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Evaluating the Case for Social Security Reform: Elderly Poverty, Paternalism and Private Pensions

Maria O'Brien Hylton

EVALUATING THE CASE FOR SOCIAL SECURITY REFORM: ELDERLY POVERTY, PATERNALISM AND PRIVATE PENSIONS*

Maria O'Brien Hylton†

Abstract: This Article considers the many arguments currently being made in favor of Social Security pension reform and evaluates each of them in terms of the principal Congressional goal of the program—the elimination of elderly poverty—as well as more recent goals that have been articulated by subsequent commentators such as a reduction in government paternalism and the maximization of retirement income. The Article begins with a short history of the public pension program in the United States and considers at length the details of the various reform proposals that currently enjoy support. In addition it examines the enormously regressive tax structure that the current payroll tax imposes and suggests that this feature, more than any other, of the existing program warrants modification although not necessarily privatization. Finally, the Article suggests several ways in which to order the competing claims of reformers who favor privatization and those who prefer tinkering with the status quo and concludes that this debate can best be understood in light of the clash between equity and efficiency that scholars and practitioners perennially confront in the insurance arena.

INTRODUCTION

In his landmark study, *The Struggle for Social Security 1900-1935*, Roy Lubove argued that various forms of social insurance "aspired to rationalize the income-maintenance system in the United States. Such rationalization hinged upon . . . the transfer of responsibilities from the voluntary to the public sector. The need for social insurance was rooted in the

† Professor, Boston University School of Law. A.B., Harvard University; J.D., Yale Law School. This Article was originally presented at the symposium "Getting Ready for Individually Managed Pensions: A Global Perspective" held at Brooklyn Law School, September 17, 1998.

individual's precarious status in a wage-centered, money economy."[1] Today, no one seriously argues that the problem of potential economic dependency in old age has been eliminated. On the contrary, supporters of a reformed Social Security pension program explicitly rely on the current program's questionable financial viability as the basis for future reforms. This modern acceptance of the basic virtue of the public pension program represents a radical departure from the vociferous hostility which nearly engulfed the original program.[2]

Our focus today, then, is not on the desirability of this compulsory social insurance scheme but on what can and should be done to ensure its financial viability well into the next century. Or so it appears. In truth, some of the proposals currently touted in the name of "saving" Social Security would, in some cases, so radically alter the foundations of the program as to justify a conclusion that the whole concept of social insurance for elderly wage earners is, as it was in the 1930s, again under attack.

The current debate over privatization is, at least in part, a debate about whether and how to socialize risk (in this case risk of inadequate income upon retirement). This means that a conversation about Social Security reform is, at bottom, informed by the same principle at stake in the controversy over insurance risk classification. The issue is the extent to which so-called "discriminatory" outcomes should be tolerated and can be justified by an appeal to efficiency maximization. For example, would higher pension income returns delivered by a healthy stock market outweigh the loss to low income retirees of the income transfer feature that characterizes the existing program? Would individual retirement accounts (presumably associated with some degree of investment autonomy) result in such an enhancement of overall retiree wealth, thereby diminishing the loss (to some) of the transfer payment? Supporters of individual, private accounts say "yes." Others are less sure.

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[1] ROY LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935 23 (1968).

[2] Although hard to appreciate today, several historians have chronicled Social Security's shaky start. *See, e.g., An Analysis of The Development and Rationales of the U.S. Income Security System, 1776-1980 Before the Select Committee on Aging*, 97th Cong. (Comm. Pub. No. 97-303 1981) (statement of Michael S. March) [hereinafter *An Analysis of Development*]; GERALD D. NASH ET AL., SOCIAL SECURITY: THE FIRST HALF CENTURY (1988).

This Article provides a short historical introduction and then proceeds to evaluate the proposals for individually managed pensions in terms of the program's original goals: reduction in elderly poverty, income transfers from high income workers to those with relatively low incomes, and provision of a minimal income upon retirement so as to avoid elderly dependency and destitution.

I. A SHORT HISTORY OF PUBLIC PENSION IN THE U.S.

Several comprehensive histories of the Social Security program[3] have been written which provide the details of both the political and economic climate during the Great Depression which culminated in the most voluminous and far reaching social legislation this country had seen. Below this Author briefly recounts the details in order to explore some of the value judgments contained in the final legislation.

Some 60 years ago the American economy was convulsed by massive unemployment;[4] the stock market had lost approximately 70 percent of its value from 1928 to 1933, and real GNP had contracted by more than one quarter from 1929 to 1934.[5] On January 8, 1934 President Franklin Delano Roosevelt announced his intention to provide for Social Security. He created by executive order a committee on economic security which was empowered to study the problem of economic insecurity and to make recommendations which would ultimately serve as the basis for legislation. The committee's recommendations were presented to Congress in January of 1935; the

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[3] *See, e.g.*, ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY (1968); LUBOVE, *supra* note 1; EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962); *see also* Edward Berkowitz & Kim McQuaid, *Businessman and Bureaucrat: The Evolution of the American Social Welfare System, 1900-1940*, 38 J. ECON. HIST. 120 (1978).

[4] *See An Analysis of Development*, *supra* note 2, at 24 (in 1933 unemployment was estimated at over 13 million people out of a labor force of 50 million); *see also* CAROLYN L. WEAVER, THE CRISIS IN SOCIAL SECURITY: ECONOMIC AND POLITICAL ORIGINS 58-76 (1982).

[5] *See* Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 133 (1998). *See generally An Analysis of Development*, *supra* note 2, at 20-21; NASH ET AL., *supra* note 2, at 8.

Social Security Act of 1935 was signed into law on August 14, 1935 and immediately triggered litigation aimed at establishing the Act's unconstitutionality.[6]

The new Act created a social insurance program designed to pay retired workers age 65 or older an income. At the signing of the Act, the President remarked:

> [w]e can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age . . . .[7]

Although the Act would be amended in a variety of ways in subsequent years, the basic structure of the program has remained unchanged. (The Medicare bill was signed on July 30, 1965 by President Lyndon Baines Johnson;[8] the Federal Coal Mine Health and Safety Act was added in 1969;[9] the Health Care Financing Administration ("HCFA") was created in 1977;[10] the Department of Health and Human Services

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[6] *See* Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). In both opinions, Justice Cardozo rejects the claim that the federal government cannot impose income and excise taxes to raise revenue for the program to spend in aid of the "general welfare." In *Helvering*, the Court states: "Congress may spend money in aid of the general welfare . . . [T]he concept of the 'general welfare' [is not] static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times." 301 U.S. at 640-41 (internal citations omitted); while in *Steward* the Court notes:

> [t]he Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased.

301 U.S. at 588-89.

[7] SOCIAL SEC. ADMIN., A BRIEF HISTORY OF SOCIAL SECURITY: SOCIAL SECURITY 60TH ANNIVERSARY 4 (SSA Pub. No. 21-059, 1995) [hereinafter A BRIEF HISTORY]. This objective was repeated in the President's message to Congress. 74 CONG. REC. 598 (Jan. 17, 1935) (message of President Roosevelt).

[8] 42 U.S.C. §§ 1320, 1395 (1998).

[9] 30 U.S.C. §§ 801 *et seq.* (1998) The Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.* (1998), broadened the coverage of the Social Security program and transferred its oversight to the Department of Labor.

[10] The HCFA was created as a principal operating component of the HHS by the Secretary on March 8, 1977 to combine the oversight of the Medicare program,

("HHS") was created in a cabinet level reorganization in 1980;[11] and in 1983, President Ronald Reagan signed into law additional changes which extended coverage to federal employees, increased the retirement age, and subjected Social Security benefits to taxation.)[12] Today, more than one in seven Americans receives a Social Security benefit, and more than 90 percent of working people are subject to the tax which funds the program.[13]

Although it may appear today that this kind of massive social insurance program was inevitable, Arthur Altmeyer, who served on the first Social Security Board, noted that "[i]t really didn't seem to us inevitable at the time . . . quite the contrary."[14] The program reflected, of course, several key value judgments, some of which are under attack today. The first important value reflected in the legislation is the symbolic importance of a uniform tax rate, shared equally by employers and employees. The serious regressiveness problem posed by such a rate and exacerbated by the "cap" or maximum annual taxable amount has caused much concern among commentators.

The second significant value reflected in the Act is the decision to create a "pay-as-you-go" system devoid of any significant opportunity for the investment of contributions. Much has been said about this system and the absence of an investment feature driving a substantial number of today's proposals for partial privatization.

The third value, and a key component of this social legislation, is the benefit formula's built-in transfer of benefits to low wage earners from high wage earners. Comprehensive discus-

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the federal portion of Medicaid, and related quality assurance activities under one administration. For the HCFA's statement of organization, see 59 Fed. Reg. 14,628 (1994).

[11] Originally created as the Department of Health, Education and Welfare on April 11, 1953, the HHS was redesignated by the Department of Education Organization Act, 20 U.S.C. § 3508 (1998).

[12] These amendments were enacted after the President had appointed a blue-ribbon panel, known as the Greenspan Commission, to study the long term financing crisis of Social Security and to make recommendations for legislative changes. *See* A BRIEF HISTORY, *supra* note 7, at 16.

[13] *See* A BRIEF HISTORY, *supra* note 7, at 19.

[14] Arthur J. Altmeyer, If, Address at the Michigan Social Security Conference (Nov. 16, 1960) <http://www.ssa.gov/history/aja1160.html>.

sions as to the importance of this feature are lacking. It is discussed, therefore, in detail below.

Finally, the statute is explicitly concerned with the alleviation of elderly poverty. Despite the fact that it has been fashionable of late to proclaim the many ways in which the public sector falls short when compared with the efforts of the private, Social Security has been phenomenally successful in terms of this goal. It has reduced elderly poverty from 50 percent in 1935 to 11 percent today.[15] In fact, because of Social Security, one is far more likely to be poor if one is a child or a single mother than elderly.[16] This means that *on its own terms* the program has been successful. Such success, of course, does not defeat any claim for program modification, but it does mean that reform proposals should be subject to considerable scrutiny as they might unsettle decades of achievement.

II. THE SPECTRUM OF REFORM PROPOSALS

In order to understand the many reform proposals on the table, it is critical to appreciate how the current program is financed and how it calculates benefit payments to eligible retirees. As is widely known, participation in the program is, for covered employees, mandatory. For some commentators, this feature, alone, is objectionable. Indeed, Professor Feldstein claims to have demonstrated that participation in Social Security has diverted resources from other more valuable avenues of savings and investment.[17] Others object strenuously on the grounds of state paternalism.[18] The compulsory nature of the

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[15] Without Social Security benefits, today's elderly poverty rate would jump to 42%. Moreover, Social Security currently provides 90% or more of all income received by 30% of elderly beneficiaries. *See* Richelle Friedman, *Social Security: More Secure Than Privatizers Want You To Believe*, NETWORK CONNECTION, Sept.-Oct. 1998, at 3.

[16] *See generally* Friedman, *supra* note 15, at 3-5.

[17] *See, e.g.*, MARTIN FELDSTEIN, THE SOCIAL SECURITY EXPLOSION 103-04 (Pub. Inst. No. 81, 1985); Martin Feldstein, *How to Save Social Security*, N.Y. TIMES, July 27, 1998, at A17.

[18] *See, e.g.*, GERALD DWORKIN, PATERNALISM (1983) (paternalism is "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."); JOHN KLEINIG, PATERNALISM 5 (1983) ("[i]ndividual freedom is abrogated in the name of benevolence . . . ."; *id.* at 7 ("paternalism . . . [is] freedom-diminishing . . . ."); Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evi-*

scheme, however, is what allows the benefit formula to shift benefits toward low wage workers and away from high wage workers.[19] It also prevents high wage earners from electing to place their contributions in other investment vehicles where this income redistribution feature is not present. Thus, the mandatory feature of the program is essentially a mechanism for avoiding the phenomenon of adverse selection so common in other kinds of public and private insurance.[20]

When the Act was first enacted, it provided for the creation of a reserve to be used to fund future benefits; this was subject to much criticism[21] and ultimately, in 1939 Congress eliminated the reserve.[22] Thus, from 1939 until the late 1970s the system functioned on a pay-as-you-go basis as opposed to a funded system. This is an important distinction. It is important to appreciate that privatization is not the same thing as a "pre-" or "fully-" funded arrangement. A funded system is one in which retirement funds are built up in advance, during the working years of an employee who then draws down on these funds (and the attendant interest) during retirement. Fully funding retirement makes sense for a number of reasons. First, it increases the savings rate, freeing up the stock of capital available for productive investment. It has the further advantage of avoiding the burdensome tax rates that are needed to fund a "pay-as-you-go" arrangement. Professors Kotlikoff and Leibfritz recently estimated that future generations of Americans will face a Social Security tax burden 50 percent greater than that of individuals born today.[23] Not only would this

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dence and Economic Theory, 58 U. CHI. L. REV. 1275 (1991).

[19] *See* Michael J. Boskin et al., *Social Security: A Financial Appraisal Across and Within Generations*, 40 NAT'L TAX J. 19 (1987). *See generally* U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: DIFFERENT APPROACHES FOR ADDRESSING PROGRAM SOLVENCY 27-28 (GAO/HEHS-98-33, July 1998) [hereinafter GAO, SOCIAL SECURITY].

[20] *See* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION—CASES AND MATERIALS 3-4, 130-43 (1995). Adverse selection problems arise in the insurance context because potential policyholders know better than insurers whether they pose comparatively high or low risk: when insurers charge each party the same price for coverage, then high-risk parties elect to be insured in greater proportion than low-risk parties, and insurers are forced to raise the price of coverage.

[21] *See* Moore, *supra* note 5, at 139.

[22] *See* Moore, *supra* note 5, at 139.

[23] *See* LAURENCE KOTLIKOFF & WILLI LEIBFRITZ, AN INTERNATIONAL COMPARISON OF GENERATIONAL ACCOUNTS (National Bureau of Econ. Research Working

kind of tax rate represent an enormous hardship for many moderate income workers, it would almost surely prove politically intolerable.

Privatization—total or partial—would permit workers to place contributions into private accounts. While this would, at first, exacerbate the funding problem because it would divert tax dollars into accounts from which they could not be used to satisfy the government's existing obligations to current retirees, the privatization proposals might subsequently generate more income for certain retirees than Social Security. In 1950 there were sixteen workers for every eligible retiree; by 2030 there will likely be less than two.[24]

We are confronted today with the various privatization proposals for several reasons, including the misconception that privatization will solve the funding problem. It will not. In the short run, any diversion of taxes into private accounts will exacerbate the funding problem, leaving the government with only the following few alternatives: cut benefits; raise taxes; raise the eligibility threshold at which a participant may begin collecting; or some combination of each of these. The problem of unfunded liabilities really should be considered separate from the question of privatization. Privatization is attractive for a number of reasons, but it should not be understood as a solution to the funding issue. Currently, of course, the system consists of both a "pay-as-you-go" feature and partial temporary reserve financing (often referred to as "the Fund").[25] To the extent that proponents of privatization rely on concerns about unfunded liabilities to promote their schemes, they are confusing the debate. The case for privatization must be made separately from the case for funding reform, although a com-

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Paper No. 6447, 1998). Payroll taxes have already begun increasing, as noted in a recent Wall Street Journal article. *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments,* WALL ST. J., Oct. 21, 1998, at A1.

[24] See DANIEL J. MITCHELL, A BRIEF GUIDE TO SOCIAL SECURITY REFORM 3 (Heritage Found. Talking Points No. 22, Aug. 1997). *See generally* LAURENCE J. KOTLIKOFF ET AL., SOCIAL SECURITY: PRIVATIZATION AND PROGESSIVITY (National Bureau of Econ. Research Working Paper No. 6428, 1998).

[25] Currently about $500 billion is available in the Fund to pay future benefits. I 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY REPORT.: FINDINGS AND RECOMMENDATIONS 16 (1997) [hereinafter I ADVISORY COUNCIL REPORT].

prehensive proposal would, ideally, include a mechanism for funding existing liabilities and avoiding future, unfunded promises.

III. EVALUATING THE CASE FOR REFORM

There are many different "camps" promoting numerous privatization plans.[26] For the purposes of general discussion, one can identify four basic proposals: first, the immediate, complete privatization of all contributions for all participants; second, the partial privatization of some of the contributions of all participants; third, changes to the existing program that would permit the maintenance of basic benefits for at least some participants; and, fourth, complete privatization of contributions for some, but not all, workers. Because complete and total privatization for any population segment (much less all covered workers) has not received much serious attention from policymakers, this Article focuses below on partial privatization and on plan amendments that would maintain basic benefits for at least some portion of recipients.

Recently, the GAO released a report which examined the seriousness of the Social Security funding shortfall and a number of proposals for strengthening the program, including private accounts.[27] The report finds that the issue of investment risk to retirees is non-trivial. It notes, "[e]ven if the market experienced no dramatic or long-lasting downturns, the normal market cycles will create 'winners' and 'losers', depending upon when and how workers invest their Social Security assets in the market and when they liquidate their holdings. Individuals with similar work histories could receive substantially different benefits."[28]

With respect to adjustments that would leave the current plan structure intact, the report notes that raising the payroll tax would have both advantages and disadvantages for workers. Disadvantages include lower disposable income and higher labor costs. One advantage of raising the payroll tax is that it

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[26] *Id.* at 12-13, 25-33; *see also* GAO, SOCIAL SECURITY *supra* note 19; Jackie Calmes, *Social Security Report Opens Debate,* WALL ST. J., Jan. 7, 1997, at A2.

[27] *See* GAO, SOCIAL SECURITY, *supra* note 19.

[28] *Id.* at 56.

would not have the effect of raising program costs through higher benefits, as benefits are calculated on the basis of covered earnings, not contributions. Of course, it is this that would reduce the value to workers of the program because their future benefits would remain the same—they would only cost more to obtain. The GAO report does not provide a theoretical mechanism with which to evaluate these various proposals. This Article suggests below that two very different views of government coercion and equality inform these proposals. Ultimate resolution can only be made with reference to a particular set of values.

A. *Partial Privatization*

The various partial privatization proposals have in common two characteristics—all workers (sometimes only those below a certain age) must contribute a percentage of current taxes to a private, individual account and must direct the investment of funds in that account to a private source. (Whether and how much control the government would have in directing the investment of the funds in these accounts is the object of considerable controversy.)[29] A worker would then have available at retirement the following two sources of benefits: income from the individual account (which would be a function of contributions and investment performance) and a guaranteed minimum benefit. This guaranteed minimum benefit amount would probably be less than the current Social Security benefit amount because of the diversion of taxes to the private, individual fund.

The core argument in favor of partial privatization is that workers will be better off because future worker contributions will not go toward the ongoing support of an existing retiree, but rather, will enjoy a substantial investment period, providing a much larger benefit at retirement. In addition, the fund-

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[29] *See, e.g.*, I ADVISORY COUNCIL REPORT, *supra* note 25, at 35-102; PETER J. FERRARA, POWER TO THE PEOPLE: A PRIVATE OPTION FOR SOCIAL SECURITY (Americans for Tax Reform Policy Brief, 1996); MICHAEL TANNER, A NEW SOCIAL SECURITY DEBATE (Cato Inst. ed.) (Robert M. Ball approach would allow government to invest in private capital markets, while Scheiber-Weaver proposal advocates giving investment control to individuals); Ronald Brownstein, *Conservatives Want Risks of Old Age Assumed By People, Not Government*, L.A. TIMES, Apr. 7, 1997, at A5.

ing problem is at least partially addressed in that the government makes no commitment and, therefore, incurs no liability with respect to the private, individual account. Retirees will have more money to spend during their retirement, and the likelihood of elderly dependence and poverty will be reduced. Therefore, private accounts are consistent with the spirit and goals of the original program.

B. *Plan Amendments to Maintain Basic Benefits*

On the other side of the divide from partial privatization proponents are those who are persuaded that the current program is basically sound and needs only minor adjustments to correct the pending funding imbalance. It is true that no one can say for sure how serious the funding shortfall will be or exactly when it will occur. The timing and severity of the looming crisis depends on assumptions about demographic changes, interest rates, tax rates and growth in worker productivity.

Supporters of relatively minor modifications which would not include any partial privatization tend to believe in the political feasibility of tax increases to support unfunded liabilities;[30] they tend to feel that any costs associated with, for example, raising the eligible retirement age[31]are negligible. In addition, and in contrast to supporters of partial privatization, adherents of the current plan structure point to Social Security's undisputed success in reducing elderly poverty and dependence, and view the income transfer feature from high to low wage workers as an attractive way to further tax high earners.[32] The only reservation which exists with regard to

[30] *See, e.g., Future of Social Security; Personal Accounts Before the Subcomm. on Soc. Sec. of the House of Representatives Ways and Means Comm.*, 105th Cong. (June 3, 1998) (testimony of Robert M. Ball, former Comm'r of Soc. Sec.); *see also* I ADVISORY COUNCIL REPORT, *supra* note 25, at 16-21, 25-27.

[31] *See, e.g.,* Robert Rosenblatt, *GAO Warns Against Raising Age for Retirees,* L.A. TIMES, July 15, 1998, at A1. This is a real hardship for blue collar, manual laborers, many of whom cannot realistically expect to work for long after age 65 due to the physical demands of their jobs. Moreover, some of them might have to apply for disability benefits, driving up additional costs for the federal government.

[32] For some or all of these arguments, see Henry J. Aaron & Robert D. Reischauer, *A Look at the Future of Social Security,* WASH. POST, Apr. 19, 1998, at C3; Friedman, *supra* note 15, at 13-14; Richard Gephardt, *Be Careful With Social Security,* WASH. POST, July 1, 1998, at A23.

increasing the tax rate for contributions is its tremendously regressive nature.[33] Some commentators have suggested that one way to reduce the regressiveness would be to eliminate the cap on taxable income.[34] While this would help, it clearly does not eliminate the basic problem of a flat tax rate across all income levels.

C. *Discussion*

Although it may at first appear so, supporters of partial privatization and those who would only "tinker" with the existing system are not, in fact, talking at cross *purposes*. On the contrary, at the heart of this debate are conflicting *visions* of the proper role of the state, the degree to which investment risk can be made politically tolerable (even to those segments of the population that are not financially sophisticated), and a fundamental (albeit not new) conflict between equality and efficiency. Supporters of partial privatization believe, at the end of the day, that the distasteful, compulsory nature of the Social Security program is mitigated by giving workers a significant say in how and where their contributions are invested. This desire for a measure of autonomy, in spite of the background requirement that one must first save for retirement at all, resonates with those who are hostile to state paternalism.

Paternalism, in this context, is seen as a substantial infringement on liberty—the forced taking of earned dollars and the subsequent placement of that money in what must surely be judged a low risk/low return investment. Paternalism here is implicitly rejected as a misguided effort to protect individuals from themselves or from their tendency to make mistakes and under-invest for retirement.

Social Security is clearly paternalistic. There are other bases upon which to support the program, however. Income redistribution–accepted as a legitimate aim with respect to certain portions of the Internal Revenue Code[35]–is likewise a

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[33] *See* GAO, SOCIAL SECURITY, *supra* note 19, at 34. The Advisory Council on Social Security has concluded that there is little political support for bringing the program back into financial balance through payroll tax increases alone.

[34] Currently, the cap is set at $65,400.00 for 1997. 26 U.S.C. § 3121(a)(1) (1998).

[35] *See, e.g.*, 26 U.S.C. § 32 (1998) (earned income credit); *see also* ALICIA H.

useful model for Social Security. Of course, at the end of the day there is no clear way to resolve the competing claims of those who favor liberty and those who favor the program's income redistribution component.

A common concern raised by detractors of privatization is the introduction of market risk to a program that has, until now, functioned like a straightforward defined benefit plan.[36] The argument, essentially, is that privatization proposals actually promise nothing—just the possibility of better economic performance. The notoriously volatile nature of the stock market is cited to buttress this position. The critique always ends with the question: what happens to the retiree whose investments perform very badly? Supporters of privatization point to the long term tendency of the market to recover over time and the enormous upside potential for retirees to earn market rates of return over long periods of time. It is true, of course, that, as with a defined contribution[37] plan in the ERISA[38] context, nothing is promised. This has not kept millions of workers and employers from moving away from the supposed security[39] of a defined benefit plan toward defined contribution arrangements precisely in order to capture the investment advantage.

MUNNELL, THE FUTURE OF SOCIAL SECURITY 6-7 (1977) (discussing the social adequacy component of Social Security).

[36] *See* Peter T. Scott, *A National Retirement Policy,* 44 TAX NOTES 913, 919-20 (1989). A defined benefit ("DB") plan guarantees a certain amount to be paid at an employee's retirement, thereby protecting the participant against investment risk. If plan assets diminish below appropriate funding levels, it is the plan sponsor's duty to increase pension contributions. Defined contribution ("DC") plans, on the other hand, do not provide specific dollar benefits at retirement. Instead, the benefits payable to participating employees are based on the amount of employer contributions to the plan. Defined benefit plans, which numbered 103,000 in 1975, now total 53,000 while defined contribution plans have climbed to 647,000 from 208,000 in the same period, according to the Employee Benefits Research Institute ("EBRI"). ERISA statutes relating to DB plans include 29 U.S.C. § 1344 (1998).

[37] *See* Scott, *supra* note 36, at 919-20.

[38] *See* Scott, *supra* note 36, at 919-20.

[39] However, there is an "illusory" nature to defined benefit plans—at the end of the day, a plan sponsor can terminate or inadequately contribute to the plans, leaving them grossly underfunded. Moreover, even though the Pension Benefit Guarantee Corporation ("PBGC") steps in, it generally makes only a partial payment, on vested benefits.

Finally, no real resolution of these competing positions is possible because, like the equity/efficiency debate in the insurance context, each set of arguments poses some difficulty. As Ken Abraham[40] and this Author[41] have described in other settings, the tension in insurance between equity (here, redistribution of income from high to low wage earners because low earners are presumed to have had little opportunity to save during their working lives; also thought in some circumstances to consist of the "thoughtful scrutiny of individuals")[42] and efficiency (here, probably income maximization and autonomy for retirees) recurs in many other employee benefits contexts. Proponents of privatization certainly cannot guarantee that any given retiree will do better under a semi-autonomous market investment scheme, but they can demonstrate that, on average, most retirees should do better. The appeal of the income transfer feature is, without question, limited to those who favor some form of income redistribution. This appeal is demonstrably not universal. In the end, maybe the most that can be said is that the sum weight of the arguments, in light of the multiple miseries faced by the elderly poor, not only support a compulsory system of retirement savings, but one that puts, at most, a relatively small portion of those savings at risk.

The equity argument likely merits an additional comment. Many commentators believe that because this is a government, as opposed to private, program, a certain amount of attention

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[40] *See* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification,* 71 VA. L. REV. 403 (1985).

[41] *See* Maria O'Brien Hylton, *Insurance Risk Classification After McGann: Managing Risk Efficiently in the Shadow of the ADA,* 47 BAYLOR L. REV. 59, 94 (1995) ("Supporters of risk management practices, specifically classification, reveal preferences for efficiency and loss prevention incentives as the operative values in the . . . market. These values are not universally shared and frequently clash with competing concerns about avoiding the grouping of individuals based on sex, race, etc.").

[42] *See* City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 (1978) (holding that Title VII does not allow discrimination based on sexual stereotypes, no matter how sound the underlying actuarial assumptions). Thus, the Los Angeles Department of Power and Water could not require its female employees to make larger contributions to its pension fund than its male employees simply because women, as a class, generally live longer than men. Even if the sex-distinct mortality tables were efficient for group pricing, it was unfair to individuals–in this case, to the women who do not live as long as the average man.

must be paid to formal equality—i.e., two workers with essentially similar employment/earnings histories ought to draw substantially the same benefits upon retirement. Under partial privatization, this kind of "equality of outcome" cannot be guaranteed. On the contrary, depending upon the nature of investment decisions made by each worker and the timing of withdrawals, one can readily imagine two workers with similar histories who have radically different income streams at retirement under the program. This, for some, offends notions of basic fairness and equity.[43] Part of the efficiency/income maximization response, of course, is that this is the natural and appropriate outcome of semi-autonomous choice, no different from the varied experiences of consumers who elect to purchase disparate, albeit equally priced, goods and experience different levels of satisfaction. We clearly tolerate this "inequality" in other arenas—why not with public pensions as well?

CONCLUSION

Two of the three basic proposals currently floating around, which purport to "solve" the funding crisis looming in the next century, are not necessarily linked to program solvency or financing: fully private accounts (with substantial individual control over investment strategy) and partial, private accounts (with substantial government control over investment options). The case for any kind of privatization must, in the end, stand on its own merits independent of the funding question. A helpful place to start the discussion is to ask: "would we want privatization even if there was no pending issue of unfunded future liabilities?" If not, the various "maintain benefits" proposals, which Congress has looked to in the past, remain relatively attractive. Still, there exists substantial consensus that the only politically viable proposals are those involving *partial* privatization. It is here that this Article focuses in suggesting criteria for evaluating reform.

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[43] *See* GAO, SOCIAL SECURITY, *supra* note 19, at 56. Equity arguments have also been raised with regard to nontaxable fringe benefits, primarily afforded to well compensated employees, and to two-earner couples vis-a-vis couples with only one worker. I ADVISORY COUNCIL REPORT, *supra* note 25, at 139-43.

Specifically, the following criteria should be included as policymakers determine how to proceed: first, it is important to recall that the program's original, stated goal was the alleviation of elderly poverty within relevant political constraints—this ought to remain the benchmark. Benefits proposals should be subject to the repeated query: what is the expected effect of this change on rates of elderly poverty? Second, how are other vulnerable plan participants and beneficiaries affected? Categories of vulnerability may be the subject of some debate, but women, the poorly educated and low income workers might be useful places to start. Third, what are the horizontal and vertical equity effects of plan changes which eliminate the income transfer feature from the program? Is the absence of intergenerational transfers problematic? (Recall that under a partial privatization regime, two workers with substantially similar work histories could retire with dramatically different benefits.) Fourth, is there evidence which suggests privatization would enhance efficiency by maximizing income and/or autonomy for retirees? How important a value is autonomy to a retirement program? Fifth, is the introduction of investment (or market) risk politically tolerable? If so, what should be done to address the (apparently) widespread problem of investor/participant ignorance? Finally, it seems obvious that on its own terms the program has been a dramatic success, as the drop in rates of elderly poverty demonstrates. Except for concerns about funding, the plan enjoys enormous political support. Thus, any changes should be made with an eye toward retaining as much good will for the plan as possible.

None of these criteria is included in order to suggest that the current program is without blemish. The extreme regressivity of the current flat payroll tax, the unpleasant intrusion of the state into individual decisions about financial planning which a compulsory program necessarily entails, and the cap on taxable income which exacerbates vertical equity problems are but a few examples of serious issues raised by the plan's current design.

At the end of the day there is no single, simple answer to the question of whether privatization is a sound idea. The real issue is: good for whom? Given the extreme miseries of elderly poverty (a hallmark of which is the nearly complete absence of realistic prospects for upward mobility unlike poverty at other stages in life) the most one might say is that, on balance, a small amount of market risk may be tolerable.