generation, a familiar pattern from ancient times.<sup>198</sup> In the absence of other types of support, the elderly who reached the point of complete incapacity were dependent on family, church, or local organized poor relief.<sup>199</sup>

Third, a more organized approach to old-age provision began to emerge in this period, both for the peasantry and for the urban skilled craftsmen. The concept of retirement began to spread beyond the landed aristocracy, in response to the needs both of the workers, but also in some cases of their "employers," in this case, the landed nobility who in some areas tightly controlled the land and conditions of work of their fiefdoms.<sup>200</sup>

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195. SHULAMITH SAHAR, *GROWING OLD IN THE MIDDLE AGES* 171 (Yael Lotar trans., 1997).

196. *Id.* at 32.

197. *See id.* at 171.

198. *See id.* at 95–97, 147.

199. *See id.* at 163–70.

200. *See generally* MARC BLOCH, *FEUDAL SOCIETY* 145–62 (L.A. Manyon trans., 1961).

For peasants who controlled their own land, the pattern looks very much like the millennia-old approach to old-age income security—the aging father would either remain in control of the property and monetary funds even though he ceased to work the property, or in some areas, “the aging peasant retired and transferred the holding to one of his sons, who then became the head of the household.”<sup>201</sup> In urban areas, the growing skilled craftsman class organized into guilds early in the medieval period, primarily for protection of each craft’s monopoly over its sphere of work, but also for social welfare purposes. Part of the dues paid by each member into the guild was reserved for various kinds of assistance for its members, including financial support for aged members who were no longer able to pursue their craft.<sup>202</sup> Thus, the connection between old-age assistance and attachment to specific employment could be said to have been made at least by the fourteenth century.

In summary, the historical record through the pre-industrial era in the West shows remarkable consistency in the treatment of the elderly and the problem of their support, as well as in the expected life-spans of adults, who appear to have considered themselves “old” only when they reached age sixty or so. Throughout history, those with property assured their own financial well-being in old age by controlling the terms of transfer of that property to the next generation. Those without property, on the other hand, worked essentially until death or until ill-health prevented further work, at which point they either lived on accumulated savings, with the help of family and friends, or on the charity of the Church, and later of the government.

## B. Purposes of Retirement in an Industrialized World

The development of organized private and public retirement systems as part of the growth of industrialization has been explored by numerous scholars,<sup>203</sup> so there is no need to discuss the changing

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201. SAHAR, *supra* note 195, at 146. The latter arrangement could involve a formal maintenance agreement between father and son, perhaps brokered by the local village leaders, or by the lord of the demesne estate (where the peasant farmer would be a tenant rather than a landowner), who would protect his interest in having the land properly worked by a productive laborer.

202. *Id.* at 136–37.

203. See, e.g., HABER & GRATTON, *supra* note 4; ORLOFF, *supra* note 4; JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE* (1988); THANE, *supra* note 5.

patterns of industrialization in detail here. However, in order to appreciate fully the radical change in retirement expectations that began in the twentieth century, it is necessary to highlight two aspects of the beginning of the industrial retirement model. On one hand, we see the persistence of ancient historical patterns in dealing with old-age support, while on the other, in the wake of major changes in the way labor was organized and controlled, we see the beginning of a new approach with retirement reliant on work-based entitlement.

#### 1. PERSISTENT PATTERNS OF INTERGENERATIONAL SUPPORT

There is a remarkable continuity from the premodern to the modern era in attitudes and prevalent means of income maintenance and care of the aging. The same themes predominate that we have seen since ancient times: the primary responsibility of adult children for the care of parents, the control of resources by the elderly to insure that their children live up to those responsibilities, the desire of elderly people for independence and continued useful existence, the expectation of society that working people would work virtually until death, and the bifurcation of the opportunity to retire—available for those with means during their working lifetimes, out of reach for those with a life of work but little accumulated property.

In eighteenth-century England, for example, as the country moved from agrarian and village organization to industrial labor and urban center dominance, old age was still thought to begin around age sixty, and individuals in that age group and above still expected and desired to remain independent and to work as long as possible.<sup>204</sup> The elderly of all social classes essentially relied on themselves, on family, and, for those at the bottom end of the economic scale, on local community assistance for support.<sup>205</sup> Contrary to some popular im-

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204. SUSANNAH OTTAWAY, *THE DECLINE OF LIFE, OLD AGE IN EIGHTEENTH-CENTURY ENGLAND* 7 (2004).

205. *Id.*

The locus of responsibility for the elderly is best thought of in terms of a tripartite divide: the family, the community, and the older individuals themselves. The three were integrally connected, and each aged individual was likely to rely on some combination of these sources of support . . . Eighteenth-century English families certainly felt that there was a moral obligation to support their elderly members . . . Moreover, this duty was established by law, even if the law was seldom applied: the poor laws stipulated that children should support their aged parents . . . Clearly, there was a cultural ideal of familial responsibility for elder-care at this time.

ages of the experience of aging before Social Security, the three-generation household, while not uncommon, was more likely to occur in households of some means, where the elderly were giving assistance rather than needing it.<sup>206</sup> The lower the household income, the more likely elderly persons were to be living alone and needing community assistance.<sup>207</sup>

In the United States, industrialization did not fully take hold until after the Civil War and the completion of white settlement of the American West.<sup>208</sup> In this still largely agrarian society, the majority of older Americans worked on family farms, and while retirement was not unknown, complete cessation of work was unlikely even in old age.<sup>209</sup> However, the classic pattern we have seen stretching back to ancient Mesopotamia still prevailed in farm families, indeed in all families with some sort of working property: the older generation would secure its own support in old age through continued legal control and ownership of the property, and the conditioning of inheritance by the younger generation on maintenance of the elder until death.<sup>210</sup>

The notion of retirement itself was still largely restricted to the propertied and professional classes, who were expected to save enough to provide for their old age, through purchase of annuities or otherwise.<sup>211</sup> However, in this period retirement began to be dis-

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206. See *id.* at 7–8.

207. *Id.* at 8.

208. Jonathan Prude, *Town-Factory Conflicts in Antebellum Rural Massachusetts*, in *THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION* 71, 71–102 (Steven Hahn & Jonathan Prude eds., 1985) (interpreting the agrarian influence in American patterns of industry). See generally WALTER LICHT, *INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY* (1995); RICHARD SLOTKIN, *THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION 1800–1890* (1985).

209. See HABER & GRATTON, *supra* note 4, at 29–30:

Gender, marital status, and economic standing controlled farm-family experience. The myth of the extended farm household had some validity for the wealthy, married and native-born. Aging male farmers generally retained the role of household head. Their valued property encouraged younger members to remain in the household and provide their assistance. . . . Poorer families, however, exhibited different patterns of family structure. The less affluent struggled as hired hands and subsistence farmers. . . . Additional family members did not necessarily contribute to their well-being.

*Id.* See generally DAVID HACKETT FISCHER, *GROWING OLD IN AMERICA* (1978).

210. See HABER & GRATTON, *supra* note 4, at 88–89; see also W. ANDREW ACHENBAUM, *SOCIAL SECURITY: VISIONS AND REVISIONS* 105 (1986).

211. See HABER & GRATTON, *supra* note 4, at 104.

cussed as something that should be available to the laboring classes, even though in reality most workers were still expected to work up until death, and the indigent elderly were at the mercy of whatever care was available in their local communities.<sup>212</sup> Despite the rumblings of the need for pensions for all, the expectation of most workers in industrial and farm labor was to work until physical debilitation prevented further work, with death following shortly thereafter.<sup>213</sup>

## 2. RETIREMENT AND INDUSTRIALIZATION OF THE LABOR FORCE

The persistence of traditional behavior patterns of families and aging individuals notwithstanding, the industrial revolution did eventually transform the agrarian economy and family-based farm society both in Western Europe and in the United States, and as a result, began to change the ways in which individuals and families approached the care of the aging. As the types of skills necessary for work changed, new systems of economic support for elderly individuals who could no longer work in the industrial context came to be seen as necessary.<sup>214</sup> Probably of equal importance to the growth of the idea of retirement for all is the great increase in overall wealth of American society, among the aging as well as the young, brought about by industrialized work and increasing productivity. Although income was not distributed evenly, and poverty remained a problem in both urban and rural areas, before the Great Depression there probably was not a particularly dire rate of poverty amongst the elderly in particular.<sup>215</sup>

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212. *Id.*

213. *See id.* at 71.

214. *See* ORLOFF, *supra* note 4, at 99:

The shift to the predominance of waged work concomitant with industrialization was the critical factor in the increasing economic vulnerability of the aged. Further, within the industrial sector, processes of capitalist rationalization were destructive for older workers as their skills became technologically obsolete and as employers' interests in making their work forces efficient increased, trends which became particularly evident in the 1920s and 1930s.

215. *See* HABER & GRATTON, *supra* note 4, at 65–67:

The cost-of-living studies, along with the surveys of the elderly population in the 1920s, demonstrate the imposing gains in the economic welfare of older persons during the industrial period. According to the surveys, more than half the aged lived in good economic circumstances. The remainder divided into three approximately equal groups: one having sufficient means, another on the verge of dependency, the last wholly dependent on family or charity. Combining earnings and potential income from wealth, about half the elderly

Nonetheless, over the course of the nineteenth and into the early twentieth century, the idea of old-age pensions for ordinary people, sponsored by both employer and by central governments, began to take hold both in Western Europe and in the United States.<sup>216</sup> The rise in productivity accompanying industrialization brought higher incomes to at least the nonagricultural population, increasing the possibilities for both group and individual old-age retirement annuities.<sup>217</sup> A detailed examination of this immensely complex process is beyond the scope of this article, but it is possible to select two key developments that laid the groundwork for the social insurance approach to old age and retirement in the twentieth century: the public pension as social welfare, and the industrial pension as a labor force management tool.

First, from veterans' pensions in the United States to early civil service pensions in England and later in America, government pensions of various sorts essentially paved the way for private industrial pensions as a labor force management tool. Civil service pensions began to be paid in England in the late eighteenth century as a part of anticorruption reform movements; later in the nineteenth century in the United States, Civil War veterans pensions paved the way for other types of public and private pensions.<sup>218</sup> The first true employer sponsored pensions came in the early nineteenth century in England, and later in that century in the United States, for railroad and utility company workers.<sup>219</sup> It should be noted that these first pension pro-

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had incomes equal to or exceeding the average earnings of male workers in the 1920s.

216. *Id.*

217. See COSTA, *supra* note 166, at 54–57.

218. See OTTAWAY, *supra* note 204, at 82; see also THANE, *supra* note 5, at 239:

An effect of the formalized pension system for the middle ranks of the civil service was to encourage recruitment of younger, fitter men . . . . The pensions . . . were low in relation to real as distinct from formal earnings, since most Customs officials supplemented their earnings . . . from more or less corrupt fees from merchants and others with whom they dealt. As such corruption was cleaned up at the end of the eighteenth century, some compensation was awarded from 1798, in the form of the abolition of the superannuation contribution and the doubling of pensions.

*Id.* For U.S. Civil War pensions, see THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 37–71 (1995).

219. For the English experience, see THANE, *supra* note 5, at 243–48:

In the late seventeenth century occupational pensions had been provided by statute in private firms closely linked with government and especially important for national prosperity, including the Bank of England and the East India Company . . . . Formal pension schemes

grams were primarily for what could be called white collar workers in civil service and skilled positions.<sup>220</sup> It took strengthened labor unions in the United States until the mid-twentieth century to achieve retirement pension coverage for industrial workers in the auto and steel industries, which sparked the expansion of retirement pension coverage to workers in other industries.<sup>221</sup>

The government's strongest role in pension provision came in veterans' pensions, a role that goes back to the Roman Empire, as noted earlier. In the United States, government pensions were among the first benefits granted under the new federal government, to veterans of the Revolutionary War who could demonstrate financial need.<sup>222</sup> Sixty years later, the Civil War created the need for a new veterans' benefit program, this time of much greater scope, duration and lasting impact.<sup>223</sup>

One of the most important "innovations" of the American Civil War was the involvement of a large portion of the total male population of both the North and the South. Over two million men—about thirty-seven percent of military age males in the Union states—served in the Union army; almost one-fifth of them died from direct or indirect combat related causes, and another 300,000 returned home wounded.<sup>224</sup> As a direct result of this loss of a wage earner or of earning capacity as a result of participation in combat by such a large proportion of adult men, Congress established the veterans' pension program that, with expansions during and after the Civil War years, became the first large-scale social welfare program in the United States.<sup>225</sup>

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developed earliest in the largest and most bureaucratized firms . . . Most of the railway companies by the 1860s ran compulsory contributory schemes providing sickness, superannuation and funeral allowances. They paid pensions of between two shillings and six shillings weekly after a minimum of twenty-five years' service.

*Id.* For the American experience, see GREENOUGH & KING, *supra* note 46, at 27–31.

220. See GREENOUGH & KING, *supra* note 46, at 27–31; THANE, *supra* note 5, at 243–48.

221. LANGBEIN & WOLK, *supra* note 46, at 18–19 (citing Peter Drucker, *Pension Fund "Socialism,"* PUB. INT. 3 (1976)).

222. See Dilley, *supra* note 120, at 1095–96 (citing John P. Resch, *Federal Welfare for Revolutionary War Veterans*, 56 SOC. SEC. REV. 171, 172 (1982)).

223. *Id.* at 1099–1100.

224. See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 103 (1992).

225. *Id.* at 102–30.



The historical significance of the Civil War pension program goes beyond the actual benefits paid to veterans and their families; even as late as 1910, when surviving Union veterans would have been in their seventies and late sixties, almost twenty percent of all persons age sixty-five, in some areas of the United States, were receiving Civil War pension benefits, a percentage similar to the numbers covered by European old-age pension programs at that point.<sup>226</sup> These numbers are highly significant because most men over age sixty-five were still gainfully employed early in the twentieth century—it seems likely, therefore, that a substantial portion of older American men and their families who were unable to work were receiving pensions from the federal government, long before the enactment of Social Security.

Moreover, Civil War pensions should properly be viewed as true “social welfare” benefits, because the stated aim of the Congress in enacting the pension program, as well as its repeated expansions throughout the nineteenth century, was to prevent veterans and their families from having to suffer the shame of charity support and poor relief.<sup>227</sup> While the Civil War veteran generation generally had passed away by the early 1920s, clearly the children and grandchildren of those veterans were familiar, by the time of the Social Security Act of 1935, with the idea of a federal role in poverty prevention for the elderly who could no longer work.

The other major development of the late nineteenth into the twentieth centuries was the beginning of true employer-provided pension plans as a tool for work force management and the establishment of retirement as at least a goal for more than the most highly paid minority of workers. American employers instituted a variety of “private social welfare” efforts in the late nineteenth century which gradually developed into employer-sponsored group savings plans, and finally into true stock purchase and pension plans, serving as both a source of capital and as a way of retaining and then easing out valued older employees.<sup>228</sup>

Early private pension plans in the United States were not particularly reliable as a support for broad-based retirement—few workers were covered by any plan, few, if any, plans were funded in ad-

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226. *Id.* at 129.

227. *Id.* at 148–51.

228. See ORLOFF, *supra* note 4, at 98; see also GREENOUGH & KING, *supra* note 46, at 27–59; Dilley, *supra* note 121, at 1198.

vance, and most workers were not vested in any benefit unless they retired while still in the sponsoring employer's pay.<sup>229</sup> The likelihood of ever receiving such a pension was not high because of these rules and employer reluctance to make good even on the few promises already made. In fact, employer groups began discussing the problem of adequately funding the pension promises already made to their employees as early as 1925, long before the catastrophic stock market crash of 1929 and the widespread termination of employer pension plans during the economic depression of the 1930s.<sup>230</sup> Despite funding difficulties, however, employers began to see sponsoring a retirement pension program for their employees as a way to further their own goals of managing their work forces—through the use of long vesting requirements, they could encourage their most valued employees to stay with the company, without immediate outlays in increased salary. In addition, funded pension trusts were valuable pools of capital for investment.<sup>231</sup>

The stage was set for a broad-based, three-tiered true retirement system, based on a federally funded social welfare benefit program based on service or employment, limited employer-sponsored pensions, and individual savings. Nonetheless, retirement was not yet a widespread experience or expectation of most workers, who continued to work well past the age of sixty-five until after the enactment of Social Security; even immediately after World War II, almost half of men over age sixty-five remained in the work force.<sup>232</sup>

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229. See LANGBEIN & WOLK, *supra* note 46, at 127.

230. See GORDON, *supra* note 25, at 253–57.

231. *Id.* at 245–46. Gordon cites the example of stock ownership plans: Proponents advertised stock plans as guarantees of loyalty and efficiency, but their operation betrayed more mundane concerns. For employers, the oversubscription of World War I Liberty Bonds and the precedent of financing such purchases through payroll deductions suggested an untapped source of capital: workers themselves. . . . Plainly intended to raise capital rather than redistribute ownership, only one-third of 496 plans studied in 1929 purchased stocks already on the market. Sale of stocks to employees occurred primarily in expanding, nonunion industries. . . . Most plans forced workers to pay for a block of stocks in installments, limiting both control of stock and its resale.

*Id.* Obviously, given the current experience of § 401(k) plans and employer stock purchase, employer goals have not changed much in the last eighty years.

232. See ORLOFF, *supra* note 4, at 97–102 (“The issues of retirement and the problems of older workers may have gained salience in the 1920s and 1930s, but it is important to remember that mass retirement, predicated on a public retirement wage, is a post World War II phenomenon.”); JAMES H. SCHULZ, *THE ECONOMICS OF AGING* 65 (6th ed. 1995).

### C. Melding of Retirement and Care of Aging in the Twentieth Century

The history of aging in the Western world demonstrates that throughout most of human history, the responsibility for providing of the necessities of life in old age largely rested with the old themselves, mainly through continued control of property worked by the next generation, or labor until death. Retirement was a rarity until the late nineteenth century and even then was largely restricted to those with status and means to support a genteel existence in old age; charity and community welfare support was, at the other end of the wealth and power spectrum, restricted to the helpless and powerless.<sup>233</sup>

The beginning of the twentieth century saw the stirrings of support for a retirement pension system, predicated on attachment to the work force, but voluntary depending on the employer's decision to sponsor a pension plan.<sup>234</sup> After the collapse of private retirement arrangements along with other American economic institutions during the depression of the 1930s, retirement seemed less essential than simply staving off starvation and homelessness in old age to many reformers.<sup>235</sup> However, the enactment of Social Security, with its melding of entitlement to retirement pensions for virtually all workers with old-age antipoverty measures, essentially launched the institution of retirement that took hold in the post-World War II era.<sup>236</sup> It is this innovation of the combination of pension entitlement and poverty prevention functions that is currently under attack.

#### 1. THE SOCIAL INSURANCE INNOVATION

The development of mechanisms for providing old-age pensions for workers in certain industries was a necessary element of the industrial revolution and the mechanization of work itself. As work became less and less a matter of individual self-directed craft and increasingly a matter of working under supervision, by the clock, for an employer and with machinery, older workers began to be valued only up to the point of perceived inefficiency and obsolescence. Retirement

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233. See generally MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986).

234. *Id.* at 200–05.

235. *Id.*

236. *Id.*

began to be seen as a way to regularize this obsolescence, without demoralizing the rest of the work force.<sup>237</sup>

Nonetheless, most American men continued to work past age sixty-five until the post-World War II era, and the minority of workers who did retire did so based on private retirement arrangements, either informal (family farm maintenance arrangements, for example) or formal (privately purchased annuities or employer-provided pensions).<sup>238</sup> As a result, both those who relied on earnings in old age and those who relied on private arrangements for old-age income support were extremely vulnerable to the collapse in monetary and property values caused by the 1929 stock market crash and the worldwide economic depression that followed.<sup>239</sup>

It is difficult for contemporary readers to fully appreciate the extent of the disaster of the Great Depression, but many of its most salient effects had a particularly devastating effect on the old. Worldwide price deflation created a downward price spiral in personal and real property. Rising unemployment and falling wages for the jobs that remained depleted the ability of working age children to support their elderly relatives. Widespread bank failures destroyed the life savings of the elderly, with no federal bank insurance program in place to salvage any of their accounts.<sup>240</sup> The spillover effect on pension plans was predictably disastrous: funded plans became unable to pay benefits as the banks in which pension trusts were held went bankrupt,

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237. See James A. Wooten, *The 'Original Intent' of The Federal Tax Treatment of Private Pension Plans*, 85 TAX NOTES 1305, 1307-08 (1999); see also ORLOFF, *supra* note 4, at 100-01.

238. As late as 1931, over half of all men over age sixty-five remained in the paid labor force, and it is likely that most men in their mid to late sixties continued to work and support themselves and their spouses. By 1941, that percentage had dropped to forty-four percent, which may reflect sustained high unemployment rates during the Great Depression more than an increase in voluntary retirement. See ORLOFF, *supra* note 4, at 97-98.

239. See GORDON, *supra* note 25, at 160; see also HABER & GRATTON, *supra* note 4, at 42.

240. *Introduction*, in THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY (Michael D. Bordo et al. eds., 1998).

In terms of its impact on economic performance, the depression was a disaster without equal in the twentieth century. The contraction phase of the depression, extending from August 1929 to March 1933, saw the most severe decline in key economic aggregates in the annals of U.S. business cycle history. Real GNP fell by more than one-third, as did the price level. Industrial production declined by more than fifty percent. Unemployment rose to twenty-five percent by 1933.

and unfunded plans simply stopped paying benefits as the sponsoring employers either retrenched or went out of business.<sup>241</sup>

The New Deal response to widespread economic disaster took many forms, but one of the most long lasting and widely effective measures was the enactment of Social Security, and along with it, various federal and state partnered antipoverty programs. Again, a complete description of the development of Social Security is beyond the scope of this article, and I have analyzed the relationship between the idea of entitlement and Social Security's role in preventing poverty in the context of retirement elsewhere in some detail.<sup>242</sup> A distillation of my argument is sufficient here to show how Social Security provided a bridge from early industrialization's tentative moves toward a worker retirement ethos to the late twentieth century's retirement expectation. The two most important elements built into Social Security's design were entitlement, based on earnings, and redistribution in the benefit formula and family benefit structure, both of which are the focus of privatization attacks today. Together, they formed the basis for the retirement expectation that was cemented in the American workers' consciousness in the years following World War II.

The Social Security Act of 1935 was at first, somewhat limited attempt to put a federal pension program into place, with limited anti-poverty features, and little immediate effect, because first benefits would not have been paid until 1942. However, the Social Security program as revised in 1939 took the shape it has essentially had ever since—benefit entitlement based on lifetime earnings in the paid work force; pay-as-you-go financing; compulsory coverage for employment determined legislatively; no means-testing of benefits; and a benefit formula, including spousal and survivor benefits, weighted in favor of low-income workers.<sup>243</sup>

The most pressing immediate need of the elderly at the time was probably to secure adequate sources of income for those in desperate straits, and the Old-Age Assistance program, providing needs-based elements to the elderly, was the immediate answer.<sup>244</sup> However, the long-term focus of the Committee on Economic Security, appointed by President Roosevelt to make the recommendations that led to the 1935

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241. See GORDON, *supra* note 25, at 160.

242. See Dilley, *supra* note 120.

243. *Id.* at 1126.

244. *Id.*

Social Security Act, was centered on a retirement system that combined an earnings-based entitlement with strong redistributive elements.<sup>245</sup> The express purpose of this design was to prevent poverty in old age through a unified retirement program that would cover all workers and their families, which the designers hoped would mean virtually all Americans once the economy recovered and employment rates improved.<sup>246</sup>

Entitlement was assured through the benefit eligibility structure, which was based on substantial years of work in employment covered by the system.<sup>247</sup> The financing structure, built around payroll taxes on employee wages and a matching tax on employers, reinforced the public and political belief that benefits had, in fact, been “paid for,” securing future retirement income with something like a property right. Of course, this is not literally the case, but politically it might as well be—no Congress or President has ever reduced Social Security benefits in current payment status, even during the most serious short-term financial crisis of the system in the late 1970s and early 1980s.<sup>248</sup>

The other critical design element is the redistributive benefit formula and structure—the combination of antipoverty benefit design and work-based entitlement is the single transformative hallmark of Social Security that virtually created retirement as we know it in modern America. At the time, the designers may have had some interest also in labor force management, a familiar private pension goal; at least some New Dealers were convinced that a program to regularize retirement from the labor force was important for maintaining strong employment levels.<sup>249</sup> But the features that would make retirement a reality for lower- and middle-income Americans were not like any-

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245. *Id.* at 1127–28.

246. *Id.* at 1131.

247. LARRY DEWITT, SOC. SEC. ADMIN., *THE HISTORY AND DEVELOPMENT OF THE SOCIAL SECURITY RETIREMENT EARNINGS TEST* (1999), at <http://www.ssa.gov/history/ret2.html> (“A contributory annuity system . . . will enable younger workers, with the aid of their employers, to build up gradually their rights to annuities in their old age.”).

248. See Dilley, *supra* note 120, at 1033. As President Roosevelt said some years later: “I guess you’re right on the economics, but those taxes were never a problem of economics. They are politics all the way through. We put those payroll contributions there so as to give the contributors a legal, moral and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program.”

249. See DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 257 (1999).

thing offered in private pensions: family benefits, including for spouses and surviving children and spouses, without any reduction in the primary worker's benefit; a benefit formula weighted in favor of lower wage workers; and complete portability of coverage from one job to the next, so that lifetime earnings would underwrite eventual benefits regardless of the number of jobs the worker had held.<sup>250</sup>

These features embody the social insurance principle of insuring workers against risks that private pensions are not designed to take account of, such as periods of unemployment or low education that prevents access to high-paying work. Under social insurance principles, these are social, as well as individual, risks because ignoring their consequences could lead to social instability and dangerous disparities in income levels. It should not be forgotten that the Russian Revolution had occurred a mere fifteen years prior to the election of Franklin Roosevelt, a scion of the American monied upper class, and few policy makers in the New Deal could ignore the lessons of social and economic unrest which roiled Europe throughout the 1920s. A stable and dependable retirement system for working people could greatly contribute to eliminating political insecurity as well as economic insecurity—and it did.

## 2. THE FLOWERING OF THE RETIREMENT EXPECTATION

The post-World War II era saw the solid establishment of the retirement expectation for middle- and even lower-income workers, as Social Security coverage gradually expanded to most American workers and benefits were gradually increased.<sup>251</sup> Private pension plan coverage expanded exponentially, partly because of labor union collective bargaining, which covered most of the large manufacturing employers, placed a premium on achieving retirement pension coverage.<sup>252</sup>

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250. See Robert M. Ball, *The 1939 Amendments to the Social Security Act and What Followed*, in 50TH ANNIVERSARY EDITION REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935 AND OTHER BASIC DOCUMENTS RELATING TO THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 162–67 (1985).

251. Coverage was gradually extended, beginning in 1950 and extending through 1983, to cover farm workers, clergy, self-employed persons, including small business owners, and finally government employees. See SOC. SEC. ADMIN. OFFICE OF RESEARCH & STATISTICS, ANNUAL STATISTICAL SUPPLEMENT 2003 tbl.2.A1, available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2003/2a1-2a7.html>.

252. See SCHULZ, *supra* note 232, at 228; see also GRAEBNER, *supra* note 164, at 215–21.

The best indication of the solidification of retirement in American life is the steady downward decline of labor force participation rates of men over age sixty; from 1960 to 2000, the average age of retirement, that is, cessation of regular full-time work, steadily declined from sixty-six to 63.6.<sup>253</sup> The percentage of American men continuing to work past age sixty-five declined from just under fifty percent to less than twenty percent in 1992;<sup>254</sup> the comparison for women is difficult to make, because women only began entering the full-time work force in great numbers in the late 1960s.<sup>255</sup>

For small employers, the pension tax laws provided a great opportunity for using pensions as tax shelters as well as pension vehicles for the owners, without necessarily extending meaningful coverage or benefits to their lower paid employees.<sup>256</sup> Pension coverage for U.S. workers never, even at its probable height in the early to mid-1970s, exceeded sixty percent and many workers, while experiencing coverage at some point during their working lives, probably reached retirement with very little in the way of retirement resources other than Social Security.<sup>257</sup> During the 1980s, and continuing to the present day, almost sixty percent of American retirees relied on Social Security benefits for more than half of their retirement income: for almost thirty percent of them, Social Security constituted virtually their sole retirement income.<sup>258</sup>

The expansion of Social Security as a source of retirement income probably played the largest role in solidifying American workers' expectation that they could retire at or close to age sixty-five

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253. See Richard Johnson, *Why the 'Average Age of Retirement' Is a Misleading Measure of Labor Supply*, MONTHLY LAB. REV., Dec. 2001 at 38, tbl.2. In labor force participation terms, the change is more stark—in 1960, 30.6% of men age sixty-five and older were in the labor force, while in 2000, only 17.5% of that group were in the labor force. *Id.*

254. See SCHULZ, *supra* note 232.

255. *Id.*

256. See generally Halperin, *supra* note 45.

257. See Munnell et al., *supra* note 3, at 9 fig.9.

258. In 2000, Social Security benefits provided over half the income for sixty-four percent of all Social Security beneficiaries age sixty-five and older. See SOC. SEC. ADMIN. OFFICE OF RESEARCH, EVALUATION AND STATISTICS, INCOME OF AGED CHARTBOOK, available at [http://www.ssa.gov/policy/docs/chartbooks/income\\_aged/2000/iac00.html#income](http://www.ssa.gov/policy/docs/chartbooks/income_aged/2000/iac00.html#income). This statistic appears to have remained remarkably stable, since in 1988, over half of all households headed by a person sixty-five or older similarly depended on Social Security benefits for at least fifty percent of total income. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., OVERVIEW OF ENTITLEMENT PROGRAMS WMCP: 101-29, at 1015 tbl.17 (1990 GREEN BOOK) [hereinafter GREEN BOOK].



without descending into abject poverty. In the years following World War II, coverage under Social Security was expanded beyond the initial industrial manufacturing base to reach farm workers, employees in any regular commercial activity, and self-employed professionals.<sup>259</sup> By 1983, when Federal government workers were covered and State and local governments were no longer allowed to withdraw from the system, Social Security covered the vast majority of American workers.<sup>260</sup> Finally, with the enactment of Medicare in 1964, the last remaining area of insecurity in old age, catastrophic medical expenses, was in large part addressed through a social insurance approach.<sup>261</sup>

The role of Social Security benefits in financing individual retirements also grew, particularly after the institution of automatic cost of living increases in 1972, which interestingly was advocated by President Nixon as a conservative move to preempt more generous ad hoc benefit increases that Congress had repeatedly passed in the preceding two decades.<sup>262</sup> In 1977, the final step of indexing the wage record on which the initial benefit is calculated completed the virtual integration of Social Security benefits with the rise and fall of the national economy.

The enormous significance of wage indexing Social Security benefits is largely hidden from the public, who have been told time and again that the future financing problems of the system will be caused by the larger percentage of the population that will be over sixty-five and living to older ages.<sup>263</sup> However, if the benefit structure

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259. See Johnson, *supra* note 253.

260. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 67, 67-70 (1983).

261. See Title XVIII of the Social Security Act, Health Insurance for the Aged and Disabled, 42 U.S.C.A. § 1396(c) (West 2004).

262. See President Nixon's Special Message to the Congress on Social Security (Sept. 25, 1969), available at <http://ssa.gov/history/nixstmts.html> (advocating passage of automatic cost of living increases: "By acting to make future benefit raises automatic with rises in the cost of living, we remove questions about future years; we do much to remove this system from biennial politics; and we make fair treatment of beneficiaries a matter of certainty rather than a matter of hope.").

263. See Bill Frenzel, *Bold Steps to Help Social Security*, BOSTON GLOBE, Oct. 16, 2004, at A19:

Despite its successes, though, the retirement program will be stressed when baby boomers start retiring at the rate of 10,000 a day in 2008. First, when Social Security was enacted, the average life expectancy was 60. Today, thanks to health and medical advancements, it is 78. In fact, those over 80 years of age are now the fastest growing segment of our population. Second, 30 years ago there were five workers supporting every Social Security recipient. Today that ratio is 3.4

were static, that is, not linked to increases in wage productivity, those numbers would not necessarily create much of a financing problem, because initial benefit levels would not be nearly as high if they were based on nonindexed wage levels.<sup>264</sup> It is not an understatement to say that because of the two types of indexing used in the Social Security benefit structure, the portion of the American economy devoted to Social Security benefits is basically fixed, changing only as the numbers of the elderly increase. As the economic pie grows, the slice devoted to Social Security keeps pace and will increase as the number of beneficiaries grows.

Once the economic foundations for broad-based retirement were established, the marketing of retirement began to take hold, particularly once § 401(k) plans began to expand and investment advisors saw the possibilities for expanding their client base to large segments of the middle and upper-middle class.<sup>265</sup> The latter third of the twentieth century saw the expansion of whole industries—"over-fifty-five" housing developments, leisure cruises, and other activities aimed at "active seniors"—built around the idea that almost all workers would stop working at or before age sixty-five, because they would have a stable source of lifetime income.<sup>266</sup>

Programs for poor elderly persons continue to provide benefits for those who have too little income from other sources to get by, primarily under the federal-state Supplemental Security Income (SSI) program, the successor to the New Deal's Old-Age Assistance.<sup>267</sup> But,

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workers per retiree. By the year 2030 (when the baby boom generation is fully retired), the ratio will be 2 to 1.

264. See Halperin, *supra* note 43, at 39.

265. For example, Fidelity has set up an entire investor newsletter aimed specifically at seniors to whom they want to market financial advice:

New! Retirement Income Guide for Senior Investors, In September 2004 we began monthly publishing of the Fidelity Independent Adviser *Retirement Income Guide*, dedicated to helping you plan and manage your income during retirement. The *Retirement Income Guide* is focused on portfolios and advice to, 1. Protect your wealth 2. Generate retirement income 3. Make strategic moves in anticipation of the market 4. React quickly to changing market conditions.

<http://www.fidelityadviser.com>.

266. For example, an entire website, "Retirement Net," can be accessed at <http://www.retirenet.com/> to find the perfect retirement community; see also *Retire . . . Florida*, at <http://www.fl-esi.com/retriving/2-cm.htm>, for a similar website devoted to Florida opportunities.

267. Title XVI of the Social Security Act:

The . . . SSI . . . program is a means-tested, federally administered income assistance program . . . Established by the 1972 amendments to the Social Security Act (Public Law 92-603) and begun in 1974, SSI

as the drafters of the Social Security Act had predicted in the 1930s, the numbers of impoverished elderly who had no claim on the earnings-based benefit system under Social Security dwindled over the course of the century, to the point that by the 1990s, SSI had become primarily a disability benefit program for poor disabled persons.<sup>268</sup> The issue of how to care for the aging had in fact been largely settled—earnings based redistributive entitlements, both public and private, provided for retirement and old-age support until death.

This is the established retirement order that has come under attack over the last twenty years. First, changes in employment patterns combined with the gradual diminution of employer commitment to pension provisions, among other reasons, has led to a decline in maintenance and establishment of defined benefit plans providing a lifetime stream of income to retirees. Next, along with the decline of the defined benefit model came the substitution of highly marketed employer sponsored savings plans substantially invested in employer stock and strongly affected by market swings, leaving employees with little security for retirement in the event of a market and economic downturn, as occurred beginning in 2000. Finally, the relentless assault on Social Security began around 1980 with the election of Ronald Reagan, which coincided with short-term financing problems that eventually impelled passage of refinancing and reform legislation that secured the program's ability to pay benefits until (currently) around 2040.<sup>269</sup> The question facing policymakers now is what will be the result if these attacks succeed.

The promotion of private and employer-sponsored individual savings arrangements as the best way to finance retirement is essentially based on an enormous leap of faith unsupported by current or past experience. Workers are in fact disproving the claim that indi-

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provides monthly cash payments . . . to needy aged, blind and disabled persons. The SSI program replaced the former Federal grants to the State for old age assistance, aid to the blind and aid to the permanently disabled.

See GREEN BOOK, *supra* note 258, at 699.

268. In 1975, of the 3.9 million people receiving SSI benefits, just over half, 2.0 million, were sixty-five aged, and 1.9 million were disabled or blind; by 2003, 1.1 million SSI recipients were aged, while 5.5 million were blind or disabled. See SOC. SEC. ADMIN., 2004 ANNUAL REPORT OF THE SSI PROGRAM tbl.IV.B6, available at <http://www.ssa.gov/OACT/SSIR/SSI04/Participants.html#wp439058>.

269. See Paul Pierson & Miriam Smith, *Shifting Fortunes of the Elderly: The Comparative Politics of Retrenchment*, in ECONOMIC SECURITY AND INTERGENERATIONAL JUSTICE 27 (Theodore Marmor et al. eds., 1994).

viduals can save for their own secure retirement by continuing to work past retirement age in greater numbers since the late 1990s and the downturn in the stock market and the economy.<sup>270</sup> Without the certainty of at least a basic source of income through the end of life, workers will not, and indeed should not, stop working, and thus the institution of retirement itself could not be sustained in such an environment.

### III. Can We and Should We Preserve Retirement?

Old age has always and will always have to involve some dependence on others, if for nothing else, to support the elderly person's consumption of goods and services when production and self-support are no longer possible. The historical record shows the pattern that prevailed for millennia in the absence of redistributive public programs—the old controlled resources to insure their own care in old age from the younger generation, usually families as last support, while those elderly who did not control property experienced a high poverty level among the old.

History also shows that while the modern era is not exceptional in having a substantial portion of its population over age sixty, the postindustrial age is exceptional in the degree of surplus production made possible by technology and modern organization of industry

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270. See Kelly Greene, *Many Older Professionals Delay Their Retirement*, WALL ST. J. Online, at <http://www.careerjournal.com/myc/retirement/20031002-greene.html> ("Many older workers are planning to push their final retirement dates into their 70s, or in some cases their 80s, according to a new study, largely because of deep nest-egg losses. The survey, released in late September, was conducted for AARP, a Washington advocacy group for people age 50 and older. The findings quantify a significant shift in older Americans' retirement goals, resulting largely from the combination of the stock-market downturn, historically low interest rates on conservative investments favored by retirees, and widespread cutbacks in retiree health benefits."); see also CONG. BUDGET OFFICE, RETIREMENT AGE AND THE NEED FOR SAVING, ECONOMIC AND BUDGET ISSUE BRIEF (May 12, 2004), at [www.cbo.gov/showdoc.cfm?Index=5419&sequence=0](http://www.cbo.gov/showdoc.cfm?Index=5419&sequence=0).

Labor force data suggest that some workers are indeed working longer and that the long-term trend toward earlier retirement may have ceased or even reversed. Participation in the labor force by people ages 65 and over—both men and women—declined for many years until the mid-1980s, but it has risen modestly since then. For people ages 55 to 64, the patterns are slightly different: labor force participation by men declined until the mid-1990s and has since turned upward; participation by women has been climbing more or less continuously for half a century, though with a relatively stable period in the 1970s and 1980s . . . .

and agriculture. The problem we now face is not that the elderly will comprise an increasingly high percentage of our total population; it is that we must decide how our surplus production of goods and services is best distributed in order to care for the nonworking portion of our population.

The debate on all of these trends has focused on whether the institutions that currently pay for retirement are adequate, are affordable, and sustainable over the long run. But the real questions are more fundamental—is retirement itself feasible into the remainder of the twenty-first century? And even if feasible, is retirement as currently advertised—an extended period of leisure without diminution in the standard of living beginning in the late sixties—desirable as a matter of social policy? Finally, if retirement is “too expensive,” will reduction or elimination of redistributive entitlements return the elderly in America to the situation that faced generations of old people before the enactment of Social Security and the growth of private pensions: work until death or disability prevents it, followed by charity or reliance on children?

First, is the institution of retirement as it has evolved in the latter half of the twentieth century sustainable into the twenty-first century? The foundation of that institution—Social Security—is clearly viable for the next seventy-five years, with some relatively minor tweaking, as discussed below. The private pension system, however, is in serious trouble, and it is unclear that employers will be willing or able to restore true pension guarantees that will reliably underwrite employee retirement.

Various suggestions have been made to shore up the employer pension leg of the three-legged retirement stool, both to extend coverage to workers who are not now covered by any type of pension arrangement and to induce employers to make their existing and any future pension arrangements more equitable for low-income workers.<sup>271</sup> Some of these suggestions would place more stringent requirements for coverage of all an employer’s workers under a plan, and perhaps provide additional incentives to cover such employees.<sup>272</sup> Others would encourage formation of more employer-provided sav-

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271. See Halperin, *supra* note 43, at 45–73; see also Jefferson, *supra* note 55; Stein & Dilley, *supra* note 45.

272. See Halperin, *supra* note 43.

ings plans that would involve more employer contributions and safer investment policies.<sup>273</sup>

These suggestions could improve the likelihood of workers having some sort of private retirement savings when they reach old age. Unfortunately, they still depend on voluntary actions by employers, in a system which at this point continues to allow highly paid employees to defer almost infinite amounts of compensation, both through cash deferrals and various kinds of stock purchase arrangements, without necessitating any provision for rank and file employees at all.<sup>274</sup> Legislation has recently been enacted to attempt to place some restrictions on the ability to defer income for executives<sup>275</sup>—it remains to be seen whether these changes will affect executive arrangements enough to begin to strengthen private employer plans for rank and file employees.

Suggestions for solving the long-term deficit for Social Security also abound, ranging from increased payroll taxes to decreased benefits to increasing the retirement age to changes in the cost of living measurement system. For example, most recent analysts agree that lifting the cap on earnings on which payroll taxes are levied, combined with some increase in rates at some point in the next ten years, would essentially eliminate the long-term financial deficit of the program.

A more fundamental place to start, however, would be the grounding of all three pillars of the American retirement system—pensions earned through work. Our traditional approaches are all employment and employer based: the public earnings-based system of Social Security, the privately sponsored pension system dependent on voluntary action of individual employers, and individual savings which are indirectly dependent on employment and earnings. Tying future retirement income to past work has been a largely unexamined principle underlying old-age pensions for centuries in Western Europe and particularly in the United States. Political support for the Social Security system has in all likelihood rested on the view of workers paying into the system that they have earned their benefits and have an unalienable right to them.

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273. See Munnell et al., *supra* note 3.

274. Halperin, *supra* note 43, at 45–47.

275. See American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 885 (2004).

Cultural imperatives may still dictate a requirement of work history for receipt of any type of benefits, but expansion of Social Security benefits, flexible access to benefits, and increased financing through income and corporate taxes rather than solely payroll taxes, can all still require an earnings credit system while still allowing detachment of old-age security from employment per se. There are many options for redesigning our public and private benefit system—but they all will require increased redistribution of resources from rich to poor in order to prevent lower- and even middle-income elderly from falling into abject poverty and working long past the time their health would dictate retirement. We need to explore a citizen-based public approach, to bolster retirement in the face of possible employer unwillingness or inability to maintain the voluntary private approach.

Finally, our notions of retirement itself should evolve to match changes in longevity, health, and work over the last several decades. The industrial revolution created a need to ease older workers out of mechanically demanding jobs, while the Great Depression instilled the idea in both workers and policy makers that older workers needed to retire to make way for the younger generation in jobs requiring technical skill, as the nature of work evolves, through technological innovations like computers and long distance wireless communication. However, these imperatives may be vanishing. In addition, as the relatively smaller post-baby boom generations reach maturity, employers are beginning to discover a need for workers in some jobs that younger employees may not necessarily be willing or able to take.

I would argue that we need to rethink the whole notion of a fixed “retirement” age, in the sense of an age when work ceases and leisure begins, lasting through the rest of life. Meaningful occupation, suited to the individual’s health and strength as he ages, should be available in a part time or phase down setting as individuals age. It seems unlikely that workers aged twenty-five to sixty-five will continue to be willing to finance extended periods of nonproductive activity that currently last from birth to after college, and that begin again in the late sixties and frequently last as long as twenty to thirty years. No aging person whose physical and mental condition impairs her ability to work should be required to do so; but we should explore ways to amend the current programs to encourage productive work in more flexible settings for a longer, and probably healthier, life in old age.

#### IV. Conclusion

*Nos ignoramus, quid sit matura sectus; scire aevi meretum, non numerare decet* (Let us refuse to know the meaning of ripe old age. Better to know Time's worth, than count his years.)<sup>276</sup>

It took the cataclysm of the Great Depression in the 1930s to convince Americans at all income levels that public shared responsibility and some redistribution of wealth through the tax and social welfare systems was necessary for the survival of capitalist democracies. Assuring a dignified, if not wealthy, old age for most Americans came to be accepted as a matter of social responsibility, rather than of individual or family fortune, in the wake of the worldwide failure of capital accumulation to stave off poverty in old age for most people. The other major element in the retirement system, the private pension system, matured over the post-World War II period as a tool for employers to insure orderly exit from labor force while maintaining good employer-employee relations. Taken together, the public and private systems focused on ensuring a stream of income for consumption in retirement, which diminished both the need for capital accumulation before retirement and the uncertainty about adequacy of income to the end of life that previously had kept older workers in the labor force or dependent on immediate family members.

Memories have faded, however, over the last seventy years, and a "devil take the hindmost" economy has dramatically undercut public support for economic approaches based on shared risk and responsibility. Conservative economists, led by Martin Feldstein, have been beating the drum for the last thirty years for a return to economic insecurity, which can be seen as a capitalist imperative: insecurity about future income in old age drives capital accumulation, theoretically increasing the savings rate.<sup>277</sup> At the same time, the private pension system has undergone a dramatic shift away from employer responsibility and toward individual employee risk, in the form of retirement

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276. Ausonius, urging his wife to ignore the arrival of old age when it comes, and to always call one another *iuvenis* and *puella*, cited in PARKIN, *supra* note 177, at 23.

277. For Feldstein's steadfast opposition over the decades to Social Security, see Martin S. Feldstein, *Should Social Security Be Means-Tested?*, 95 J. POL. ECON. 468 (1987). See generally MARTIN FELDSTEIN, WOULD PRIVATIZING SOCIAL SECURITY RAISE ECONOMIC WELFARE? (Nat'l Bureau of Econ. Res., Working Paper 5281, 1995). But see also Olivia S. Mitchell & Stephen P. Zeldes, *Social Security Privatization: A Structure for Analysis*, 86 AM. ECON. REV. 363, 366 (1996) ("Overall, it seems precarious to build a case for privatization based on the argument that it would increase national savings.").



savings plans, such as § 401(k) plans, which are displacing traditional defined benefit plans that insure an income stream in old age.

The result is the undermining of the retirement expectation for workers at average and below-average income levels, and more generally, the decay of a major pillar of middle-class life and work in the United States. While the debate over the last twenty years has centered on possible replacements for Social Security as the foundation of retirement, it is my contention that Social Security and the system of social insurance generally must be expanded to gradually transform the traditional employer-based pension system if the institution of retirement is to last very far into the twenty-first century. Placing the burden of retirement security on individual employers is no longer effective or fair—if we as a society wish to maintain the institution of retirement for all of the working population, financing that institution must be a societywide responsibility.

In addition, our notions of retirement itself must change as the healthy lifespan of most people lengthens—the notion of “old age” beginning in the midsixties has begun to change, and our idea of the proper working life span must change as well. The common wisdom reflecting the changing reality of life spans has been that the retirement age under Social Security must be raised. I argue that raising the age of eligibility for benefits, as was done in the 1983 Social Security Amendments, is punitive for those who must retire, and ineffective for those who can choose when to retire. We need a more flexible approach, one that allows gradual diminution of work and effort, while still providing necessary income for those who, because of ill health or dramatic shifts in working opportunities, cannot find work later in life.

Both parts of my suggested reform program lead to the same general conclusion—we need a citizen-based, rather than a strictly employment-based old-age income support system. As the nature of work itself continues to evolve, a system financed by payroll taxes will be under increasing pressure as the payroll base itself changes. The financial burden of assuring a secure and dignified old age for all Americans should be shared by all those—corporations and individuals alike—who benefit from the financial and social stability such a program insures. The ultimate solution for reforming Social Security is to make it both more “social” and more capable of assuring more “security” for all workers, at all income levels.