Privatization of Social Security: Misguided Reform

Kathryn L. Moore
University of Kentucky College of Law, kmoore@uky.edu

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INTRODUCTION

Once described as the most successful program of the modern welfare state, social security has a long-term future that is now in doubt. The Board

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2. For purposes of this article, the term social security will be used in its generally accepted manner as referring only to the cash benefits provided by the Old-Age, Survivors, and Disability Insurance ("OASDI") program. The Old-Age Survivors Insurance ("OASI") program provides benefits for retired workers and their spouses and children and to survivors of deceased workers. The Disability Insurance ("DI") program provides benefits for disabled workers and their spouses and children and pays for rehabilitation services for the disabled. Ycas, supra note 1, at 49. For a discussion of other possible definitions of the term social security, see Robert M. Ball, Social Security Today and Tomorrow 1-4 (1978), and Robert J. Myers, Social Security 5-6 (4th ed. 1993). See also Arthur J. Altmeier, The Formative Years of Social Security 3-6 (1966) (discussing history of use of term "social security" in the United States); Wilbur J. Cohen & Milton Friedman, Social Security: Universal or Selective? 6 (1972) (noting the term social security "expresses, at the same time, a program, an aspiration, and an evolving complex of social institutions and attitudes"); Edwin E. Witte, Social
of Trustees of the Federal Old-Age and Survivors Disability and Insurance (OASDI) Trust Funds predicts that unless corrective action is taken, social security benefit payments will exceed dedicated tax revenues by the year 2013, and the social security program will become insolvent — unable to pay promised benefits in full — by the year 2029.3

As a result of this dire prediction, proposals to reshape the social security system abound. Among the most popular of these proposals are suggestions that the social security system be privatized.4 Once viewed as a fairly radical recommendation, policymakers are now seriously considering privatization.5

Although the privatization proposals vary widely in their details, they share certain common foundations. Among those foundations is a requirement that workers invest a portion of their social security contributions in one or more private funds. Benefits then are based on the amount invested in the private fund or funds and the earnings and/or losses on those investments.

In the current climate of a seemingly endless bull market, the proposals may appear quite appealing. They offer workers the opportunity to earn market rates of return on their social security contributions. The proposals, however, are not a costless panacea to social security’s long-term funding problems. Rather, they suffer from both practical limitations and theoretical problems.

First, on the practical side, the privatization proposals do not guarantee that workers will do better than under the current system. Rather, they subject workers to investment risk. Workers might do better than under the current system; on the other hand, they might do worse. In addition, the...
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privatization proposals inevitably impose transition costs as they shift from our current system, which is predominantly funded on a pay-as-you-go basis, to a funded system.

The privatization proposals also suffer from two significant theoretical problems. First, they promote misguided paternalism by forcing workers to save for retirement while subjecting them to investment risk. Second, they misconceive the role social security should play in our national retirement system.

This article begins by briefly describing the social security program. It then discusses the reasons for social security's widespread popularity and its impending funding crisis. The article goes on to briefly describe some of the pending privatization proposals. The article concludes by discussing the practical and theoretical problems with privatizing social security. Specifically, it describes the investment risk participants face under a privatized system and the transition problems created by converting to such a system. Finally, this article explains why the privatization proposals promote misguided paternalism and misconceive the role social security should play in our national retirement system.

I. THE SOCIAL SECURITY PROGRAM

A little more than sixty years ago, America's economy was in tatters. By 1934, unemployment had risen to 21.7% while real GNP contracted by more than 25% over the previous five years. Moreover, the stock market had fallen by more than 70% in the five years ending 1933.6 "Americans were frightened and they called for bold leadership. The Great Depression had set the stage and President Roosevelt deftly took his cue."

On June 29, 1934, the President established the Committee on Economic Security to "study problems relating to the economic security of individuals."8 Less than seven months later, the Committee issued a report recommending, among other things, the establishment of an "old-age security

6. Proposals, supra note 4, at 139 (stating testimony of William G. Shipman, Principal, State Street Global Advisors).

7. Id.; see also Philip Booth, Social Security in America 7 (1973) ("There is little doubt that the act would not have been adopted in 1935 except for acute public awareness of widespread deprivation, dependency, and hopelessness during the Great Depression that convinced the people and their representatives in Congress that government action was essential to relieve the human distress caused by unemployment, old-age dependency, insecurity, and widespread poverty."); J. Douglas Brown, Essays on Social Security 60 (1977) (stating that in 1935, "[c]ontributory social insurance, especially on a national basis, was a revolutionary idea. Only a severe depression coupled with a President with exceptional political insight and influence could have caused it to be established."). See generally Carolyn L. Weaver, The Crisis in Social Security: Economic and Political Origins 58-76 (1982) (discussing economic and political changes leading to enactment of social security).

program” to help safeguard against “the major hazards and vicissitudes of life.” Following in large part the Committee’s recommendations, Congress enacted the Social Security Act of 1935, which President Roosevelt signed into law on August 14, 1935.

Social security’s “old-age security program” began as a relatively small and discrete program. As originally enacted, it covered approximately 55% of the civilian workforce, provided limited monthly benefits solely to workers, and delayed the commencement of the payment of benefits until January 1, 1942. Even before the benefits began, however, Congress “completely revamped” the program with the Social Security Act Amendments of 1939; it extended benefits to wives, widows, and children, substantially increased benefits in the early years, and advanced the effective date for payment of benefits to 1940.

In the years since 1939, social security has grown slowly and inexorably into one of the country’s largest and most successful social welfare pro-

10. Id. at 45, 19 (quoting President Roosevelt’s Message to Congress reviewing the Broad Objectives and Accomplishments of the Administration of June 8, 1934).
11. Wilbur J. Cohen, The Social Security Act of 1935: Reflections Fifty Years Later, in Report of the Committee, supra note 8, at 3, 7 (“In seven months the several proposals, with some important changes, deletions and additions, were converted into a law whose two major ‘social insurance’ programs were upheld as constitutional by the U.S. Supreme Court within two years.”).
13. 79 CONG. REC. 13078 (1935).
14. The Social Security Act of 1935 was not limited to the establishment of an old age security program. It contained, among other things, grants to states for unemployment compensation administration, aid to dependent children, and maternal and child welfare. Pub. L. No. 74-271, tiths. III-V, 49 Stat. 620 (1935). As discussed in supra note 2, however, this article will focus on social security’s OASDI program.
15. As of 1939, the social security system covered 55.1% of the civilian workforce. CHARLES M. BRAIN, SOCIAL SECURITY AT THE CROSSROADS 49 tbl.3-5 (1991).
16. In addition, certain workers over 65 or their estates were to receive lump sum payments. Id. at 38 & n.9.
17. Id. at 41.
20. Id. at 1362-78. The 1939 Amendments also converted the system from a system funded by a large reserve account to a “pay-as-you-go” system with a partial reserve. Alan Pifer & Forrest Chisman, Foreword to Report of the Committee, supra note 8, at v, xi. For a more detailed discussion of the 1939 Amendments, see Weaver, supra note 7, at 115-24.
21. For an excellent discussion of the reasons for social security’s slow, steady, and almost controversy-free growth, see MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY (1979). For an excellent discussion of the early history of the Social Security Act, see ALTMEYER, supra note 2, at 3-118. For a fairly lengthy discussion of amendments to the Act over the years, see Weaver, supra note 7, at 115-72. For briefer discussions of amendments to the Act, see Brain, supra note 15, at 37-97; Ball, supra note 18, at 167-72; and Marilyn E. Manser, Historical and Political Issues in Social Security Financing, in Social Security Financing 21, 23-29 (Felicity Skidmore ed., 1981).
grams. In 1995, the program covered approximately 141 million workers, or about 96% of all workers in paid employment and paid benefits totalling $332.6 billion to 43.4 million beneficiaries. This included more than twenty-six million retired workers receiving survivor benefits averaging $720 per month, more than five million widows and widowers receiving benefits averaging $680 per month, and more than four million disabled workers receiving benefits averaging $682 per month.

This section briefly describes the social security program of today. It then explains why the program has achieved such popularity and why it faces a funding crisis beginning early next century.

22. See Altmeyer, supra note 2, at 263 (noting that in 1954, President Eisenhower, a Republican, called contributory old age, survivors', and disability benefits system "the cornerstone of Government's programs to promote the economic security of the individual"); Ball, supra note 2, at vii (stating in the foreword, Senator Gaylord Nelson of Wisconsin declared, "[S]ocial security is our most successful program of social reform"); Brain, supra note 15, at 227 ("[T]he social security program has received overwhelming support in its fifty-five year history."); Derthick, supra note 21, at 4 ("The great popularity of social security has been one of the axioms of American public life."); Joseph A. Pechman et al., Social Security: Perspectives for Reform 1 (1968) ("The social security system is among the most effective and successful institutions ever developed in the United States"); Herman B. Leonard, In God We Trust — The Political Economy of the Social Security Reserves, in Social Security's Looming Surpluses: Prospects and Implications 57, 59 (Carolyn L. Weaver ed., 1990) [hereinafter Looming Surpluses] (noting social security enjoys nearly unassailable political support); Bruce K. MacLaury, Foreword, in Martha Derthick, Agency Under Stress: The Social Security Administration in American Government at vii (1990) (noting social security is no less sacred politically today than in 1979); Pifer & Chisman, supra note 20, at xiii ("Whatever its faults, the Social Security Act is by many measures the single most successful piece of domestic legislation ever created in the United States."); Felicity Skidmore, Introduction to Social Security Financing, supra note 21, at 7-8 ("That social security was one of the most popular social programs was accepted without question.").


24. Id. at 30. Excluded workers fall into five principal categories: (1) federal civilian employees hired before January 1, 1984; (2) railroad workers (who are covered by a retirement system that is coordinated with social security); (3) certain state and local government employees who are covered by a retirement system; (4) household workers and farm workers whose earnings are below a minimum amount; and (5) individuals with very low net earnings from self-employment. Id. The 1994-1996 Advisory Council on Social Security recommended that coverage be extended to state and local government employees. 1994-96 Advisory Council on Social Security, Report Vol. I: Findings and Recommendations 19-20 (1997) [hereinafter Advisory Council Report, Vol. I]. In addition, some, but not all, members of the President's Bipartisan Commission on Entitlement and Tax Reform also have suggested that coverage be extended to state and local government employees. 1995 Bipartisan Comm'n Final Rep. on Entitlement and Tax Reform, at 28, 38, 82, 227 [hereinafter Bipartisan Comm'n Final Rep.].

25. Annual Statistical Supplement, supra note 23, at 14-15. These figures refer to the combined old-age, survivors, and disability insurance program.

26. Id. at 14.
A. Social Security Today

Social security is a nationwide, federally-administered, compulsory, contributory, defined benefit retirement program that historically has been funded on a predominantly pay-as-you-go basis. The national, rather than state-by-state, character of social security is one of the basic principles forming the foundation of the system. Unlike unemployment benefits and workers' compensation, social security applies in an identical manner throughout the United States. A single federal agency, the Social Security Administration, administers social security benefits in an extremely efficient manner.

Participation in social security is mandatory. "Social security requires that all workers — provident and improvident alike — contribute to their future security." The compulsory nature of social security serves a number of purposes. First, it permits the program to redistribute protection from the higher-paid to the lower-paid. In addition, it prevents the problem of ad-
verse selection that would occur if individuals could decide whether, and to what extent, they wanted to participate in social security. Finally, compulsion reduces the need for public assistance by requiring the improvident to pay their share of their future retirement needs.

Social security is a "contributory" system; that is, it is funded by "contributions," or payroll taxes imposed on employers and employees. The Federal Insurance Contributions Act requires that employers and employees each "contribute" 6.2% of wages, up to a maximum taxable wage base that is indexed for inflation, to fund old-age survivor and disability insurance benefits. As noted above, the "contributions" are mandatory; the payroll taxes must be paid for all covered employment. Employers and employees cannot opt out of the system.

Social security is a defined benefit retirement program under which the government promises to provide participants specific benefits based on

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34. ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 15; see also Report to the President of the Committee on Economic Security, supra note 9, at 45, 33 (["O"]ld-age annuities are designed to prevent destitution and dependency. Destitution and dependency are enormously expensive, not only in the initial costs of necessary assistance but in the disastrous psychological effect of relief upon the recipients, which, in turn, breeds more dependency.").

Some may argue that the lower-paid should not be required to contribute to social security because they have more pressing current needs while others may respond that all people — no matter their level of income — should be required to do something for their own future economic security. Cf. Peter J. Ferrara, SOCIAL SECURITY: THE INHERENT CONTRADICTION 280 (1980) (objecting to governmental paternalism because it restricts individuals' freedom to control their own lives); compare ALICIA H. MUNNELL, THE FUTURE OF SOCIAL SECURITY 93 (1977) (supporting view that lower-paid people should not be required to contribute), with MYERS, supra note 2, at 505 (advocating view that all people should be required to contribute). See generally Part III.C.

35. The "contributory" nature of the program is another of the first principles on which the system was based. DERTHICK, supra note 21, at 21. For a more in-depth discussion of the philosophy and effect of the "contributory" nature of the system, see infra notes 62-69 and accompanying text.


39. The OASI program receives 5.35% of the tax while 0.85% is allocated to the DI program. BOARD OF TRUSTEES REP., supra note 3, at 34-35.


41. The Act also requires that employers and employees contribute 1.45% of wages to fund hospital insurance, namely Medicare. 26 U.S.C. §§ 3101(b), 3111(b).

42. There are two basic types of retirement plans: defined benefit and defined contribution plans. Defined benefit plans are plans in which the benefit is expressed as a certain amount that
past earnings. To calculate retirement benefits, the government begins by determining the number of years upon which to base benefits. Currently, for all participants born after 1928 and retiring in 1991 or later, the base is thirty-five years. Earnings are then indexed for inflation. The government calculates average adjusted earnings, or "average indexed monthly earnings" (AIME) by taking the best thirty-five years of earnings, adding them together and dividing by 420 (the number of months in thirty-five years). It then multiplies average adjusted earnings by a progressive benefit formula to determine the "primary insurance amount" (PIA).

The PIA determines how much of the average adjusted earnings should be replaced. Specifically, in 1997, the progressive formula was "90% of the is to be paid at the employee's retirement. Such plans generally provide that a fixed amount per month will be paid for the life of the retired employee and spouse. The amount is based upon a formula which often takes into account the employee's years of service and salary. Plan assets are pooled together to meet the aggregate demands of all plan participants and the participants are protected against investment risk.

Defined contribution plans, in contrast, do not promise a specific benefit at retirement. Instead, benefits are based upon employer contributions to the plan. The employer contributes a specific amount to each individual account established on behalf of each participant. The account is credited not only with the employer's contributions but also with earnings and losses. Upon retirement, the participant is entitled to the amount held in the account, rather than any fixed amount. Thus, the participant, rather than the employer, is subject to investment risk. See generally ADVISORY COUNCIL ON SOCIAL SECURITY, REPORT VOL. II: REPORTS OF THE TECHNICAL PANEL ON TRENDS AND ISSUES IN RETIREMENT SAVINGS, TECHNICAL PANEL ON ASSUMPTIONS AND METHODS AND PRESENTATIONS TO COUNCIL 33-36 (1997) [hereinafter ADVISORY COUNCIL REPORT, VOL. II]; ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 75-79 (1991); JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 41-43 (2d ed. 1995).

43. ADVISORY COUNCIL REPORT, VOL I, supra note 24, at 15.

44. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY: UNDERSTANDING THE BENEFITS (1996) [hereinafter UNDERSTANDING THE BENEFITS]. Disability benefits are calculated in a similar manner, but fewer years may be taken into account. See EUGENE C. STEUERLE & JON M. BAKUA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 84-85 (1994).

45. UNDERSTANDING THE BENEFITS, supra note 44, at 11. For those born in 1928 or earlier, there are fewer years in the base. Id. The 1994-1996 Social Security Advisory Council recommended that the base be extended to 38 years. ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 20.

46. All individuals who reach 65 after 1983 must index their earnings. Individuals who reached age 62 before 1979 may not index their earnings, and individuals who reached age 62 after 1979 but before 1984 may, but are not required to, index their earnings. 2A Soc. Security L. & Prac. 22:5-7 (1987).

47. To index earnings, "each year's wage is multiplied by an 'indexing factor,' which equals the ratio of the average national wage in the year the worker turns 60 to the average national wage in the year to be indexed. For administrative convenience, wages earned at age 60 or later are left at their nominal values in the indexing process." STEUERLE & BAKUA, supra note 44, at 76.

48. Again, for individuals born in 1928 or earlier, fewer months will be taken into account. Id.

49. For a discussion of the advantages of using average earnings, see BROWN, supra note 7, at 21-23.
first $455 of AIME, plus 32% of AIME [between $455 and $2,741], plus 15% of AIME [above] $2,741." Thus, according to the formula, as a person's average earnings increase, the percentage of adjusted average earnings that are replaced decreases. Consequently, the ratio of benefits to average earnings is higher for those with low average earnings than for those with high average earnings.

As originally enacted, social security provided for the creation of a substantial reserve to fund future social security benefits. The creation of such a reserve, however, was widely criticized. In 1939, Congress amended the program to increase benefits to the first generation of retirees and thus eliminated the creation of a significant reserve. As a result of the 1939 amendment, social security shifted from a reserve system essentially to a pay-as-you-go system where current revenues funded current benefits. From 1939 to 1977, social security was financed principally on a pay-as-you-go basis. In 1977, and again in 1983, Congress amended social security to move...
away from the pay-as-you-go system toward a system with temporary partial-reserve financing where reserves built up for a few decades and then used to pay for future benefits.\textsuperscript{58} Thus, under the current system, most current revenues are used to finance current benefits, but some current revenues are set aside to fund future benefits.\textsuperscript{59}

\section*{B. Popularity of Social Security}

Although many factors may contribute to social security's popularity,\textsuperscript{60} two factors appear essential to the overwhelming popularity of the program. First, social security's advocates have carefully packaged the program to garner support. Second, until now, social security has paid most participants far more in benefits than they have contributed to the system.

1. Packaging the Program

Social security enjoys enormous political popularity because most participants view the program as an insurance program to which they contribute and from which they have a right to receive benefits.\textsuperscript{61} The public's percep-
tion of the program is not happenstance. Rather, the founders and proponents of social security have cultivated this perception carefully over the years.

The founders of the program decided to finance social security through "contributions" or payroll taxes because they believed that such financing would give participants a "right" to benefits and thus provide long-term support for the program. When asked by a reporter why the program was to be financed through payroll taxes, President Franklin D. Roosevelt replied:

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.

See supra notes 35-41 for a discussion of how contributions are calculated.

See also COHEN & FRIEDMAN, supra note 2, at 90 (statement of Wilbur J. Cohen) ("Requirement that both employee and employer contribute to the program has given political, psychological, and legal reality to the right . . . [payroll taxes] safeguard the statutory benefit as a matter of right."); DERTHICK, supra note 21, at 228 ("When policymakers considered how to pay the costs of social security, more than a method of financing was at stake. The whole philosophy of the program and the psychology of its public relations rested on the proposition that benefits were earned through the 'contributions' of individual workers. Financing was more than a means to an end. It was central."); Pifer & Chisman, supra note 20, at ix-x ("In [Roosevelt's] view, financing social security by a payroll tax would create a continuing political constituency for the program, because it would give people the feeling they had earned and were entitled to their benefits by virtue of a lifetime of payments. So far he has been proven right."); see also ADVISORY COUNCIL REPORT, VOL. 1, supra note 24, at 95 ("The fact that workers pay earmarked contributions from their wages into the system also reinforces the concept of an earned right and gives contributors a moral claim on future benefits above and beyond statutory obligations.").

64. BRAIN, supra note 15, at 1 (citing ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 308-09 (1958)). Similarly, in originally recommending that social security be financed through payroll taxes, the Committee on Economic Security explained, "[c]ontributory annuities are unquestionably preferable to noncontributory pensions. They come to the workers as a right, whereas the noncontributory pensions must be conditioned upon a 'means' test."
Over the years, social security consistently and intentionally has been referred to as insurance. In fact, Congress named the program through which social security benefits are funded the “Federal Insurance Contributions Act.” In its messages to the public, the Social Security Administration purposely has used the term “insurance” to secure public acceptance for the program. Although critics of the program long have challenged the use of the word “insurance” to describe the program, the general public continues to view the program as an insurance program through which they have a right to benefits.

2. Return on Contributions

Social security also owes much of its popularity to the fact that until now nearly all social security participants have received far more in benefits than

65. *Proposals, supra* note 4, at 140 (“To reinforce the perception of security, insurance patois was substituted for accurate terminology. . . . The misuse of the words, employed in the original legislation, continues to this day.”); see also *Weaver, supra* note 7, at 123-24 (discussing use of insurance terminology to increase marketability of social security program).

66. 26 U.S.C. ch. 21 (1989) (italics added). Insurance terminology was built into the Social Security program immediately after the United States Supreme Court upheld the constitutionality of the program in *Helvering v. Davis*, 301 U.S. 619 (1937). See *Myers, supra* note 2, at 13. Prior to that decision, administrators were advised to play down use of the term “insurance.” *Weaver, supra* note 7, at 109.

67. *Dertick, supra* note 21, at 199; see also *Altmeyer, supra* note 2, at 263 (“[T]he Social Security Board consistently throughout the years called the contributory old age, survivors’, and disability benefit system ‘insurance.’”); *Myers, supra* note 2, at 15 (“[T]he Social Security Board . . . very definitely overstressed the insurance concept in the early days of the program. This was done primarily to build up and maintain public support for the social security program—by drawing on the good name and reputation of private insurance.”).

68. See *Myers, supra* note 2, at 12-16 (defending use of term “insurance” to describe social security); see, e.g., *Proposals, supra* note 4, at 140 (Testimony by William C. Shipman, Principal, State Street Global Advisors); *Cohen & Friedman, supra* note 2, at 27 (statement of Milton Friedman) (“The very name — old age and survivors insurance — is a blatant attempt to mislead the public into identifying a compulsory tax and benefit system with private, voluntary, and individual purchase of individually assured benefits.”); *Ferrara, supra* note 34, at 66-67, 71-72 (challenging representation of social security as insurance program financed by contributions as fraudulent); *Joseph A. Pechman et al., supra* note 22, at 4 (“The differences [between social security and private insurance] are significant, however, and [our] volume argues that the present program is more appropriately viewed as a system of transfers which, like any other government program, must be financed by taxes.”); William G. Shipman, *Why It's So Hard to Reform Social Security, Pensions & Investments*, Oct. 31, 1994, at 12 (“The three components of social security . . . have little resemblance to private insurance even though the term is used throughout.”).

69. Shipman, *supra* note 68, at 12 (“The intentional misuse of terms has had the intended effect. Most Americans favor the system. They believe they have ‘contributed’ to a retirement fund where they have an account of assets.”); see also Leonard, *supra* note 22, at 57-59 (noting “armies of policy-oriented economists” unsuccessfully attempted to get everyone to see social security as they see it, as a transfer program rather than insurance); Camilla E. Watson, *Machiavelli and the Politics of Welfare, National Health, and Old Age: A Comparative Perspective of the Policies of the United States and Canada*, 1993 *Utah L. Rev.* 1337, 1359 n.113 (1993) (“Many people consider social security to be an “insurance policy.”).
they have paid in taxes. These returns, or intergenerational transfers, are a natural result of social security's operation basically as an immature pay-as-you-go system. In a pay-as-you-go system, current contributions fund current benefits. So long as the working population is stable, or growing vis-à-vis the retired population, and the economy is growing, a pay-as-you-go system can pay retirees benefits that exceed their contributions. If, however, real wages fall or the working population shrinks vis-à-vis the retired population, a pay-as-you-go system may no longer be able to pay retirees benefits that exceed their contributions.

70. See Boskin, supra note 61, at 35-37 & tbl.2.10 (noting internal rate of return for age cohort reaching 65 by 1970 ranges from 9.7 to 7.5 and cohort reaching 65 by 1980 return ranges from 6.6 to 5.6); Alicia H. Munnell, The Economics of Private Pensions 79 tbl.4-2 (1982) (showing favorable tax-benefit ratios of hypothetical workers retiring in 1979); Richard V. Burkhauser & Jennifer L. Warlick, Disentangling the Annuity from the Redistributive Aspects of Social Security in the United States, 27 Rev. Income & Wealth 401, 402 (1981) (asserting past near-unanimous support of social security may be attributable to fact that up to 1972 all income classes were net gainers under program); James E. Duggan et al., Returns Paid to Early Social Security Cohorts, XI Contemp. Pol'y Issues 1 (1993) (stating 1895-1922 birth cohort received aggregate real return of 9.1% annually); Michael D. Hurd & John B. Shoven, The Distributional Impact of Social Security, in Pensions, Labor, and Individual Choice 193, 212 (David A. Wise ed., 1985) (finding retirees who were between 58 and 64 in 1969 earned a real rate of return of approximately 8%). See supra notes 42-51 and accompanying text for a discussion of the calculation of Social Security benefits.

71. See Blinder, supra note 33, at 24-26 (explaining how social security has transferred income across generations). These intergenerational transfers are separate and distinct from the intragenerational transfers explicitly intended by social security's progressive benefit formula. See supra notes 42-51 and accompanying text; see also Blinder, supra note 33, at 26-28 (explaining how social security transfers income within generations).

72. Aaron, supra note 56, at 41 (finding Social Security operates as immature pay-as-you-go financing which provided excessive benefits to initial recipients); Bernstein & Bernstein, supra note 29, at 235-36 (concluding that Social Security's excessive benefits to its initial participants are inevitable in any pay-as-you-go system); Alicia H. Munnell, Comment on World Bank Study, in Social Security: What Role for the Future?, supra note 58, at 197 (emphasizing inevitability that first generation does well in pay-as-you-go system).

73. If the population and tax rate remain constant over time, retirees will receive a return on their contributions equal to the growth in real wages. The following formula explains this phenomenon. Assume that w is the average covered money wage, W is the number of covered workers, R is the number of retirees drawing benefits, and t is the payroll tax rate. A total of twW will be paid into the system, which can finance an average benefit payment of tw(W/R). In a stable population, W/R will be constant over time. Thus, a fixed payroll tax rate will be able to finance benefits equal to a fixed percentage of average wages. If the working population vis-à-vis the retired population is growing and the tax rate remains the same over time, retirees will receive a return on their contributions equal to the growth in population and real wages. Applying the preceding formula, in a growing population, W/R will increase over time. Thus, a fixed payroll tax rate will be able to finance benefits equal to an increasing percentage of average wages. See Blinder, supra note 33, at 21; see also Munnell, supra note 34, at 127-28; Henry J. Aaron, The Social Insurance Paradox, 32 Canadian J. Econ. & Pol. Sci. 371-74 (Aug. 1966) (showing that pay-as-you-go social insurance can increase the welfare of each person if the sum of the rates of growth and real wages exceeds the rate of interest).

74. Applying the preceding formula, in a shrinking population, W/R will decrease over time unless real wages generate adequately larger contributions. Thus, a fixed payroll tax rate will only be able to finance benefits equal to a decreasing percentage of average wages.
In 1939, Congress expressly decided to convert social security to a pay-as-you-go system because it permitted Congress to pay the first generation of retirees more than they paid into the system. Because Congress decided to operate the system on a pay-as-you-go basis instead of limiting benefits to the actuarial equivalent of contributions, the program was able to provide the first generation of participants with "reasonably adequate" benefits.

Social security has continued to provide participants with benefits that greatly exceed their contributions by continually increasing benefits and extending coverage to additional portions of the workforce.

75. See supra notes 52-59 and accompanying text for a discussion of the history of the funding of the social security system.

76. See ALTMEYER, supra note 2, at 26 (noting that technical staff presented plan that permitted reasonably adequate benefits to be paid to workers reaching retirement age in early years of the program by "using some of the current receipts to pay the cost in excess of the contributions which had been paid on behalf of these workers."); FINAL REPORT OF 1937-1938 ADVISORY COUNCIL ON SOCIAL SECURITY, reprinted in REPORT TO THE COMMITTEE, supra note 8, at 173, 187 ("The policy of paying higher benefits to persons retiring in the earlier years of the system than are the equivalent of the individual contributions is already established in the present act. Such a policy is not only sound social insurance practice but has long been recognized as necessary in private pension programs. Only through the payment of reasonable benefits can older workers be retired."); see also Richard A. Musgrave, A Reappraisal of Financing Social Security, in SOCIAL SECURITY FINANCING, supra note 21, at 89, 97 (observing two reasons given for conversion from funded system to pay-as-you-go system: (1) "it seemed unacceptable to exclude the then old generation from benefits;" and (2) "the 1937 recession, which followed rapidly upon the introduction of the system, rendered a substantial system surplus undesirable on grounds of stabilization policy.").

77. BALL, supra note 2, at 110 ("To make the program quickly effective, relatively high benefits compared to contributions have been paid to those who worked under the program just long enough to meet quite minimum eligibility requirements."); BROWN, supra note 27, at 97-98 ("To provide a reasonable level of benefits for those retiring in the early years of the system would require paying far more in benefits to the retired than the worker and his employer had contributed."); STEURLE & BAKHA, supra note 44, at 16 (asserting system crafted to transfer large amounts to first generation of retirees because no one retiring during the first few decades of the program would have contributed enough years to finance even a modest pension); Barry Bosworth, Long-Term Social Security Financing, in ADVISORY COUNCIL REPORT, VOL. II, supra note 42, at 398 ("Creating a funded system would have required, say 30 years, for a sufficient retirement fund to be built up.").

78. Under a pay-as-you-go system, increasing benefit levels permits current participants to receive benefits that exceed their contributions because they do not need to pay throughout their working lives the higher taxes required for the increased benefits. WEAVER, supra note 7, at 122. See generally James M. Buchanan, The Budgetary Politics of Social Security, in LOOMING SURPLUSES, supra note 22, at 45, 53 ("Throughout most of the history of social security, benefits have increased well beyond the limits justified by actuarial standards."); Carolyn L. Weaver, Controlling the Risks Posed by Advance Funding - Options for Reform, in LOOMING SURPLUSES, supra note 22, at 170 ("Over the years, Congress has routinely increased benefits and met part of the cost by depleting reserves.").

79. Under a pay-as-you-go system, extending coverage permits current participants to receive benefits that exceed their contributions because benefits payable vary directly with the number of people subject to the tax and the tax rate necessary to finance any given level of benefits varies inversely with the number of people subject to the tax. WEAVER, supra note 7, at 122, 127-28.
C. The Impending Funding Crisis

The days of paying participants benefits that greatly exceed their contributions, however, are coming to a close. First, Congress may no longer rely on extending coverage to fund increasing benefits. Social security already covers 96% percent of the working population; thus, there is little room left for expansion. Second, Congress may no longer increase benefits without increasing tax rates to an unacceptable level. Finally, and most importantly, the United States faces an aging population, that is, an increasing percentage of its population is sixty-five or older.

Initially, social security covered only workers in business and industry. Over the years, the program has expanded to include “the self-employed, nonprofit groups, agricultural and household workers, the Armed Services, the Congress, and all other Federal employees hired after 1983.” ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 19. The 1994-1996 Advisory Council recommended that coverage be extended to all state and local government employees hired after 1997. Id. at 25, 29, 32. See also infra notes 21-26 and accompanying text for a description of coverage under the current system.

80. Boskin, supra note 61, at 14 (“While the direct transfer from taxpayers to beneficiaries is most obvious in the example of the very first group of retirees, a similar process is repeated every time Social Security tax rates are increased or coverage extended.”); Bosworth, supra note 58, at 89, 97 n.11 (“It has taken the U.S. a surprisingly long time to complete the transition through the first generation, which receives benefits without having to pay for past retirees.”); Eugene C. Steuerle & Jon M. Bakija, How Social Security Redistributes Income, 62 TAX NOTES 1763, 1767 (1994) (“Although lifetime benefits and taxes were both growing rapidly for each successive cohort of retirees, benefits for new retirees over most of this period grew by a larger amount than the taxes they had paid during their working lives.”); see also Hurd & Shoven, supra note 70, at 193 (“The excess of benefits over taxes for the presently retired is also due to the generosity of Congress in the early 1970s. Between 1968 and 1974 benefits were raised at a rate considerably higher than the rate of inflation.”).

81. Some may argue that use of the word “crisis” is an overstatement. See, e.g., ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 102, 131 (emphasizing that Social Security is not in crisis and system needs only minimal changes); BIPARTISAN COMM’N FINAL REP., supra note 24, at 110 (statement of Commissioner Thomas J. Downey); see also Program Should Not Be Privatized As Pensions Grow Riskier, Lawmaker Says, 24 Pens. & Ben. Rep. (BNA) 1616, 1617 (July 14, 1997) (noting that view of congressmen as to whether social security system is in crisis largely divided along party lines).

82. See generally BIPARTISAN COMM’N FINAL REP., supra note 24, at 48 (statement of Commissioner Peter Peterson) (“In the past, entitlement reform has almost always rewarded the earlier-born at the direct expense of the later-born. But the days when we could finance entitlement windfalls to ourselves by shifting the costs to a more numerous and affluent rising generation are long gone.”).

83. As discussed supra note 24, the 1994-1996 Advisory Council and some members of the President’s Bipartisan Commission have recommended that coverage be extended to state and local government employees.

84. Steuerle & Bakija, supra note 80, at 1770 (contending that “payroll tax rates would have to rise astronomically if they were to continue to finance net subsidies for all participants, including high-income persons”).

85. The United Nations defines the age of a population by looking at the percentage of the population that is sixty-five or older. Robert L. Brown, Social Security and Retirees: Two Views of the Projections, in Social Security: What Role For the Future?, supra note 58, at 22.
Because social security is financed principally on a pay-as-you-go basis,\(^6\) benefit payments to retirees are dependent on the tax revenues raised from the working population.\(^7\) In 1996, there were approximately 3.3 workers for every social security beneficiary.\(^8\) Primarily because a generation with a sharp decline in the birth rate followed the baby boom generation,\(^9\) the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Trust Funds ("Trustees") predicts that the ratio of workers to beneficiaries will decline significantly early next century.\(^10\) Using intermediate assumptions,\(^11\) the Trustees predict that the number of workers per beneficiary will decline to 2.4:1 by 2020 and further fall to 2.0:1 by 2030.\(^12\)

As a result of social security's traditional funding on a pay-as-you-go basis and the country's aging population, participants in the coming years may expect to receive very low or negative returns on their contributions,\(^13\) and social security faces a long-term funding deficit. Again, using intermediate assumptions, the Trustees predict that social security benefit payments

\(^6\) See supra notes 52-59 and accompanying text for a discussion of the history of the funding of the social security system.

\(^7\) Id.

\(^8\) Board of Trustees Rep., supra note 3, at 21.

\(^9\) Increased longevity is also a factor in social security's long-term funding problems. Specifically, three factors shape the demographic equation: (1) the fertility rate, which determines how many future workers will pay into the system; (2) life expectancy which determines how long benefits must be paid over the lifetime of each beneficiary; and (3) immigration. See id. at 62-65.

\(^10\) Id. at 21, 123-24.

\(^11\) The Board of Trustees uses three sets of assumptions regarding future economic and demographic trends in evaluating the financial and actuarial status of the OASDI program. The three sets range from low cost to high cost. The Board of Trustees viewed the intermediate assumptions as their "best estimates." Id. at 11. Policymakers traditionally use the intermediate assumptions. Carolyn L. Weaver, Introduction, in LOOMING SURPLUSES, supra note 22, at 2; see also Advisory Council Report, Vol. II, supra note 42, at 137, 141-43 (explaining use of intermediate assumptions); Bipartisan Comm'n Final Rep., supra note 24, at 259 (noting projections based on intermediate assumptions). But see id. at 122-44 (quoting Commissioner Peter Peterson's contention that intermediate assumptions are too optimistic).

\(^12\) Board of Trustees Rep., supra note 3, at 124. Lawrence H. Thompson notes that the increased retiree to worker ratio constitutes a permanent shift in the projected age distribution of our population and should not be viewed as a temporary phenomenon associated with the aging of the baby boom population. Lawrence H. Thompson, Altering the Public/Private Mix of Retirement Incomes, in SOCIAL SECURITY AND PRIVATE PENSIONS, supra note 33, at 209, 210; see also Michael J. Boskin, Comment, in SOCIAL SECURITY AND PRIVATE PENSIONS, supra note 33, at 227 (agreeing with Thompson's characterization).

\(^13\) Advisory Council Report, Vol. I, supra note 24, at 104 ("Under present law, the average real rate of return on Social Security taxes is projected to fall to about 2% on average for workers reaching age 65 in 2020, and to level out at 1 to 2% on average for younger workers and future generations. This is substantially below the real return to private capital investment, which is estimated to be on the order of 9.3% for society as a whole on a pre-tax basis, or 5.4% net of corporate income taxes."); Steuerle & Bakija, supra note 80, at 1770 ("Lifetime contributions begin to exceed lifetime benefits for high-wage single males retiring in the 1980s. Positive net transfers are eliminated for high-/average wage two-earner couples retiring after the turn of the century. [H]igh-wage single workers and two-earner couples retiring in the 2020s and later will face very large negative transfers (or positive net lifetime taxes) from the system.").
will exceed dedicated tax revenues by the year 2013. The Trustees further predict that beginning in 2019, expenses from social security will exceed income, and by the year 2029, the reserve funds will be completely exhausted. The Trustees predict that unless corrective action is taken, beginning in 2029 the program’s revenues will only cover about three-fourths of the cost of benefits.

Social security’s long-term funding problems are hardly surprising. They are the inevitable result of social security’s traditional funding, on a pay-as-you-go basis, and the aging of our population. Anticipating these problems, the Committee on Economic Security predicted that over the long run, the United States’ population would age such that benefit payments would ultimately exceed income. The 1937-38 Social Security Advisory Council similarly warned of the impending demographic shift:

The planning of the old-age insurance program must take full account of the fact that, while disbursements for benefits are relatively small in the early years of the program, far larger total disbursements are inevitable in the future. No benefits should be promised

94. As discussed above, in 1977 and in 1983, Congress amended social security to move toward a system with partial-reserve financing. See supra note 58 and accompanying text. As a result of the 1977 and 1983 Amendments, the Trustees predict that revenues from social security will exceed expenditures for the next two decades, and that income from taxes plus interest on accumulated funds will continue to exceed expenses each year from 2013 until 2018. BOARD OF TRUSTEES ANN. REP., supra note 3, at 6, 25.

95. These figures refer to the combined OASDI program. See id.

96. Id. at 28.

97. But see Bosworth, supra note 77, at 398 (“Policymakers in the 1930s could not have predicted the current economic and demographic trends that have created this financing problem.”).

98. ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 12 (“[F]rom now on many young workers and workers of future generations under present law will be paying over their working lifetimes employee and employer taxes that add to considerably more than the present value of their anticipated benefits. This is the inevitable result of a pay-as-you-go system such as the United States has had, and an aging population.”); WEAVER, supra note 7, at 121-22 (“As demographics (and the insurance status of workers) inevitably changed so as to increase the proportion of beneficiaries of workers, it was believed [by opponents of a pay-as-you-go system] that the increase in tax rates ultimately required to buttress returns may well be politically unsustainable.”).

99. Report to the President of the Committee on Economic Security, supra note 9, at 33 (“Benefit payments will be light in the early years, but will increase steadily until by 1965 they will exceed the annual receipts.”); see also ALTMEYER, supra note 22, at 29 (“On the afternoon of January 16, after the President had already notified Congress that on the following day he would present a special message on economic security, he sent for Miss Perkins. He said there must be some mistake in a table which appeared in the report since he had not understood that a large deficit to be met out of general revenues would develop in the old age insurance system beginning in 1965. It is probable his attention had been called to this by the Secretary of the Treasury. When informed that the table was correct, the President said the report must be changed at least to the extent of indicating this plan was only one of several that Congress might consider. He also directed that the committee proceed to develop, as soon as possible, a completely self-sustaining old age insurance system.”).
or implied which cannot be safely financed not only in the early years of the program but when workers now young will be old.\textsuperscript{100} Despite these warnings,\textsuperscript{101} over the years Congress has chosen to fund social security principally on a pay-as-you-go basis.\textsuperscript{102} As a result, social security already has transferred large sums to retired individuals\textsuperscript{103} and today's workers face the inevitable problems of a maturing pay-as-you-go system.\textsuperscript{104}

II. The Privatization Solution

In recent years, a variety of individuals have begun to offer privatization as a solution to social security's long-term funding problems.\textsuperscript{105} Once viewed

\textsuperscript{100} See Final Report of the 1937-1938 Advisory Council on Social Security, supra note 76, at 199; id. at 184 (discussing steadily growing number of aged in country); see also Edwin E. Witte, Old-Age Security in the Social Security Act, reprinted in Witte, supra note 2, at 130 ("In a country as wealthy as the United States, it might be possible to finance a national old-age insurance system on a 'pay-as-you-go' (annual assessment) basis. It is very certain, however, that the annual costs under such a plan would increase very rapidly, due to two factors: (a) the rapid increase in the number of old people, and (b) the fact that, on the average, men retired at age 65 live twelve years thereafter and women fifteen years. This phenomenon of rapidly increasing costs has characterized every retirement system ever established and will, undoubtedly, also occur in the national old-age insurance system."). Similarly, in the early years of its existence, the Social Security Board warned that without a funded system, "[i]t would be possible for succeeding generations to meet obligations accruing through this early period only by means of a much higher tax rate than the maximum in the present law, or by a large government subsidy." Weaver, supra note 7, at 114-15 (quoting 1936-37 U.S. Soc. Security Bd. Ann. Rep. 23).

\textsuperscript{101} See 96 Cong. Rec. H12666-68 (1950) (objection of Rep. Byrnes of Wisconsin) (opposing immorality of binding future generations to pay for benefit increases paid to current retirees); Robert J. Myers, Social Security's Hidden Hazards, Wall St. J., July 28, 1972, at 8 (reporting former chief actuary of the Social Security Administration objects to increase in benefits because of effect it will have on subsequent generations).

\textsuperscript{102} It is possible that most members of Congress simply did not understand the impending demographic problems. See Brown, supra note 7, at 97 ("The understanding of actuarial costing of future benefits was almost as rare in Congress as any understanding of foreign social insurance experience.").

\textsuperscript{103} See supra notes 70-80 and accompanying text for a discussion of a pay-as-you-go system.

\textsuperscript{104} National attention was first drawn to social security's long-term funding problems in the 1970s. As a result of the perceived "crisis," Congress amended social security in 1977 and again in 1983. Following those amendments, social security moved toward a system with temporary partial-reserve financing, but, as the Trustees' most recent report illustrates, the amendments did not solve social security's long-term funding problems. For a detailed discussion of the political maneuvering leading up to the 1983 amendments, see Paul Light, Artful Work: The Politics of Social Security Reform (1985) [hereinafter Light, Artful Work]; and Paul Light, Still Artful Work: The Continuing Politics of Social Security Reform (2d ed. 1995) [hereinafter Light, Still Artful Work].

\textsuperscript{105} There are three basic approaches to privatizing social security: (1) immediate, complete privatization of the benefits of all participants; (2) immediate, complete privatization of the benefits of some, but not all, workers; and (3) partial privatization. Robert J. Myers, Privatization of Social Security: A Good Idea?, J. Am. Soc'y C.L.U. & ChFC 42, 43 (July 1996). As partial privatization proposals are by far the most common and are given the most serious consideration, this article will address only partial privatization proposals.
as a fairly radical recommendation,\textsuperscript{106} proposals to privatize partially social security have begun to receive increasing attention in the popular press.\textsuperscript{107} In addition, policymakers have begun to give the proposals serious consideration. Most recently, seven of the thirteen members of the 1994-1996 Social Security Advisory Council advocated partial privatization of social security in a report they issued in January 1997.\textsuperscript{108} Similarly, a number of members of the President's Bipartisan Commission on Entitlement and Tax Reform advocated partial privatization in the Commission's Final Report released in December 1995.\textsuperscript{109} Moreover, in recent years, members of Congress have

\textsuperscript{106} See, e.g., \textit{Advisory Council Report, Vol. I}, supra note 24, at 134 ("[T]here was a time when discussing personal accounts as a component of Social Security was radical."); \textit{Ferrara}, supra note 34, at 15 (describing as "radical" his proposal to split welfare and insurance functions of social security into separate programs and sets of institutions and completely turn over insurance portion of program to private sector); \textit{Weaver}, supra note 7, at 193 (describing proposals to privatize social security as radical); Deborah H. Weiss & Marc A. Sgaraglino, \textit{Prudent Risks for Anxious Workers}, 1996 Wis. L. Rev. 1175, 1181 (noting that privatization was once a notion that appealed to same constituency that planned to block fluoridation of water supply). Of course, some opponents of privatization still describe such proposals as radical. See e.g., Peter A. Diamond, \textit{The Future of Social Security}, in \textit{Social Security: What Role for the Future?}, supra note 58, at 225, 231.


Some of the recent attention given to privatization may be attributable to the Cato Institute's interest in the issue. In 1995, the Cato Institute created the "Cato Project on Social Security Privatization," made up of 22 economists, academics, investment advisers, insurance executives, and former government officials, whose charge was to develop and promote a politically and economically workable plan to privatize social security. See Barry B. Burr, \textit{Think Tank's Call to Reform Big Program}, Pensions & Investments, Jan. 8, 1996, at 10; Robert Dreyfuss, \textit{The Biggest Deal: Lobbying to Take Social Security Private}, 26 Am. Prospect 72 (May-June 1996).

\textsuperscript{108} \textit{Advisory Council Report, Vol. I}, supra note 24. The fact that members of the Advisory Council proposed privatization of social security is of particular significance because historically the Advisory Council has played a vital role in social security policymaking. \textit{Booth}, supra note 7, at 29-30 (citing importance of Advisory Council's contribution); \textit{Brown}, supra note 7, at 113 (stating Advisory Councils on Social Security have been valuable); \textit{Dert thick}, supra note 21, at 89 (noting important role played by Advisory Council on Social Security). That significance may, however, be somewhat diminished because historically the importance of the Advisory Council was in large part due to its ability to reach consensus, and the 1994-1996 Advisory Council could not reach consensus on the issue of privatization. \textit{Id.} at 107-08.

\textsuperscript{109} \textit{Bipartisan Comm'n Final Rep.}, supra note 24, at 26, 40.
introduced bills to privatize partially social security, and congressional subcommittees considered the issue at hearings.

Although partial privatization proposals differ widely in their details, most share the same basic elements. Typically, they require all currently covered workers (or perhaps only those workers under a certain age) and all future new workers to contribute some percentage of their social security contributions to an individual account and to invest the contributions in one or more private funds. The proposals then provide two tiers of benefits. The first tier may entitle all participants to a flat benefit regardless of earnings. In the alternative, like benefits under the current system, the first tier benefit may be based in part on earnings, but provide a greater return on lower wages than on higher wages. First tier benefits typically are lower than benefits under the current system to reflect the diversion of contributions to the individual account. The second tier benefit consists of the proceeds of


111. See, e.g., Proposals, supra note 4; Retirement Income Security: Can the Baby Boomer Generation Afford to Retire?: Hearing before the Subcomm. on Social Security of the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993); see also UNITED STATES GENERAL ACCOUNTING OFFICE, SOCIAL SECURITY: ANALYSIS OF A PROPOSAL TO PRIVATIZE TRUST FUND RESERVES 6-8 (1990) [hereinafter ANALYSIS OF A PROPOSAL].

112. Michael J. Boskin, Laurence J. Kotlikoff, and John B. Shoven offered a decidedly unique reform proposal. See Michael J. Boskin et al., Personal Security Accounts: A Proposal for Fundamental Social Security Reform, in SOCIAL SECURITY AND PRIVATE PENSIONS, supra note 34, at 179-201. They call for the creation of personal security accounts from which individuals could purchase insurance customized to suit their needs. Although five members of the Social Security Advisory Council adopted the term "personal security account" to describe their proposal, the proposal otherwise bears little resemblance to the Boskin, Kotlikoff, and Shoven proposal. Id. at 181.

113. For a discussion of why the proposals are mandatory rather than optional, see supra notes 30-34 and accompanying text and infra Part III.C.

114. Depending on the proposal, they may provide more, less, or the same redistribution that is provided under the current system. The General Accounting Office ("GAO") devised a method to adjust first tier benefits to recover fully the subsidy higher-income workers currently provide lower-income workers under the current social security system. The GAO began by
the individual account and is entirely dependent on contributions to the individual account and earnings on those contributions.

Privatization proposals vary a great deal in details such as: the percentage to be contributed to the individual account; the limitations, if any, imposed on the funds in which the worker may invest individual account contributions; the manner in which the proceeds of the individual account may be paid out upon retirement; and the amount and calculation of the first tier benefit. A comparison of the two privatization proposals advocated by members of the 1994-1996 Social Security Advisory Council illustrates the range of these differences.

Unable to reach a consensus on how to reform social security, the Advisory Council released a report in January 1997 setting forth three different proposals for reform, two of which include provisions for the partial privatization of social security. The first proposal recommends, among other

determining the average implicit rate of return each age group would receive from social security. It then subtracted for each worker an amount equivalent to the annuity that the worker's diverted taxes would have purchased if the worker had earned her age group rate of return. By applying the same age group reduction to everyone, the adjustment would achieve the current system's redistribution because individuals earn different rates of return under social security depending on their level of income. See Analysis of a Proposal, supra note 111, at 6-7.

115. Some also vary in the duration of privatization. For example, the Advisory Council proposals contemplate permanent privatization while Representative Porter proposed that social security be privatized on a temporary basis - for as long as social security collects contributions that exceed benefit costs. For a detailed discussion of the Porter proposal, see id. at 6-7.


117. The third approach would make minor modifications, such as extending the benefit computation period and covering newly hired state and local government employees, but otherwise maintain the present social security structure essentially as it is. Advisory Council Report, Vol. I, supra note 24, at 25-27. It does not include any provision for private investment but does envision, "after a period of study and evaluation," the possibility of the government investing the OASDI Trust Fund surplus in the equity market. Id. at 25. According to at least one commentator, any investment of social security funds in the equity market constitutes "privatization," even if the investment is done by and held by the government. See Davis, supra note 4, at *1 ("All the members of the [Social Security Council] advocate investing some of the $400 billion of Social Security taxes collected each year in the stock market — in effect, 'privatizing' a portion of the system."). Nevertheless, as explained supra note 4, for purposes of this article, privatization will refer only to proposals that require individuals to direct their own accounts and bear investment risks.


things, 119 (1) the establishment of individual accounts ("IAs") for participants; (2) a mandatory additional contribution of 1.6% of covered payroll to fund the IAs; 120 (3) individuals' investment choices be limited to government-managed index funds; 121 and (4) IA balances be converted to single or joint minimum guarantee indexed annuities upon retirement. 122 The first tier benefit, like the current social security benefit, is based in part on contributions. The proposal contemplates retaining the current 90% replacement rate for low earnings. It then proposes to decrease the replacement rate for middle earnings from 32% to 22.4% and decrease the replacement rate for high earnings from 15% to 10.5%. 123

The second Advisory Council proposal 124 recommends, among other things, 125 (1) the creation of personal security accounts ("PSAs"), (2) that the PSAs be funded by the reallocation of five percentage points of the employee's share of the current OASI tax, (3) that the PSAs be individually owned, privately managed, and subject to limited regulatory constraints, (4) that the funds be freely available for withdrawal at age sixty-two, and (5) that any funds remaining in the individuals' PSAs at death be includible in the

119. Other recommendations include accelerating and extending the gradual increase in the age of eligibility for full retirement benefits, slowing the growth of basic benefits, especially for middle- and high-wage workers, increasing survivors' protection for two-earner couples, and lowering dependent spouse benefits. Id. at 25-27.

120. That is, wages from covered employment and self-employment up to the maximum taxable wage base. See supra notes 24 and 41 and accompanying text.

121. The proposal does not specify which index funds would be selected or how the selection would be made. For a general discussion of the advantages of investing in stock index funds, see BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET: INCLUDING A LIFE-CYCLE GUIDE TO PERSONAL INVESTING 359-66 (5th ed. 1990).

122. The Advisory Council Report further elaborates:

The minimum guarantee provision would assure that some portion of the purchase price of the annuity—say, an amount equal to 1 year's worth of the annuity—would be payable in all cases. Thus, even if a worker who had elected a single annuity died after receiving only one annuity payment, an additional sum would be paid to the survivors.

As is the case with other pension plans, a married worker would have a choice (with the consent of the spouse) on whether a single or 'joint and survivor' annuity was chosen. (The 'joint and survivor' option would provide a lower basic annuity while the worker was alive, but would continue to pay a portion of the annuity to the survivor after the worker's death.)

ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 28.

123. See supra notes 44-51 and accompanying text for a discussion of current replacement rates and how social security benefits are calculated.

124. Five members of the Council, Joan T. Bok, Chairman, New England Electric System; Ann L. Combs, Principal, William M. Mercer, Inc.; Sylvester J. Schieber, Vice President, Watson Wyatt Worldwide Co.; Fidel A. Vargas, Mayor, City of Baldwin Park, California; and Carolyn L. Weaver, Director, Social Security and Pension Studies, The American Enterprise Institute, endorse this proposal. ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 30 n.20.

125. Other recommendations include accelerating and extending the gradual increase in the age of eligibility for full retirement benefits, eliminating the retirement earning test, extending social security coverage to all state and local government employees hired after 1997, and amending the spouse, survivor, and disabled worker OASDI benefits. ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 30-33.
individual's estate. The PSA proposal provides a flat first tier benefit for all workers under age twenty-five in 1988 equal to $410 per month in 1996 dollars, or the equivalent of 65% of the current poverty level for an elderly person living alone or 76% of the benefit payable to a low wage worker retiring in 1996.

The privatization proposals differ fundamentally from our current system in two ways. First, they move away from our current pay-as-you-go system toward a funded system because benefits from the privatized portion of the system, the individual accounts, are fully funded. Second, the proposals subject workers to investment risk. Returns from the second tier, the individual accounts, are dependent entirely on contributions and earnings on those contributions.

III. A Critique of the Solution

In today's seemingly endless bull market, the privatization proposals may appear quite appealing. They offer social security participants the opportunity to earn market rates of return on contributions to social security. The proposals, however, may not be quite as appealing as they appear at first blush. First, they do not guarantee workers that they will do better than under the current system. Rather, they subject participants to investment risk. Second, they may impose significant transition costs. In addition, by requiring workers to save for retirement while subjecting them to investment risk, the proposals promote irrational paternalism. Finally, the proposals misconceive the role social security should play in our national retirement system.

A. Investment Risk

Proponents of privatization typically emphasize the potential return to participants under a privatized social security system. They contend that privatization is an improvement over the current system because it offers the potential of a better return than the current system. For example, proponents of the Advisory Council's PSA proposal devote considerable attention

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126. Id.
127. Id. at 31.
128. Proponents offer additional justifications for privatization. For example, Representative John Porter claimed that his proposal to privatize social security on a temporary basis would (1) unmask the federal government's general budget deficit; (2) increase the national savings rate and American competitiveness; and (3) provide "individuals an opportunity to improve their overall retirement income by earning a higher return on their contributions in the private sector than under Social Security." Analysis of a Proposal, supra note 111, at 1. For a discussion of the effect of a funded system on national savings and the unmasking of the federal deficit, see generally Bosworth, supra note 58, at 102-08; Promoting National Saving Through Social Security Trust Funds, in Looming Surpluses, supra note 22, at 17-38.
to comparing the internal rates of return\textsuperscript{129} offered by the three Advisory Council proposals.\textsuperscript{130} The proponents contend that the PSA plan offers the best internal rate of return in most cases\textsuperscript{131} and thus suggest that the plan is superior for that reason.\textsuperscript{132} Similarly, the PSA advocates compare the "money's worth" ratios\textsuperscript{133} offered by the three proposals and contend that the PSA plan offers the highest ratios for workers born after the early 1960s.\textsuperscript{134} They suggest that the PSA plan is superior for that reason.\textsuperscript{135}

Like most proponents of privatization, the advocates of the PSA plan base their projections on the assumption that "workers will receive a rate of return consistent with the average historical long-term rates of return on equities."\textsuperscript{136} They concede, however, that there is no guarantee that future returns will reflect past returns.\textsuperscript{137} Indeed, it is a well-known caveat of financial planning that past returns are no guarantee of future returns.

Over the last 100 years, the average real return on stocks in the United States was about 7%.\textsuperscript{138} Over shorter periods of time, however, the returns have fluctuated enormously.\textsuperscript{139} For example, in the 1970s, stocks averaged returns of -1.4% while they averaged returns of 11.8% in the 1980s.\textsuperscript{140} Infla-

\textsuperscript{129} The internal rate of return is the "rate of return at which the present discounted value of future benefits is equal to the present discounted value of taxes paid." \textit{Advisory Council Report, Vol. I, supra} note 24, at 38.

\textsuperscript{130} See id. at 38-46.

\textsuperscript{131} The proponents concede that the MB plan offers greater or equal internal rates of return for one-earner couples but discount the importance of that differential because one-earner couples are now much less common than they were when social security was enacted in 1935. \textit{Id.} at 43.

\textsuperscript{132} The proponents of the plan concede that how well each plan does depends on the criteria used. None of the plans surpasses the others in all dimensions. \textit{Id.} at 58.

\textsuperscript{133} Money's worth ratio is the "present value of the benefits a typical individual has received or is expected to receive compared to the present value of the payroll taxes, discounted at the actual past and projected future rates of return on government bonds held by the Social Security trust funds." \textit{Id.} at 46.

\textsuperscript{134} \textit{Id.} at 46-49.


\textsuperscript{136} \textit{Advisory Council Report, Vol. I, supra} note 24, at 46.

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} Narayana R. Kocherlakota, \textit{The Equity Premium: It's Still a Puzzle}, 34 J. Econ. Literature 42, 42 (1996).

\textsuperscript{139} See generally \textit{Stocks, Bonds, Bills, and Inflation 1995 Yearbook} (Ibboston Assoc. 1995). The standard deviation on large company stock returns has been over twenty percent. \textit{Id.} at 33. Thus, in any given year, a one-third chance exists that returns could be as high as 27% or as low as -15%. Alicia H. Munnell, \textit{Book Review: Prospects for Real Reform}, 6 J. Pol'y Anal. & MGMT. 456, 458 (1987).

\textsuperscript{140} \textit{Analysis of a Proposal, supra} note 111, at 8.
tion-adjusted annual returns for Standard and Poor 500 stocks for rolling twenty-year periods between 1957 and 1990, ranged from approximately 1% to more than 5%.\textsuperscript{141} If workers are required to annuitize their individual account benefit upon retirement, as the IA proposal requires, market fluctuations could have a dramatic impact on returns particular workers earn, depending on the year they retire.\textsuperscript{142}

Even if workers are not required to annuitize their individual account benefit, as the PSA plan proposes, and can ride out market fluctuations, there is no guarantee that all "workers will receive a rate of return consistent with the average historical long-term rates of return on equities."\textsuperscript{143} First, to the extent that workers are free to invest in assets other than equity indexes,\textsuperscript{144} there is no guarantee that they will earn the average real return on stocks, whatever that may be. For example, to the extent that individuals invest in corporate bond indexes, as the IA proposal would allow, their returns are likely to be lower than the average stock returns because corporate bond returns typically are lower than stock returns.\textsuperscript{145} Moreover, to the extent that workers are entitled to invest in particular stocks, as the PSA proposal would permit, workers may earn substantially different rates of return than the average equity return. Although the average real return on stocks was about seven percent over the last century, returns on individual stocks have varied enormously. For example, although the nominal annual return on the Standard and Poor 500 Index was 23% in 1996,\textsuperscript{146} returns on individual stocks varied from as much as 207% to -43.5% that year.\textsuperscript{147} Finally, by substantially increasing the demand for equities, privatization could cause the long-term rates of return on equities to decrease.\textsuperscript{148}

\textsuperscript{141} Id.
\textsuperscript{142} See, e.g., \textit{id.} at 8 (explaining if an individual account earned interest at the inflation adjusted-adjusted rate that the S&P earned from 1967 to 1986, it would earn 3.7% while another individual account would earn 1.4% if it earned the rate from 1965 to 1984).
\textsuperscript{143} ADVISORY COUNCIL REPORT, VOL. I, supra note 24, at 46.
\textsuperscript{144} The PSA proposal would limit investments to financial instruments that are widely available in financial markets but would otherwise impose few restrictions on investments. \textit{id.} at 28. The IA proposal, in contrast, would impose far greater limits on investment choice. Individuals would only be permitted to invest in portfolios ranging from those consisting entirely of bond index funds to those consisting entirely of equity index funds. \textit{id.} at 28.
\textsuperscript{145} For example, over the 1980s, stocks earned returns averaging 11.8% while bonds earned an average return of 7.5%. For rolling 20-year periods between 1957 and 1990, inflation-adjusted average returns for stocks ranged from about 1% to over 5% while bond return averages ranged from about -2.7% to roughly 3.2%. \textit{ANALYSIS OF A PROPOSAL, supra} note 111, at 8.
\textsuperscript{147} Erin Davies, \textit{The Ins and Outs of This Year’s 5 Hundred}, \textit{FORTUNE}, Apr. 28, 1997, at F1.
\textsuperscript{148} See generally Myers, \textit{supra} note 105, at 45 ("If such huge amounts of money were available for investment in common stocks, then it is likely that rates of return will be lower than historical ones. Such massive new investment would probably produce some desirable economic growth, but there are limits to this effect. Moreover, the vast majority of the private contributions would go into the secondary capital markets, rather than into issues which would generate new capital.").
Although privatization offers workers the potential to earn better rates of return than may be possible under the current system, it does not guarantee them better rates of return. Rather, it subjects them to investment risk. Individuals might do very well; on the other hand, they might do very poorly. The privatization proposals simply do not guarantee workers that they will do better than under the current system. Indeed, individual investment experience in the 401(k) area indicates that most individuals are ill-equipped to make investment decisions\footnote{See Survey Finds Employees Lack Understanding in Retirement Preparation, 24 Pens. & Ben. Rep. (BNA) 1679, 1689 (July 21, 1997) (according to survey of benefits managers by Merrill Lynch & Co., less than 40% of employees have a good understanding of the factors that affect savings and retirement plans); Weiss & Sgaraglino, supra note 106, at 1177 (proposing reform of current pension fiduciary rules to protect financially unsophisticated workers); see, e.g., Nancy Van Gelder, Defined Contribution Upsurge Shifts Sponsor Obligation, PENSION WORLD, July 1993, at 23, 25 (“Survey data indicates that most employees in defined contribution plans: vastly underestimate the impact of inflation; tend to put too much of their money in low-yield, short-term issues, even when they have 20 or more years until retirement; hold more GICs and employer stock than defined benefit plans, creating poor diversification and unintended credit risk; tend to avoid equities, thereby failing to take enough acceptable risk; and, pay higher per capita costs—100% more than defined benefit plans in some cases.”); Archie B. Spangler, A Disciplined Approach to 401(k)/404(c) Retirement Plan Administration, PENSION WORLD, May 1993, at 18, 19 (“somewhere between 60% and 80% of 401(k) plan assets are invested in some form of guaranteed investment vehicle, bonds or cash equivalents . . . [which] are among the worst performing asset classes over time. We also know that the typical investor exhibits undisciplined use of equities, the highest performing asset class, by focusing on the short run.”).} and thus suggests that they may in fact not do well under a privatized system.\footnote{See generally Part III.C.}

B. Transition Costs

Not only do the privatization proposals subject workers to investment risk, but they may also impose significant transition costs. Privatizing social security inevitably involves transition costs. As discussed above,\footnote{See supra notes 52-59 and accompanying text.} the social security system has been funded predominantly on a pay-as-you-go basis. Thus, contributions from current workers have funded current retirees' benefits. Transferring from the current system to a privatized system requires not only that money be set aside in individual accounts to fund current workers' future benefits, but that current retirees continue to be paid benefits. Thus, privatizing social security — or switching to any other type of funded system — requires the funding of two sets of benefits at the same time.\footnote{For discussions of the transition costs of converting from a pay-as-you-go system to a funded system, see, for example, Boskin, supra note 61, at 100-01; Ferrara, supra note 34, at 337; Munnell, supra note 34, at 130; Blinder, supra note 33, at 25; Bosworth, supra note 58, at 89, 100; Munnell, supra note 72, at 197; Lawrence H. Thompson, The Social Security Reform Debate, 21 J. Econ. Literature 1425, 1443 (1983); Carolyn L. Weaver, Comment, in Social Security: What Role for the Future?, supra note 58, at 118; Peter M. Wheeler & John R. Kearney, Income Protection for the Aged in the 21st Century: A Framework to Help Inform the Debate, 59 Soc. Security Bull. 3, 15 (Summer 1996).}
The transition costs need not be financed by a payroll tax. They may be financed, for example, by general revenues or a broad-based consumption tax.\textsuperscript{153} Thus, current workers need not necessarily directly bear the burden of paying for benefits twice. The transition costs, however, must be financed from some source.

The proponents of the Advisory Council's PSA plan concede that their plan imposes transition costs.\textsuperscript{154} They propose to finance those costs by increasing the payroll tax by 1.52\% for seventy-two years and borrowing an estimated $1.9 trillion (in 1995 dollars) over the next forty years.\textsuperscript{155}

The proponents of the Advisory Council's IA plan, in contrast, assert that their plan involves no transition costs.\textsuperscript{156} They claim that "[t]he IA plan is designed to phase in naturally. The proceeds from the individual accounts gradually build up as the central OASDI benefits phase down, so that all classes of workers receive about the same benefits and the system changes naturally from the present system to the new system."\textsuperscript{157}

Contrary to the IA plan's proponents' claims, it is not possible to convert from a pay-as-you-go system to a partially funded system without imposing transition costs.\textsuperscript{158} The IA plan requires that workers (and their employers) continue to pay the 12.4\% payroll tax to fund current benefits,\textsuperscript{159} and it imposes an additional 1.6\% payroll tax to fund individual accounts to provide for current workers' future benefits. By requiring that current workers fund both current retirees' benefits and partially fund their own future benefits, the IA plan necessarily imposes transition costs.

While the transition costs in the two plans might, at first blush, appear similar, the transition costs of the PSA plan are actually much more substantial. The PSA plan requires not only a seventy-two year 1.52\% tax hike but also requires repayment on an estimated $1.9 trillion loan over the next forty years.
The actual cost of the PSA plan is estimated to be over 4% of payroll in the early years of the plan. The PSA plan imposes higher transition costs because it involves greater advance funding — 5% of payroll rather than the 1.6% of payroll under the IA plan.

The transition costs imposed by a particular privatization proposal depend upon the amount of advance funding the proposal contemplates: the greater the advance funding, the greater the transition costs. Nevertheless, to the extent that any privatization proposal contemplates converting any portion of the current system to a privatized system while retaining the old system, it must necessarily impose transition costs. The burden of the transition cost varies with the degree of advance funding.

C. Misguided Paternalism

Not only do the privatization proposals impose transition costs, but they also promote misguided paternalism. Social security is a paternalistic policy. It forces individuals to save for retirement for their own good.

160. Specifically, the plan contemplates total direct borrowing to reach $1.9 trillion in 2034, and, with interest continuing to accumulate, to peak at $2.1 trillion in 2039. Advisory Council Report, Vol. I, supra note 24, at 112.

161. Id. at 34.

162. The difference in the level of pre-funding also explains why the transition costs under the PSA plan are much higher than the transition costs would have been under the Kerrey-Simpson Bill, S. 825, 104th Cong., 1st Sess. (1995), which would have diverted two percent of the current payroll tax to individual accounts. See Advisory Council Report, Vol. I, supra note 24, at 109.

163. Gerald Dworkin defines paternalism as "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the persons being coerced." Gerald Dworkin, Paternalism, in Paternalism 19, 20 (1983). On paternalism generally, see, for example, Paternalism (Rolf Sartorius ed., 1983), and John Kleinig, Paternalism (1983).

164. Some economists view social security as an annual tax transfer program redistributing income from the relatively affluent working population to the relatively poor retired. More commonly, however, economists apply a lifetime framework to social security and view payroll taxes as mandatory saving for retirement. Munnell, supra note 34, at 7-8, 90; see also Thompson, supra note 152, 1436-38 (describing three competing conceptual models of social security: tax-transfer model, insurance model, and annuity welfare model); Deborah M. Weiss, Paternalistic Pension Policy: Psychological Evidence and Economic Theory, 58 U. Chi. L. Rev. 1275, 1279 & n. 11 (1991); Weiss & Sgaraglino, supra note 106, at 1179 n.3.

While there may be some question as to whether the current system, predominantly funded on a pay-as-you-go basis, constitutes an annual tax transfer program or a mandatory saving program, it seems clear that privatization proposals that require individuals to set aside a certain percentage of their income in an individual account for retirement and do not redistribute any portion of the amount set aside constitute mandatory savings programs.

165. One may argue that social security is for the government's good rather than for the individual's good because it reduces the government's welfare costs. See, e.g., Kleinig, supra note 163, at 165-66; Joseph Bankman, Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?, 55 U. Chi. L. Rev. 790, 820-21 (1988); Thompson, supra note 152, at 1441. See also supra notes 35-41 and accompanying text for one justification for the compulsory nature of social security. Typically, however, forced savings is viewed as promoting the good of the individual rather than that of the government. Bankman, supra, at 820.
At its most basic level, the paternalistic argument provides that without social security people will not provide adequately for their old age. Thus, we must force them to participate in social security to protect themselves from starvation, misery, poverty, and regret.\footnote{166}

Although not entirely free from criticism,\footnote{167} paternalism may justify the current social security system.\footnote{168} Specifically, the current system may protect individuals from mistakes or irrational behavior. Paternalism, however, does not justify privatization of the system.

The principle criticism of paternalism in general, and social security's paternalistic policy in particular, is that it deprives individuals of their liberty;\footnote{169} that is, social security forces individuals to purchase retirement annuities from the government, whether they want to or not. The current social security system may be justified in overriding individual liberty because it helps prevent mistakes and protects individuals from irrational behavior. Prevention of mistakes and protection against irrational behavior, however, do not justify privatization of the system.

Professor Joseph Bankman notes two different types of mistakes that may justify the forced purchase of retirement annuities.\footnote{170} The first type of


\footnote{166. See \textit{FERRARA}, \textit{supra} note 34, at 279-80; Tobin, \textit{supra} note 165, 58; Weiss, \textit{supra} note 164, at 1279.}

\footnote{167. Indeed, according to one scholar, "[p]aternalism has long been held in disrepute." Weiss, \textit{supra} note 164, at 1279. For a libertarian critique of social security's paternalistic policy, see \textit{FERRARA}, \textit{supra} note 34, at 279-81.

\footnote{168. As Professor Bankman has noted, "proposals for or against forced retirement saving raise nearly unresolvable issues. Although there are many good arguments in favor of forced saving, none of those arguments is without difficulty. Perhaps the most that can be said is that the cumulative weight of the arguments, considered in light of the misery faced by the elderly poor, might plausibly support a regimen of forced saving." Bankman, \textit{supra} note 165, at 821; see also Diamond, \textit{supra} note 165, at 275 (presenting evidence suggesting that in absence of social security, sizable fraction of American workers would not save enough for retirement); Thompson, \textit{supra} note 152, at 1442 ("It appears by a simple count of those who have addressed this issue in the Social Security literature, the vast majority believe that the gains from mandating some form of provision for retirement justify the concomitant sacrifice of free choice. In the end, the relative importance of free choice is a value judgment.").

\footnote{169. See, e.g., \textit{FERRARA}, \textit{supra} note 34, at 279-81 (discussing tendencies of paternalism to deny citizens choice and liberty); Milton Friedman, \textit{Capitalism and Freedom} 187-89 (1962) (same).}

\footnote{170. Bankman, \textit{supra} note 165, at 817. Professor Bankman discusses the justifications for the forced purchase of retirement annuities in the context of the private retirement system, but the justifications are equally applicable to social security. \textit{Id.}}}
mistake, factual mistake, is inherent in the complexity of investment decisions. Professor Bankman notes that:

[T]he amount of current saving required to support a desired lifestyle upon retirement is dependent upon future income, health and life expectancy, short-term and long-term inflation, and the risk-adjusted rate of return on alternative investments. Relatively minor errors in the factual assumptions regarding any of these factors can significantly affect the financial resources available upon retirement.\footnote{1671}

The current social security system protects workers from such mistakes by providing workers with a defined benefit upon retirement. Prevention of such mistakes, however, does not justify privatization of the system.\footnote{1672} Privatization subjects participants to investment risk and does not guarantee participants any particular return on their contributions to their individual accounts. Thus, prevention of such mistakes counsels against privatization of the system.

The second type of mistake focuses on the financial knowledge and economic sophistication of individual employees. Professor Bankman notes, "[R]etirement planning requires a facility with numbers, and the ability to understand, if not calculate, compound rates of return, amortization schedules, and the present value of a future sum."\footnote{1673} "[T]he inability of employees effectively to make use of [such] factual information may justify forced purchase of retirement annuities."\footnote{1674} Protecting against such inabilitys may justify the current social security system because it guarantees workers a specific benefit in return for the money it forces them to set aside. These inabilitys, however, counsel against privatization because privatization forces individuals to make investment decisions and thus requires them to understand, if not calculate, compound rates of return in making those decisions.\footnote{1675}

Professor Deborah Weiss describes three different types of irrational behavior protection against which may justify social security's paternalistic policy.\footnote{1676} Professor Weiss describes the first type of irrational behavior as

\footnotesize{\begin{itemize}
\item 1671. Id. at 816 (footnote omitted); \textit{see also} Pechman et al., \textit{supra} note 22, at 61 (discussing uncertainties that make individual retirement planning difficult); Thompson, \textit{supra} note 152, at 1440 (same).
\item 1672. As Professor Bankman notes, there may be ways to prevent mistakes without subjecting workers to forced savings. For example, individuals may hire professional advisors, make voluntary contributions to employer-managed pension plans, or purchase annuities from regulated financial institutions. Moreover, it may be possible to avoid mistakes by providing government-supplied information rather than forced purchase of annuities. Bankman, \textit{supra} note 165, at 816-17. Although these arguments may cast doubt on social security's policy of forcing individuals to save for retirement in the first place, they in no way support the privatization proposals. The privatization proposals, like the current system, force individuals to save for retirement.
\item 1673. Id. at 817.
\item 1674. Id.
\item 1675. See \textit{supra} notes 143-50 and accompanying text for a discussion of investment risk.
\item 1676. Weiss, \textit{supra} note 164, at 1275. Like Professor Bankman, Professor Weiss discusses this behavior principally in connection with our private pension system. Nevertheless, the discussion is equally relevant to our social security system.
\end{itemize}}
myopic. "Myopes" simply do not think much about the future. They spend money as they receive it and regret not having saved more when they retire and are forced to lower their standard of living.\textsuperscript{177} Arguably, protection against myopia may justify both the current social security system and a partially privatized system because both force individuals to save for retirement. Nevertheless, the current system is likely to do a better job of protecting against myopia because it provides workers with a defined benefit and does not tie the benefit to individual investment experience. If a myope simply does not think much about the future, she is likely to underestimate the amount of time she should devote to investment decisions and thus make unwise investment choices because she does not appreciate the importance of such decisions.

Professor Weiss describes individuals who engage in the second type of irrational behavior as "impulsives."\textsuperscript{178} Impulsives worry about their future and plan to save more, but find that they cannot. They spend their paycheck the minute they receive it and quickly regret their impetuousness.\textsuperscript{179} Impulsives may rely on "precommitment devices" to protect themselves from their impulsive behavior. For example, they may forego higher interest rates and put money in a Christmas club account to ensure they have money set aside when Christmas arrives, or they may knowingly and willingly permit the IRS to overwithhold taxes to ensure that they receive a refund.\textsuperscript{180} Arguably, both the current social security system and a partially privatized system may be justified as precommitment devices that force individuals to save for retirement and protect them from impulsive behavior.\textsuperscript{181} The current system, however, is likely to provide better protection against impulsive behavior than a partially privatized system because impulsives are unlikely to be good long-term investors. As discussed above, stock returns may fluctuate enormously over short periods of time. Thus, at times, long-term investing may require investors to be patient and ride out slumps in the market. Impulsives,

\textsuperscript{177} Id. at 1285. Professor Weiss explains why such behavior is irrational: "In common sense terms, myopia is an irrational preference for present consumption over future consumption. In economic terms, myopia is a discount rate that is irrationally larger than zero, or irrationally higher than the interest rate." Id. at 1298.

For additional discussions of myopic behavior, see, for example, Bankman, \textit{supra} note 165, at 817 (presumably Professor Bankman was referring to myopic behavior when he asserted "[a]n employee in her early working years may believe that a high retirement standard of living will bring her little enjoyment. Upon retirement, that same employee may find additional income for consumption and bequests extremely desirable."); and Thompson, \textit{supra} note 152, at 1441.

\textsuperscript{178} Weiss, \textit{supra} note 164, at 1285.

\textsuperscript{179} Id. at 1285. Such behavior may be viewed as "irrational" because it is inconsistent. \textit{Id.} at 1306-11.

\textsuperscript{180} Id. at 1307-08; Blinder, \textit{supra} note 33, at 29.

\textsuperscript{181} Alan Blinder describes such paternalism as "Ulysses paternalism," named after Ulysses who had himself tied to the mast to protect himself form the song of the Sirens. Dr. Blinder asserts that Ulysses paternalism would only seem to support a voluntary pension system, not a mandatory program. After all, Ulysses had himself tied to the mast; the government did not require it. Nevertheless, Dr. Blinder contends that "Ulysses paternalism" helps to explain social security's broad public support. Blinder, \textit{supra} note 33, at 29-30.
however, are unlikely to have the self-control necessary to do so. They are likely to "buy high" and "sell low" and find little in their individual accounts at retirement.

Professor Weiss describes individuals who engage in the third type of irrational behavior as "impatients."182 Impatients always believe that their current consumption needs are particularly important. Although they are cognizant of the need to save for the future, they believe that it will be easier to save next year than it is this year. Each year they find that their current needs are more important than they anticipated, and ultimately they find that they have saved less for retirement than they originally contemplated.183 Like impulsives, impatient behavior may be viewed as irrational because it is inconsistent.184

D. National Retirement Income Security System

Not only do the privatization proposals promote misguided paternalism, but they also misconceive the role social security should play in our national retirement income security system. Since its inception, social security balanced two competing policy objectives: equity and social adequacy. Equity means that each worker should receive a benefit that is directly related, or

182. Weiss, supra note 164, at 1286-87.
183. Id. Like impulsive behavior, impatient behavior may be viewed as irrational because it is inconsistent. Id. at 1300-06.
184. Id. at 1303.
185. Again, however, this reasoning may support only a voluntary savings program. See supra note 181.
actuarially equivalent, to the amount of her contributions.\(^{186}\) Social adequacy means that a certain standard of living should be provided for all contributors, regardless of the level of their contributions,\(^ {187}\) and implies some degree of income redistribution.\(^ {188}\) When originally enacted, social security emphasized equity.\(^ {189}\) The founders expected trust funds to accumulate and stressed the principle of a fair rate of return to each worker.\(^ {190}\) Even at the outset, however, social security assured some degree of adequacy by providing a benefit formula that weighted benefits in favor of low earners.\(^ {191}\) In any event, social security did not long emphasize equity. Within four years of enacting the system, Congress amended the program to promote a greater degree of social adequacy. Following the 1939 Amendments, social security benefits were based on average earnings over a shorter period of time and were extended to wives, widows, and orphaned children.\(^ {192}\) Since 1939, “the primary emphasis in the evolution of [social security] has been on the concept of adequacy in the prevention of hardship.”\(^ {193}\)

Wilbur J. Cohen once declared that the balancing of equity and adequacy is “the art that has made social security an acceptable system.”\(^ {194}\) In fact, because of demographics and the way social security has been financed, it has been able to ensure both adequacy and equity until now. Social security has afforded adequacy by generally giving lower-income retirees greater rates of return than higher-income retirees.\(^ {195}\) In addition, it has provided equity by paying almost all retirees far more in benefits than they have paid in taxes.\(^ {196}\) The days of ensuring all participants both adequacy and complete equity, however, have come to an end. Because of demographics and

186. MYERS, supra note 2, at 10.
187. Id.
188. Indeed, some commentators refer to the adequacy component as a welfare component. See, e.g., FERRARA, supra note 34, at 6.
189. BERNSTEIN & BERNSTEIN, supra note 29, 213-14.
190. MUNNELL, supra note 34, at 6.
191. Id. at 6 & n.2.
192. Id. at 6-7.
193. BROWN, supra note 7, at 25; see also DERTHICK, supra note 21, at 215 (explaining that welfare objectives served as one of driving forces behind changes).
194. COHEN & FRIEDMAN, supra note 2, at 68. But see FERRARA, supra note 34, at 3-4 (arguing that the inherent conflict in adequacy and equity is the source of all of the program’s major defects).
195. Whether social security has, in fact, redistributed income from the higher-paid to the lower-paid is subject to dispute. Compare FERRARA, supra note 34, at 54-57, 292 (contending that social security does not do a good job of redistributing income from the higher-paid to the lower-paid); STEUERLE & BAKIJA, supra note 44, at 1773-74 (contending that some of the highest paid have been subsidized by social security), with AARON, supra note 56, at 80 (arguing that social security operates on progressive formula, providing larger lifetime wealth increments to those workers with lower earnings); LIGHT, STILL ARTFUL WORK, supra note 104, at 37 (contending that lower-income workers have received proportionally better benefits than higher income workers).
196. As discussed in Part I.B.2, social security has been able to provide almost all retirees with far greater benefits than they paid in contributions by redistributing income from the working generations to the retired generations.
the way social security has been financed, social security will no longer be able to ensure both adequacy and complete equity. A choice between adequacy and equity must be made.

By promoting the potential return to workers under a privatized system, the privatization proposals tend to mask the need to choose between equity and adequacy. The proposals, however, do not eliminate the need to make that choice. Rather, the privatization proposals choose equity over adequacy. Their promotion of equity over adequacy can be seen in their design. First, contributions are almost invariably based solely on earnings: contributions are a percentage of social security taxes and social security taxes are a function of earnings. In addition, individual account balances are based entirely on contributions and earnings on those contributions. The privatization proposals do not guarantee any level of benefits, let alone adequate benefits, through the second tier individual accounts.

The privatization proposals may provide for some degree of adequacy through the first tier of benefit they provide. Typically, however, the first tier of benefit is lower than the benefits provided under the current system. Moreover, the first tier benefit is not what makes the privatization proposals unique. The proposals are unique precisely because they offer a second tier of benefit, the individual account, and the individual account benefit is designed to promote equity over adequacy.

The privatization proposals err in choosing equity over adequacy for a couple of reasons. First, social security is a mandatory program. To the extent that it requires all individuals to save for retirement, it should guarantee them a particular return on their savings; it should not subject them to investment risk. As discussed above, forcing individuals to save for retirement without guaranteeing them any return constitutes misguided paternalism. Moreover, choosing equity over adequacy misconceives the role social security should play in our national retirement income security system.

By creating individual accounts and basing benefits solely on workers' earnings and returns on those earnings, the privatization proposals are clearly

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197. In theory, contributions need not be based solely on earnings. Nevertheless, as discussed in supra notes 112-15, the proposals almost invariably base contributions solely on earnings.

198. As noted above, the privatization proposals also differ fundamentally from the current system because the individual account benefits are funded rather than financed on a pay-as-you-go basis. Individual accounts, however, need not be created for the system to be funded. Indeed, the Economic Security Council originally contemplated a funded system to be managed by the Social Security Board. In fact, benefits are currently partially funded through the temporary surplus managed by the Social Security Administration.

199. Admittedly, under the current system participants are always subject to the political risk that Congress may decrease benefits—or even eliminate the program altogether. In my view, however, such risks are entirely different. First, they are inevitable. Current Congresses cannot absolutely bind future Congresses. Moreover, the risks are of an entirely different nature. Under the current system, Congress is taking an individual's freedom away and promising a future benefit in return. Under a privatized system, Congress is taking an individual's freedom away and making no promises in return.
designed to promote the replacement of pre-retirement income rather than the provision of socially adequate benefits. Arguably, the replacement of a significant portion of an individual's pre-retirement income should be the ultimate goal of our national retirement income system. Replacement of a significant portion of an individual's pre-retirement income protects against the disruption of pre-retirement lifestyle after retirement. Protection against such disruption, however, should not be the goal of a mandatory retirement system like social security. Instead, such protection should be the goal of a voluntary retirement system. To the extent that workers are required to save for retirement, they should be so required to ensure that all workers have socially adequate retirement incomes upon retirement. All workers, particularly lower-income workers, should not be forced to save simply to ensure that no retirees' lifestyle is disrupted after retirement.

In our country, economic security for the aged is provided through a three-tiered system consisting of (1) a federal safety-net program called Supplemental Security Income ("SSI"), (2) social security, and (3) private initiatives. Although the three tiers of our retirement income security system

200. President's Commission on Pension Policy, Coming of Age: Toward a National Retirement Income Policy 1 (1981) [hereinafter Coming of Age] ("The Commission believes that the replacement of pre[-] retirement disposable income from all sources is a desirable retirement income goal."); Michael J. Graetz, The Troubled Marriage of Retirement Security and Tax Policies, 135 U. Pa. L. Rev. 851, 855 (1987) ("[R]eplacement of some significant portion of pre[-]retirement wages must be the fundamental goal of retirement security policy."); cf. Barbara Austin, Policies, Preferences and Perversions in the Tax-Assisted Retirement Savings System, 41 McGill L.J. 571, 577 (1996) ("The government has established two basic policy objectives behind providing tax assistance to retirement saving: (1) ensuring that all Canadians have adequate retirement income, and (2) encouraging increased private saving now to meet pension needs in the future. Ensuring adequate retirement income has generally meant both guaranteeing a basic level of retirement income for all Canadians and assisting them in avoiding serious disruption of their pre-retirement living standards.").

201. But see generally Coming of Age, supra note 200, at 5 (stating that replacement of pre-retirement income is desirable goal); Graetz, supra note 200 (arguing for mandatory retirement system to ensure replacement of pre-retirement income).

202. Brown, supra note 27, at 55 (discussing high level objectives of each of three retirement system tiers); Munnell, supra note 34, at 5 (outlining three-tier structure).

Not all commentators describe our national retirement system in the same manner. Some separate the private sector into two separate components, employer-sponsored pension programs and private, individual savings, and contend that our national retirement system consists of four tiers. See, e.g., Advisory Council Report, Vol. 1, supra note 24, at 15 (stating that retirement security system is four-tier system); Myers, supra note 2, at 5 (describing four-legged stool for providing economic security); Ball, supra note 18, at 171 (identifying four elements comprising our approach to retirement income). Others separate the private sector into the same two components but omit SSI. See Bernstein & Bernstein, supra note 29, at 93 ("Conventional wisdom holds that retirement income depends on a three-legged stool composed of Social Security, private employment-based group plans, and individual savings. Some add a fourth leg to provide for those without sufficient income from the other three, needs-tested programs, such as SSI ... "). See, e.g., Graetz, supra note 200, at 852-53 (identifying three tier structure for retirement income including social security, employer-provided pensions, and individual savings).
may overlap and work at cross purposes at times,\textsuperscript{203} they can and should perform distinct but rationally integrated roles in providing national retirement income security.\textsuperscript{204}

Social security should "serve as a floor of protection on which private-sector economic-security measures can be built."\textsuperscript{205} As such, social security should focus on the provision of socially adequate benefits rather than equitable benefits. Although the term "socially adequate benefits," like the term "floor of protection," may be vague and mean different things to different people,\textsuperscript{206} it is likely to include some degree of redistribution of income from the higher-paid to the lower-paid\textsuperscript{207} and should be greater than the level of benefits provided by SSI.\textsuperscript{208}

Private initiatives should then build on social security's "floor of protection" and may subject workers to some degree of investment risk. They should focus on equity and promote the replacement of a significant percentage of pre-retirement earnings to avoid the disruption of lifestyle after retire-

\begin{itemize}
  \item \textsuperscript{203} See Munnell, \textit{supra} note 34, at 5.
  \item \textsuperscript{204} See Nancy J. Altman, \textit{The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz}, 136 U. PA. L. REV. 1419 (1987) (discussing how retirement system elements developed in fragmented manner but should be analyzed and addressed collectively). See \textit{generally} Graetz, \textit{supra} note 200 (contending that elements of national retirement system should be considered together rather than analyzed independently and proposing reforms to current system).
  \item \textsuperscript{205} Myers, \textit{supra} note 2, at 231; see also Booth, \textit{supra} note 7, at xiv (stating social security provides a "floor of protection through wage-related benefits on which the worker can build additional security through savings, private pensions, home ownership, and other assets"); Ferrara, \textit{supra} note 34, at 17 ("The legislative history of the act makes clear that the social security program was intended to provide only a basic floor of income in old age, allowing individuals to build further income protection through private alternatives if they desired."); Nancy J. Altman, \textit{Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security}, 42 TAX L. REV. 433, 494 (1987) (stating since its inception, "social security has been recognized as inadequate by itself to maintain the standard of living of any but the very poorest recipients").
  \item \textsuperscript{206} "[Floor of protection] does not say where to locate the floor, or, to borrow a metaphor from Wilbur J. Cohen, whether the floor should be covered with quality carpeting. Far from settling anything, this standard phrase was ambiguous in the extreme. 'Undoubtedly,' Cohen once remarked, 'its great attractiveness and usefulness has been that it can mean different things to different people. Its value is in what it conceals rather than what it reveals.'" Dert Hick, \textit{supra} note 21, at 271.
  \item \textsuperscript{207} Admittedly, social security does not do as good a job of redistributing income as a pure welfare program might. See, e.g., Ferrara, \textit{supra} note 34, \textit{passim}. Nevertheless, I believe that its sometimes inefficient redistribution may be outweighed by its ability to provide lower-income workers with retirement benefits with dignity and its ability to promote the work efforts of lower-income workers.
  \item \textsuperscript{208} Social security benefits should exceed those provided by SSI to ensure that lower-income workers are encouraged to work and not to rely on SSI for retirement benefits. Cf. Myers, \textit{supra} note 2, at 805 (noting that real danger of SSI lies in its potential to discourage people from participating in social security and private retirement measures if benefit level is increased too substantially). 
\end{itemize}
ment. Finally, SSI should ensure that all individuals with spotty or weak work histories have minimally adequate incomes in retirement.\textsuperscript{209}

There is no doubt that social security's provision of "equity" played a role in the political popularity of the program.\textsuperscript{210} Expressly choosing social adequacy over complete equity, however, need not be the downfall of social security's political support. First, social security need not completely eliminate "equity" as a concept. It can and should continue to provide defined benefits based in part on earnings. Such a benefit formula can encourage productive work as well as assist the program in adapting to regional differences in income and the cost of living.\textsuperscript{211}

In addition, policymakers can further social security's political popularity by promoting it in light of its role in our national retirement income system. Policymakers may remind lower-income workers that social security provides them with retirement benefits that exceed those provided by SSI\textsuperscript{212} and that they have the right to accept the benefits with dignity because they contributed to the system and earned the right to the benefits.\textsuperscript{213}

Policymakers may point out to middle and higher income workers that without partial redistribution of their social security contributions, they would probably have to pay more income taxes to support redistributions through SSI because some earnings are likely to be redistributed whether through social security or some other program. In fact, arguably less of their money may be redistributed through social security because it forces lower-income workers to share in the cost of their retirement benefits.\textsuperscript{214}

In addition, higher-income workers may be reminded that they currently receive more than their fair share of government largesse through the third

\textsuperscript{209} SSI is a social assistance program. It provides a guaranteed minimum income to the low-income aged, blind, and disabled on a needs-tested basis and is funded through general revenues. \textit{See Advisory Council Report, Vol. I, supra} note 24, at 15 ("SSI, [not Social Security,] is designed to ensure that the most impoverished of elderly, blind, and disabled are brought up to a minimum standard of living."). \textit{See generally, Myers, supra} note 2, at 799-805 (discussing role of SSI, how payments are calculated, and how SSI helps to ensure some minimal level of income).

\textsuperscript{210} \textit{See, e.g., Munnell, supra} note 34, at 5 (discussing the "[c]oncept that each worker should receive at least as much in benefits as he had contributed was considered crucial to public acceptance of a compulsory program").

\textsuperscript{211} \textit{Dert Hick, supra} note 21, at 271-72.

\textsuperscript{212} As noted above, social security's "socially adequate benefits" should be greater than those provided by SSI to reward lower-income workers' work efforts.

\textsuperscript{213} \textit{Cf. Brown, supra} note 27, at 104-05 (maintaining "[social security was intended] to lift beneficiaries who have been regularly employed throughout life from the necessity of resorting to needs-test assistance"); \textit{Munnell, supra} note 34, at 85 (maintaining that contributory financing of social security allows workers to receive benefits as earned right rather than as a dole); Cohen, \textit{supra} note 11, at 5, 13 (stating social security "is a way of assuring the dignity and independence of the individual, the integrity of the family, and the stability and purchasing power of the community.").

\textsuperscript{214} \textit{See supra} note 207 and accompanying text for a discussion of inefficient redistribution of income.
tier of our national retirement income system. Currently, our federal government provides substantially favorable tax treatment to employer-sponsored pension programs. Although restrictions are imposed on the programs to encourage coverage of lower-income workers, plans still tend to favor the highly-paid, and the tax benefits generally accrue to the benefit of the highly-compensated.

Thus, in sum, the three tiers of our national retirement income security system can and should perform distinct but rationally integrated roles in providing national retirement income security. SSI should serve as a safety net to ensure that individuals with spotty or weak work histories have minimally adequate incomes upon retirement. Social security should serve as floor of protection to ensure that all workers have socially adequate benefits upon retirement. Finally, voluntary private initiatives should supplement social security to provide for the replacement of a significant portion of the pre-retirement earnings of individuals who participate in such programs. The privatization proposals misconceive the role social security should play in our national retirement system by requiring that all individuals participate in a program that would promote the replacement of pre-retirement income rather than the provision of socially adequate benefits.

**Conclusion**

Proposals to privatize social security are an increasingly popular solution to social security's long-term funding problems. The proposals offer participants the opportunity to earn market rates of return, a facially appealing alternative to the current system in today's seemingly endless bull market.

The proposals, however, are not a costless solution to social security's problems. First, they do not guarantee participants that they will do better than (or even as well as) they would under the current system. Rather, they subject participants to investment risk. Participants might earn better rates of return, or they might not. In addition, the privatization proposals would impose transition costs as they convert the current predominantly pay-as-you-go system to a funded system.

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215. This is not to suggest that higher-income workers should continue to receive such a large share of the governmental benefits accruing from the private sector tier of our national retirement system. It simply recognizes that they currently do.

216. The Joint Committee on Taxation estimates that net exclusions for employer retirement plan contributions and earnings will carry the highest cost of all federal tax expenditures during the years 1998-2002. Specifically, the exclusions are estimated to cost $388.8 billion in federal revenues during the years 1998-2002. **Joint Committee on Taxation, Estimates for Federal Tax Expenditures for Fiscal Years 1998-2002**, at 26.

217. See generally Altman, * supra* note 205; Bankman, * supra* note 165 (discussing impact which anti-discrimination provisions have on lower income employees and suggesting solutions which more effectively achieve goal of providing retirement income to this group); Daniel I. 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 proposals would also promote misguided paternalism. They would require individuals to save for retirement without guaranteeing them any particular return on their savings. Finally, the proposals misconceive the role social security should play in our national retirement income security system. They require that all individuals participate in a program that promotes the replacement of pre-retirement income rather than the provision of socially adequate benefits, a program that is better left to voluntary private initiatives.

Social security faces serious problems, and there are no easy answers. Although privatization may be facially appealing, it is not the solution to social security's long-term funding difficulties.