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CHAPTER 5

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SYNOPSIS

§ 5.01 INTRODUCTION

President Bush has long been a proponent of investing a portion of payroll taxes in the private sector.[2] For example, in 1999, then-Governor George Bush said to free-market crusader Stephen Moore, "I just want you to know . . . that I'm really committed to these

[1] This chapter draws from an earlier article written by this author. Kathryn L. Moore, *Privatization of Social Security: Misguided Reform* 71 Temple L. Rev. 131 (1998). The author thanks Amy Osborne for her research assistance and Peter Hislop for his comments on an earlier draft of this chapter.

[2] *Cf.* Richard W. Stevenson, *For Bush, a Long Embrace of Social Security Plan*, New York Times 11 (Feb. 27, 2005) (noting that in a speech at the Midland Country Club in the summer of 1978, Bush said that Social Security "will be bust in 10 years unless there are some changes. . .The ideal solution would be for Social Security to be made sound and people given the chance to invest the money the way they feel."); Jeffrey H. Birnbaum, *Private-Account Concept Grew from Obscure Roots*, Washington Post A01, 2005 WL 56302843 (Feb. 22, 2005) (noting that Bush "had talked about private accounts as early as 1978 during his unsuccessful run for the House of Representatives").

private investment accounts."[3] In 2001, President Bush directed a 16-member bipartisan commission, the President's Commission to Strengthen Social Security, to formulate a plan for Social Security reform that included voluntary personal retirement accounts.[4] But it was not until the beginning of his second term in office that President Bush began in earnest his crusade[5] to fundamentally restructure Social Security.[6]

President Bush devoted considerable attention to reforming Social Security in his 2005 State of the Union address.[7] In fact, the New York Times titled its transcript of President Bush's State of the Union address, *"We Must Pass Reforms that Solve the Financial Problems of Social Security."*[8] And, following his State

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[3] Karen Tumulty and Eric Roston, *Is There Really A Crisis? Social Security is a Long Way from Bankrupt, Despite the President's Assertions. Why, Then, is Bush Taking on America's Biggest, Most Successful Social Program Ever?*, Time Magazine 22, 23 (Jan. 24, 2005).

[4] *See* President's Comm'n to Strengthen Soc. Sec., Strengthening Social Security and Creating Personal Wealth for All Americans 13 (Dec. 21, 2001) ("Modernization must include individually controlled, voluntary personal retirement accounts, which will augment the Social Security safety net."). For a critique of the Commission's report, see, for example, Colleen E. Medill, *Challenging the Four "Truths of Personal Social Security Accounts: Evidence of 401(k) Plans,* 81 N.C. L. Rev. 901 (2003); Peter A. Diamond and Peter R. Orszag, *Assessing the Plans Proposed by the President's Commission to Strengthen Social Security*, 96 Tax Notes 703 (July 29, 2002).

[5] *Cf.* Tumulty and Roston, *supra* note 3, at 28 ("Bush has promised to give G.O.P. lawmakers the cover they need by spelling out the specifics of his plan and then generating so much public support that opposing it will be the risky proposition. 'I have an obligation to lead on this issue.' ").

[6] For purposes of this Article, the term Social Security is used to refer to cash benefits provided by the United States' Old-Age, Survivors' and Disability Insurance program. *See* Kathryn L. Moore, *Partial Privatization of Social Security: Misguided Reform*, 71 Temple L. Rev. 131, 131 n.2 (1998) (citing authorities showing that this is the generally accepted meaning of the term in the United States).

[7] *See "We Must Pass Reforms that Solve the Financial Problems of Social Security,"* New York Times A22 (Feb. 3, 2005) (transcript of President Bush's State of the Union address, as recorded by the New York Times) [hereinafter "State of the Union address"].

[8] State of the Union address, *supra* note 7.

of the Union address, President Bush began a blitz across the nation to campaign for his fundamental reform of the system.[9]

President Bush claims to respect Social Security and its fundamental values. In his 2005 State of the Union address, he declared that "Social Security was a great moral success of the 20th century, and we must honor its great purposes in this new century."[10] Citing the system's financial difficulties, he claimed that "we must join together to strengthen and save Social Security."[11] Adding personal security accounts, however, would do nothing to strengthen or save Social Security. Instead, it would be the first and most significant step toward dismantling the system.

§ 5.02 STEMMING THE DEFICIT

In its 2004 Annual Report,[12] the Board of Trustees of the Social Security Trust Funds predicts that contributions to the Social Security system will exceed benefits paid by the system until 2018.[13] Beginning in 2018, it predicts that Social Security will need to draw down the assets held in the Social Security trust funds[14]

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[9] *See* Nell Henderson, *Greenspan: Cut Social Security benefits: Deficits Threaten Economy, Fed Chief Says*, Lexington Herald-Leader A1, A1–A6 (March 3, 2005) ("Bush has traveled to eight states since his State of the Union address a month ago, with six more on his itinerary by the end of next week."); David Cook, *Bush outlines second-term goals; Blitz to sell politically risky remake of Social Security blasts off today*, Christian Science Monitor 25 (Feb. 4, 2005), 2005 WL 58984942 ("Now the president and top officials from his administration are fanning out across country to sell his message on Social Security. Today, Bush visits North Dakota, Montana, and Nebraska. On Friday, the President will be in Arkansas and Florida.").

[10] State of the Union address, *supra* note 7. Similarly, in announcing the formation of the President's Commission to Strengthen Social Security, on May 2, 2001, President Bush said, "Social Security is one of the greatest achievements of the American government, and one of the deepest commitments to the American people." See Remarks by the President in Social Security Announcement (May 2, 2001), available at www.csss.gov/press/press050201.html.

[11] State of the Union address, *supra* note 7.

[12] 2004 Annual Report of the Board of Trustees of Federal Old-Age and Survivors Insurance and Disability Trust Funds [hereinafter 2004 Annual Report].

[13] *Id.* at 8.

[14] Technically, there are two separate trust funds: the trust fund for the Old Age and Survivors Insurance (OASI) program and the trust fund for the Disability Insurance (DI) program. *See, e.g., id.* at 2. This chapter will refer to the combined trust funds.

in order to pay full benefits, and the trust funds will be exhausted by 2042.[15] At that point in time, under present tax rates, it predicts that contributions will only cover 73 percent of scheduled benefits in 2042 and 68 percent of scheduled benefits in 2078.[16]

President Bush has made much of this long-term deficit. In his State of the Union address, he declared

> The system, however, on its current path, is headed toward bankruptcy. . . .
>
> . . .
>
> Thirteen years from now, in 2018, Social Security will be paying out more than it takes in. And every year afterward will bring a new shortfall, bigger than the year before.
>
> For example, in the year 2027, the government will somehow have to come up with an extra $200 billion to keep the system afloat, and by 2033, the annual shortfall would be more than $300 billion. By the year 2042, the entire system would be exhausted and bankrupt. If steps are not taken now to avert that outcome, the only solutions would be dramatically higher taxes, massive new borrowing, or sudden and severe cuts in Social Security benefits or other government programs.
>
> I recognize that 2018 and 2042 may seem a long way off. But those dates aren't so distant, as any parent will tell you. If you have a 5-year-old, you're already concerned about how you'll pay for college tuition 13 years down the road. If you've got children in their 20's, as some of us do, the idea of Social Security collapsing before they retire does not seem like a small matter. And it should not be a small matter to the United States Congress.[17]

President Bush is absolutely right that Social Security faces a long-term deficit. President Bush, however, overstates his case by completely ignoring the presence of the Social Security trust funds. Indeed, President Bush's depiction of Social Security's long-term deficit has been analogized to his claim about weapons of mass

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[15] *Id.* The Congressional Budget Office, in contrast, predicts that the Social Security trust fund will not be exhausted until 2052.

[16] 2004 Annual Report, *supra* note 12, at 8.

[17] State of the Union address, *supra* note 7.

destruction.[18] By the end of 2003, the Social Security trust funds held $1,530.8 billion,[19] and the trust funds are expected to continue to grow for the next ten years or so.[20] Beginning in 2018, the trust funds will be required to redeem the government securities they currently hold, and Social Security will cease to be a net lender to the federal government's general fund.[21] Admittedly, this change in cash flow between the Social Security trust funds and the federal government's general fund is likely to have important economic and public policy implications,[22] but that does not negate the existence of the trust funds or the fact that the Social Security system has been a net lender to the federal government for the last twenty years or so.

In his State of the Union address, President Bush did not offer a plan to solve Social Security's long-term deficit. Rather, he left all ideas, other than an increase in payroll tax rates, on the table for Congress to consider. To a casual observer, President Bush may have hinted that his personal security accounts would "fix" Social Security's long-term deficit. He introduced them immediately after

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[18] *See, e.g., One Liners*, Miami Herald L4, 2005 WLNR 2020703 (Feb. 13, 2005) ("Our fearless leader is at it again. First it was WMDs, now it's the bankruptcy of Social Security. Let's hope that Congress doesn't fall for Bush's cries of wolf this time."); Editorial, *A New Term, But The Same Old Message From The People Who Brought You Iraq, Now Social Security Reform!* Phila. Daily News 19, 2005 WLNR 770683 (Jan. 19, 2005) ("Already, the Bush administration is ordering Social Security Administration employees to paint the worst possible portrait of the future of Social Security, to the dismay of workers who know that the Bush message is full of hype. It's a Bush game plan that worked during the start of the Iraq War, when CIA analysts were browbeaten to give faulty information on Saddam Hussein's regime and his threat to the United States. We can hardly wait for the Social Security equivalent to weapons of mass destruction."); *Letter*, Bellingham Herald (Wash.) 7, 2005 WLNR 741371 (Jan. 15, 2005) ("Social Security is not broken. When President Bush and his mouthpieces tell us that, we have to remember weapons of mass destruction and the mess in Iraq that he has got us into."); *Republican divisions: Bush's election euphoria has collided with political reality*, Fin. Times 10, 2005 WLNR 236893 (Jan. 8, 2005) ("Other critics argue that Mr. Bush has still to make a convincing case for a future Social Security deficit. They see a false urgency, similar to the administration's presentation of the case for invading Iraq over weapons of mass destruction.").

[19] 2004 Annual Report, *supra* note 12, at 4.

[20] *See id.* at 50 (noting that assets will grow through 2018).

[21] *Id.* at 51.

[22] *Id.*

discussing Social Security's financial woes and the need for reform. A careful review of his address, however, makes it clear that President Bush never directly claimed that personal retirement accounts would solve Social Security's long-term deficit. In introducing the personal retirement accounts, President Bush simply said, "As we fix Social Security, we also have the responsibility to make the system a better deal for younger workers. And the best way to reach that goal is through voluntary personal retirement accounts."[23] He then offered a few comments on the accounts, but never expressly claimed that personal security accounts would solve Social Security's long-term funding deficit.

A private White House memo to conservative allies confirms that personal security accounts would not solve the deficit.[24] In that memo, Peter Wehner, President Bush's director of strategic initiatives, declared "[w]e simply cannot solve the Social Security problem with Personal Retirement Accounts alone. If the goal is permanent solvency and sustainability — as we believe it should be — then Personal Retirement Accounts, for all their virtues, are insufficient to that task."[25] Indeed, depending on how they are funded, personal retirement accounts could exacerbate, rather than solve, Social Security's long-term deficit because they impose transition costs of at least $1 to $2 trillion.[26]

Understanding the reasons for Social Security's long-term deficit helps explain why creating personal retirement accounts would not solve the system's long-term deficit. Although "delineating the causes of the long-term deficit is somewhat arbitrary, since the accounting can be done in many different ways,"[27] at least three

[23] State of the Union address, *supra* note 7.

[24] *See* Memo on Social Security, available at online.wsj.com/article/0,,SB110496995612018199,00.html.

[25] *Id.*

[26] *Id.* (describing transition costs as equal to $1 to $2 trillion). *Cf. Social Security Plan Backed*, Deseret News B01, 2005 WLNR 3988642 (March 15, 2005) (stating that transition costs "are expected to be $1.3 trillion over the next 10 years and $3 trillion to $4 trillion in the 10 years after that").

[27] *Cf.* Peter A. Diamond and Peter R. Orszag, Saving Social Security: A Balanced Approach 55 (2004) ("Ultimately, delineating the causes of the long-term deficit is somewhat arbitrary, since the accounting can be done in many different ways.").

factors contribute significantly to the system's long-term deficit.[28]

First, life expectancy is increasing. When Social Security first began to pay benefits in 1940, life expectancy at age 65 was 11.9 years for men and 13.4 years for women.[29] By 2003, life expectancy at age 65 had increased to 16.0 years for men and 19.0 years for women.[30] Moreover, the Social Security Board of Trustees predicts that by 2025, 65 year old men will have a life expectancy of 17.4 years while 65 year old women will have a life expectancy of 20.0 years, and by 2080, 65 year old men will have a life expectancy of 20.3 years while 65 year old women will have a life expectancy of 22.9 years.[31] Increasing life expectancy contributes to Social Security's long-term deficit because Social Security pays benefits for life, and any increase in life expectancy at the age at which benefits begins necessarily increases Social Security's costs, unless, of course, there is an offsetting reduction in benefits.[32]

A second factor leading to Social Security's long-term deficit is the fact that the baby boom generation is reaching retirement age,[33] and it is followed by a much smaller generation.[34] The current

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[28] In introducing their plan to reform Social Security, Drs. Diamond and Orszag also discuss three important factors contributing to Social Security's long-term deficit: (1) improvements in life expectancy, (2) increases in earnings inequality, and (3) the burden of Social Security's legacy debt. *See* Diamond and Orszag, *supra* note 22, at 57–78. This article discusses the first and third of these factors, but not the second. Rather than discussing increases in earnings inequality, the article discusses the demographic shift resulting from the impending retirement of the baby boom generation which is followed by a much smaller generation because the Social Security Board of Trustees identifies that as an important factor leading to Social Security's increased costs. See 2004 Annual Report, *supra* note 12, at 3 ("Between about 2010 and 2030, OASDI cost will increase rapidly due to the retirement of the large baby-boom generation. After 2030, increases in life expectancy and relatively low fertility rates will continue to increase Social Security system costs, but more slowly.").

[29] 2004 Annual Report, *supra* note 12, at 82 tbl. V.A.3.

[30] *Id.*

[31] *Id.* (using intermediate assumptions).

[32] *See* Diamond and Orszag, *supra* note 22, at 58–64 (explaining in detail how increasing life expectancy contributes to Social Security's long-term deficit).

[33] The eldest of the baby boom generation will reach age 62 (the earliest eligibility age for Social Security retirement benefits) in 2008. *See* U.S. Gen. Acct. Off., Social Security: Different Approaches for Addressing Program Solvency 18 (1998).

[34] See American Academy of Actuaries, Financing the Retirement of Future Gen-

Social Security system is financed principally on a pay-as-you-go basis.[35] That means that most current contributions are used to fund current benefits, and thus current workers fund benefits for current retirees. As the baby boom generation begins to retire, Social Security's costs will increase rapidly,[36] but there will be fewer and fewer workers to support those retirees. In 2003, there were 3.3 workers per Social Security beneficiary. In large part because of this demographic shift,[37] the Social Security Board of Trustee predicts that by 2025, there will only be 2.3 workers per beneficiary and by 2080, there will only be 1.9 workers per beneficiary.[38]

The third, and perhaps most significant factor contributing to Social Security's long-term deficit is what Peter Diamond and Peter Orszag refer to as the "legacy cost" or "legacy debt" of Social Security.[39] The legacy cost is the inevitable result of Social Security's traditional funding on a pay-as-you-go basis and its reaching maturity (that is, all participants having contributed to the system for their entire career).[40] The first generation of retirees

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erations: The Problem and Options for Change, Public Policy Monograph No. 1 6 (1998) ("Following World War II, there was a dramatic increase in fertility rates in the United States. Rates began to soar in 1946 and, although they peaked in 1957, their effect on annual birth rates persisted until 1964. Following the post-war increases, fertility rates plummeted and, since the early 1970s, have remained below zero population growth.").

35 Currently, the system is operating with partial reserve financing; that is, the system is currently running a surplus which will be used in later years to finance benefits when promised benefits are expected to exceed contributions. *See* Robert J. Myers, Social Security 390 (4th ed. 1993) (discussing partial reserve financing resulting from 1977 and 1983 Acts amending Social Security).

36 2004 Annual Report, *supra* note 12, at 46 ("The primary reason that the estimated OASDI cost rate increases rapidly after 2010 is that the number of beneficiaries is projected to increase more rapidly than the number of covered workers. This occurs because the relatively large number of persons born during the baby-boom will reach retirement age, and begin to receive benefits, while the relatively small number of persons born during the subsequent period of low fertility rates will comprise the labor force.")

37 For additional details on the demographic shift in the American population, see, for example, Henry Aaron and John Shoven, Should the United States Privatize Social Security? 8–11 (1999).

38 2004 Annual Report, *supra* note 12, at 47 Table IV.B2 (using intermediate assumptions).

39 Diamond and Orszag, *supra* note 22, at 6–7.

40 *See* Advisory Council of Social Security, Report Vol. I: Findings and Recom-

under a pay-as-you-go system inevitably receive excessive benefits relative to the amount they contribute to the program[41] because they only contribute to the program for a brief period of time yet receive benefits throughout their entire retirement. Unlike in a funded system, their benefits are not limited to the amount that could be financed by their contributions plus earnings on their contributions. Instead, they receive far more than they contribute to the system.[42]

The most dramatic illustration of this concept is Ida May Fuller, the first beneficiary of monthly Social Security benefits.[43] Miss Fuller contributed a total of $24.75[44] to the Social Security system

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mendations 12 (1997) ("[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 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."); Carolyn L. Weaver, The Crisis in Social Security: Economic and Political Origins 121–22 (1982) ("As demographics (and the insurance status of workers) inevitably changed so as to increase the proportion of beneficiaries to 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.")

41 Henry J. Aaron, Economic Effects of Social Security 41 (1982) (finding Social Security operates as immature pay-as-you-go financing which provided excessive benefits to initial recipients); Merton C. Bernstein & Joan Broadshaug Bernstein, Social Security: The System That Works 235–36 (1988) (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? 197 (Peter A. Diamond et al. eds., 1996) (emphasizing inevitability that first generation does well in a pay-as-you-go system).

42 Determining rates of return under the current system is difficult because the system is not a pure pay-as-you-go system. Rather benefits are calculated pursuant to a complex benefit formula that is weighted so that low income workers receive benefits equal to a higher percentage of their past wages than do higher income workers, and disabled workers, and spouses and surviving spouses are also eligible for benefits. Thus, an individual's rate of return depends on more than simply when the individual began contributing to the system. For a detailed discussion of rates of return under the current system and the complexity involved in calculating them, see General Accounting Office, Social Security: Issues in Comparing Rates of Return With Market Investments, GAO/HEHS-99-110 22–31 (Aug. 1999).

43 *See* The First Social Security Beneficiary, History Page: Brief History, available at www.ssa.gov/history/imf.html.

44 *See* President's Comm'n to Strengthen Soc. Sec., *supra* note 4, at 5 ("For years the Social Security Administration would distribute photographs of Ida May Fuller of Ludlow, Vermont, who having paid $24.75 in Social Security taxes live to age 100 and collected $22,889 in benefits.").

over a period of little less than three years and was issued her first benefit check of $22.54 on January, 31, 1940.[45] Living until the age of 100, Miss Fuller received over $20,000 in benefits during her 35 years as a beneficiary.[46]

There is nothing new or surprising about this legacy cost. Social Security's architects were well aware of this phenomenon.[47] In fact, Congress expressly converted Social Security to a pay-as-you-go system in 1939[48] because it permitted Congress to pay the first generation of retirees more than they paid into the system.[49] Indeed, the 1937-38 Social Security Advisory Council warned:

> 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 greater total disbursements are inevitable in the future. No benefits should be promised or implied which cannot be safely financed not only in the early years of the program but when workers now young will be old.[50]

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[45] *Id.*

[46] A Brief History of Social Security Issued on Social Security's 65th Anniversary, SSA Publication No. 21-059 7–8 (August 2000), available at www.ssa.gov/history/reports/briefhistory.html.

[47] *See* Report to the President of the Committee Economic Security, *reprinted in* Report of the Committee on Economic Security of 1935, and other Basic Documents Relating to the Development of the Social Security Act 33 (50th Ann. ed. 1985) ("Benefit payments will be light in the early years, but will increase steadily until by 1965 they will exceed the annual receipts.")

[48] For a discussion of the history of the funding of the Social Security system, see Moore, *supra* note 6, at 139–40.

[49] *See* Arthur J. Altmeyer, The Formative Years of Social Security 26 (1966) (noting that technical staff presented plan that permitted reasonably adequately 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 of the Committee, *supra* note 42, at 173, 187 ("The policy of paying higher benefits to persons retiring in the earlier years of the system than are the equivalent of 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.").

[50] Final Report of the 1937-1938 Advisory Council on Social Security, *reprinted in* Report of the Committee, *supra* note 42, at 173, 199.

Regardless of how one may now feel about this legacy cost,[51] it exists, and creating personal security accounts does absolutely nothing to eliminate it. The legacy cost arises from past transfers to the first generation of Social Security beneficiaries[52] and simply cannot be recouped by creating personal security accounts. Similarly, creating personal security accounts does not decrease life expectancy or change the country's basic demographic structure. Thus, creating personal retirement accounts cannot and does not eliminate Social Security's long-term deficit.

§ 5.03 IMPROVING RATES OF RETURN

Although the White House concedes that personal security accounts would not eliminate Social Security's long-term deficit, President Bush, like many proponents of personal security accounts,[53] contends that they would increase Social Security's rate

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[51] Aaron and Shoven, *supra* note 32, at 70 ("Debates on whether those decisions were wise or foolish will, doubtlessly, occupy scholars for many years."). For a defense of the legacy cost, see, Diamond and Orszag, *supra* note 22, at 69–70 ("It was a humane response to suffering imposed by World War I, the Great Depression, and World War II on Americans who came of age during those years, and it helped to reduce unacceptably high rates of poverty among them in old age. Moreover, the higher benefits not only helped the recipients themselves but also relieved part of the burden on their family and friends, and on the taxpayers of that era, who would otherwise have contributed more to their support.").

[52] Social Security's legacy cost actually accumulated over several generations because benefits were continually increased and coverage extended in the years after the enactment of Social Security. See Diamond and Orszag, *supra* note 22, at 7 ("in reality, [Social Security's legacy] debt accumulated over several generations"); Moore, *supra* note 6, at 144 nn.78–79 (explaining why continually increasing benefits and extending coverage permits system to provide participants with benefits that exceed their contributions).

[53] *See, e.g.,* Advisory Council Report, Vol. 1, *supra* note 35, 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."); Steve Forbes, *How to Replace Social Security*, The Wall Street Journal A20 (Dec. 18, 1996) ("the average worker retiring today receives a lifetime return of only about 2.2 percent on the taxes he has paid into the system. . . Contrast this with the historic 9% to 10% annual returns from stock market investments . . .The advantages of an IRA-type approach are overwhelming.")

of return. In his 2005 State of the Union address, President Bush said, "Here is why personal accounts are a better deal. Your money will grow, over time, at a greater rate than anything the current system can deliver, and your account will provide money for retirement over and above the check you will receive from Social Security."[54]

Before an audience at Catholic University, Vice President Cheney elaborated,

> Young workers who elect personal accounts can expect to receive a far higher rate of return on their money than the current system could ever afford to pay them. . . . . For example, if a 25-year-old invested $1,000 per year over 40 years at Social Security's 2 percent rate of return, in 40 years she would have over $61,000. But if she invested the money in the stock market, earning even its lowest historical rate of return, she would earn more than double that amount — $160,000.[55]

There is no doubt that Social Security's projected rates of return for future generations of retirees[56] are lower than the historical average real return on U.S. equities, which is about 7 percent.[57] As discussed in the preceding section, Social Security provided workers with very high rates of return in its early years because it was an immature pay-as-you-go system. Now that the system has reached maturity, Social Security can no longer provide such rates of return.[58] Moreover, given the aging of the American population,

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[54] *See* State of the Union Address, *supra* note 7.

[55] Jim VandeHei and Jonathan Weisman, *Partisan Social Security Claims Questioned; Budget Experts Say Both Sides Flawed*, Washington Post A05, 2005 WL 56304055 (Feb. 27, 2005).

[56] "The Social Security Administration estimates that with the 10.6 percent tax rate and the benefits projected in current law, an individual joining the work force today would receive an implicit real rate of return of only about 2.5 percent." Martin Feldstein, *Structural Reform of Social Security*, NBER Working Paper 11098 5 (Feb. 2005), *citing* Social Security Administration, Office of the Actuary, *Estimated Real Internal Rates of Return on Taxes for Social Security Benefits for Cohorts Born 1982-86* (May 17, 2001).

[57] Peter A. Diamond, *What Stock Market Returns to Expect for the Future?,* 63 Soc. Sec. Bull. 38, 39 (No. 2 2000) ("Over the past 200 years, stocks have produced a real return of 7.0 percent per year.").

[58] *See* John Geanakoplos, Olivia S. Mitchell, and Stephen Zeldes, *Social Security Money's Worth*, in Prospects for Social Security Reform 79, 86 (Olivia S.

Social Security's rates of return may in fact be negative for future generations.[59]

Just as the large net transfers to the early generations were the inevitable result of Social Security's traditional funding on a pay-as-you-go basis, these lower rates of return are an inevitable result of the economics of a pay-as-you-go system and our aging population. In a pure pay-as-you go system,[60] retirees will receive a return on their contributions equal to the growth in real wages, if the population and tax rate remain constant over time.[61] If, however, the working population shrinks vis-à-vis the retired population, as it is in the United States today and will for the foreseeable future, a pay-as-you-go system can only finance benefits equal to a decreasing percentage of average wages.[62]

Nevertheless, comparing the current system's rates of return with the historic rates of return on U.S. capital markets is inappropriate for at least two reasons.[63] First, and perhaps most significantly, such

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Mitchell, Robert J. Myers, and Howard Young eds., 1999) ("It must be emphasized that these deteriorating money's worth patterns appear even though we hold constant life expectancy and the age structure of the population. That is, falling money's worth in this model is *not* due to the aging of the baby boomers, increased life expectancy, or massive administrative inefficiency, but rather to the simple arithmetic of the pay-as-you-go system.").

59 *See, e.g.,* Steurle & Bajika, *How Social Security Redistributes Income,* 62 Tax Notes 1763, 1770 (1994) ("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.").

60 Although Social Security is not a pure pay-as-you-go system, it is funded principally on a pay-as-you-go basis.

61 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. 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. See Moore, *supra* note 6, at 143 n.73 and authorities cited therein.

62 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. *Id.* at 143 n.74.

63 Regina Jefferson offers two additional reasons why such raw comparisons

a raw comparison fails to take into account the costs involved in converting from the current pay-as-you-go system to a pre-funded system. These costs, often referred to as transition costs, are the inevitable result of the current system's legacy debt.[64] Regardless of how the transition costs are funded, they inevitably lower the rates of return for the individuals who bear those costs. Indeed, economists John Geanakoplos, Olivia Mitchell, and Stephen Zeldes have shown that if a mature, pay-as-you system were shut down and new payroll taxes were invested in the private market and explicit debt were issued to replace the unfunded promised benefits, after-tax returns on individual accounts would be identical to the low returns received under the old system.[65]

Second, raw comparisons between rates of return under the current system and a system of personal security accounts fail to take into account administrative costs. The current Social Security system is administered in an extremely efficient manner, with administrative expenses only about one percent of total expenditures.[66] Administrative costs under a system of personal security accounts would undoubtedly be higher,[67] though how much higher

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are inappropriate. First, most workers would be well-advised to invest in a diversified portfolio which would include assets other than securities and the average rate of return on such portfolios would be lower than that of the stock market. Second, calculations of Social Security's rates of return often exclude the system's disability and survivor benefits. *See* Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 Wash. & Lee L. Rev. 1287, 1321–23 (2001).

The General Accounting Office offer yet three more reasons why such comparisons are misleading. First, such comparisons do not capture the annuity costs involved in system of private accounts. "Second, future returns on both market investments and Social Security as it is now structured may not be the same as in the past, and the gap between those returns may narrow. Third, risks differ between the current Social Security program and private market investments." General Accounting Office, *supra* note 37, at 40.

64 Geanakoplos, Mitchell, & Zeldes, *supra* note 53, at 84 ("one extremely important reason that our social security system imposes such a burden on today's young is that the system transferred a great deal of wealth to the generations retiring just after the Great Depression.")

65 *See id.* at 88–96.

66 2004 Annual Report, *supra* note 12, at 4. If administrative expenses for the disability insurance program are excluded, administrative expenses fall to about 0.6 percent of expenditures. Id.

67 *See* Aaron and Shoven, *supra* note 32, at 80 (noting that most efficient ap-

depends on how the system is structured.[68] According a 1999 General Accounting Office (GAO)[69] Report, estimates of administrative costs for a centralized system of personal accounts range from 0.1 percent to 2 percent of assets while estimates for a decentralized employer-sponsored system range from 0.28 percent to 3.0 percent of assets; although, the GAO believes that these figures may underestimate expenses.[70] Such administrative expenses could significantly decrease the value of a personal account over time. For example, an annual fee of one percent of assets could reduce the accumulated balance in a personal security account by 20 percent over a 40 year career.[71]

§ 5.04 VICISSITUDES OF LIFE AND OF THE MARKET

Even if personal security accounts could increase Social Security's rates of return, it would not be the creation of the personal retirement accounts themselves that would increase the rates of return. Rather, it would be the pre-funding and diversification of investments that would accompany such accounts that would increase the rates of return.[72] Personal security accounts, however,

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proach to personal accounts "is estimated to cost [Social Security Administration] as much per person to handle these transactions as the current system does. In short, the most efficient privatization option would approximately double employment in the Social Security Administration!").

[68] *See* Patrick J. Purcell, Social Security Individual Accounts and Employer-Sponsored Pensions, CRS Report for Congress RL020305 (Feb. 3, 2005) (discussing various option and administrative costs involved in establishing a system of personal accounts); Karen C. Burke and Grayson M.P. McCouch, *Privatizing Social Security: Administrative and Implementation*, 58 Wash. and Lee L. Rev. 1325 (2001) (discussing administrative issues involved in system of personal accounts).

[69] Effective July 7, 2004, the GAO's legal name became the Government Accountability Office. *See* GAO Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811 (2004).

[70] *See* U.S. Gen. Acc. Office, Social Security Reform: Administrative Costs for Individual Accounts Depend on System Design, Report to the Ranking Minority Member, Committee on Ways and Means, House of Representatives, GAO/HEHS-99-131 12–18 (June 1999).

[71] *See* Peter A. Diamond, *The Economics of Social Security Reform*, in Framing the Social Security Debate 38, 54 (R. Douglas Arnold, et al. eds., 1998).

[72] *See* General Accounting Office, *supra* note 37, at 15 n.3 (Aug. 1999) (noting that only prefunding and diversification "would be necessary to improve rates of return").

need not be created in order to pre-fund Social Security benefits or diversify investments.[73]

Although Social Security is funded principally on a pay-as-you-go basis, it is currently running a surplus. Under current law, that surplus must be invested in U.S. Government bonds.[74] If the law were changed to permit a portion of the Social Security trust funds to be invested in the private market, they could, at least in theory, reap the same, or perhaps even higher,[75] rates of return from such investments than a system of private accounts.[76] Indeed, in recent years a number of analysts[77] and policymakers[78] have

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[73] Similarly, in theory, Social Security could be converted to a system of personal security accounts without pre-funding or diversifying investments. Indeed, Latvia established a privatized but unfunded public pension system in which payroll taxes are collected by the government and credited to workers' "notional" accounts with paper returns on contributions. *See* John Geanakoplos et al., *Would a Privatized Social Security System Really Pay a Higher Rate of Return?*, in Framing the Social Security Debate 137, 141 (R. Douglas Arnold et al. eds., 1998). President Bush, however, clearly has no interest in such a system.

[74] 42 U.S.C. § 401(d) ("Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.").

[75] Arguably the returns would be even higher than under a system of individual accounts because administrative costs would be lower. *See* Diamond and Orszag, *supra* note 22, at 215.

[76] Diamond and Orszag, *supra* note 22, at 214 ("Any benefits from a diversified portfolio within an individual accounts system could in principle also be achieved through investments by the Social Security trust fund itself.").

[77] *See*, *e.g.,* Bob Ball, Insuring the Essentials: Bob Ball on Social Security 233–41; (2000); Henry J Aaron and Robert D. Reischauer, Countdown to Reform 113–14 (1998).

[78] *Cf. Clinton Fiscal 2001 Budget Plan Includes Equity Investment of Social Security Assets*, 27 Pens. & Bene. Rep. (BNA) 466, 466 (2000) ("The Clinton administration's fiscal 2001 budget proposal, transmitted to Congress Feb. 7, revisits the idea of investing Social Security Trust assets in equities, a proposal the administration dropped last year after it proved too controversial to garner bipartisan support."); Douglas E. Elmendorf, Jeffrey B. Liebman, and David W. Wilcox, *Fiscal Policy and Social Security Policy during the 1990s*, in American Economic Policy in the 1990s 61, 91–106 (Jeffrey Frankel and Peter Orszag eds., 2002) (describing Clinton Administration's proposal to allow stock market investments by the trust fund); I Advisory Council Report, *supra* note 35, at 25 (one of three different reforms proposed by Advisory Council, the "maintain benefits plan," urges further study and examination of a plan to invest OASDI trust fund monies in the equity market).

proposed that the law be changed to permit the investment of a portion of the reserve in equities.[79] President Bush, however, has no interest in such a proposal. Instead, he is firmly committed to the creation of personal accounts.

Permitting investment in the private market through personal accounts rather than through the trust fund would fundamentally alter the nature of the Social Security system. Specifically, it would shift investment risk from the federal government to individual workers.

As part of his public campaign to reform Social Security, President Bush told an audience in Louisville, Kentucky, "I believe everybody has the capability of being in the investor class. I like the idea of people opening up their statements on a quarterly basis and watching their asset base grow."[80] According to a British weekly journal:

> The notion that changing social security would be one of Bush's vehicles of greatness began and developed into another ideological issue when he was governor of Texas; the story was told then that the caretaker of a court building in Galveston had made no less than $750 [million] from dabbling in stocks and shares.[81]

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[79] Of course, such proposals raise "difficult issues of corporate governance and potential political interference in capital markets." Elmendorf et al., *supra* note 73, at 99. *See also* Charles P. Blahous III, Reforming Social Security: For Ourselves and Our Posterity 135 (2000) (objecting to trust fund investing in private market as "intolerable to our free economic traditions and to our political tradition of seeking to avoid corrupting admixtures of political and economic power"); Diamond and Orszag, *supra* note 22, at 215 (noting that "[o]ne of the most commonly raised concerns about trust fund investment in stocks involves corporate governance.").

For analyses of the wisdom of investing the Social Security trust fund in the private equities market, see authorities cited in Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 Missouri L. Rev. 341, 351 n. 42 (2000).

[80] Ryan Alessi, *His solution: private accounts: Campaign targets younger workers*, Lexington Herald-Leader A1, A1 (March 11, 2005).

[81] Stephen Andrew, america, New Statesman 19, 2005 WLNR 1383629 (Jan. 24, 2005).

Time Magazine offers a slightly different spin on this legend. It reports that Bush's advisors say that as Governor, "he was struck by the experiences of local governments in places like Galveston County that had allowed their employees to opt out of government retirement plans and invest the proceeds in private funds

While this legend may make a system of personal accounts sound appealing, stock investments do not always grow. For every legendary three-quarter millionaire courthouse caretaker, there is at least one former Enron employee who lost most or all of his or her retirement savings when Enron went bankrupt.[82]

When signing the Social Security Act into law on August 14, 1935, President Roosevelt declared,

> We 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.[83]

Rather than protecting individuals from the vicissitudes of life, a system of personal security accounts would subject individuals to the vicissitudes of the stock market.

Enron stock most dramatically illustrates the vicissitudes of the stock market. In January 2000, Enron stock sold for about $40 per

— yielding legends of courthouse janitors with $750,000 nest eggs." Tumulty and Roston, *supra* note 3, at 25.

It is indeed true that the county of Galveston, Texas, opted out of the Social Security system on January 1, 1981. It may also be true that a Galveston county courthouse janitor retired with a $750,000 nest gathered from investing in the stock market. There does not, however, appear to be any truth in the claim that the $750,000 was provided through the Galveston plan. Indeed, the Galveston plan prohibits participants from investing in common stocks. Instead, the Galveston plan provides that the county, rather than individual participants, decides how funds should be invested, and it has followed a very conservative investment strategy investing in Group Fixed Annuity Contracts issued through the American United Life Insurance Company. *See* Wilson, at 49. *See also* General Accounting Office, Social Security Reform: Experience of the Alternate Plans in Texas, GAO/HEHS-99-31 8–9 (Feb. 1999) ("The Alternate Plans were designed to give the employees a guaranteed nominal annual return on their contributions of at least 4 percent. Therefore, the Alternate Plans' managers contracted with an insurance company to purchase an annuity that guaranteed the minimum return. The portfolios holding the plans' contributions are invested only in fixed-rate marketable securities (government bonds, corporate bonds, and preferred stocks) and bank certificates of deposit.")

82 Susan J. Stabile, *Enron, Global Grossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815, 824 (2002) (noting that "many [Enron employees] lost between seventy and ninety percent of their retirement funds").

83 Presidential Statement Signing the Social Security Act. August 14, 1935, Report of the Committee, *supra* note 42, at 145, 145.

share.[84] It reached a high of about $90 per share in late 2000 and fell to $.46 per share by the end of November 2001.[85] In fact, the share price slid 85 percent in a single day in late November 2001.[86]

President Bush could protect workers from some of the volatility of the stock market by prohibiting workers from investing their personal retirement accounts in individual stocks. Indeed, his State of the Union address, President Bush said, "We will make sure the money can only go into a conservative mix of bonds and stock funds."[87]

Limiting investments to stock funds, rather than individual stocks, cannot protect participants from all of the volatility of the market. To illustrate, in 1995, the annual return on S&P 500 stocks was 37.43 percent while the annual return in 2002 was -22.10 percent.[88] Although the stock market has been remarkably stable over very long periods of time,[89] it has been much more volatile over shorter periods of time. For example, from 1953 to 1972, the real rate of return on the S&P 500 averaged 9.1 percent while over the twenty year period beginning just two years later in 1955, the real rate of return only averaged 4.2 percent, less than half that of the preceding period.[90] Stock prices did not rise at all during the 1970s, and it took the S&P 500 fifteen years to regain its 1968 value in real terms.[91]

Building on the volatility of the stock market, Henry Aaron and Robert Reischauer have shown how variable replacement rates, that is the ratio of pensions to prior earnings, can be under a system of private accounts. According to calculations that assume that the average male worker invests a constant percentage of his wages

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84 *See Enron fights for life after bid collapse*, BBC News (Nov. 29, 2001), available at news.bbc.co.uk/1/hi/business/1681522.stm.

85 *Id.*

86 *Id.*

87 State of the Union address, *supra* note 7.

88 William Reichenstein, *10 Lessons You Should Learn From Recent Market History*, AAII Journal 3, 4 Table 1 (Feb. 2003)

89 Diamond, *supra* note 52, at 39. ("Even though annual returns fluctuate enormously, and rates vary significantly over periods of a decade or two, the return on stocks over very long periods has been quite stable.").

90 General Accounting Office, *supra* note 37, at 33.

91 Elmendorf, et al., *supra* note 73, at 97.

in a "total stock market" index fund during his working years and converts the balance into an annuity at age 62, workers who reached age 62 in 1969 would have enjoyed a replacement rate of more than 100 percent (104 percent) of prior earnings, while those reaching 62 in 1975 would have received a replacement rate of only 39 percent.[92]

§ 5.05 THREE-LEGGED STOOL

Although volatility is an inevitable element of investing in the stock market, and stocks should probably, at least in theory, play a role in everyone's retirement income portfolio, individual investment risk has no place in Social Security.[93] Social Security was never intended to be the sole source of retirement income. Rather, Social Security was designed to "[s]erve as a floor of protection on which private-sector economic-security measures can be built."[94]

Our national retirement income system is often described as a three-legged stool, with Social Security one leg of the stool, employer-sponsored retirement plans a second leg, and individual savings the third leg.[95] For individuals who can afford to and do

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[92] Aaron and Reischauer, *supra* note 72, at 35.

[93] The question, one should be clear, is *not* whether saving in defined contribution plans and other private individual accounts is desirable. The question is whether the core program of income protection, instituted and still justified to assure an adequate income after retirement disability or death of an earner, should retain the shape and structure of Social Security or be converted, in whole or in part, to a defined contribution plan.

Aaron and Shoven, *supra* note 32, at 57.

[94] Myers, *supra* note 30, at 231. In a radio address on the third anniversary of the Social Security Act, President Roosevelt said:

The Act does not offer anyone, either individually or collectively, an easy life — nor was it ever intended so to do. None of the sums of money paid out to individuals in assistance or insurance will spell anything approaching abundance. But they will furnish that minimum necessary to keep a foothold; and that is the kind of protection Americans want.

Radio Address on the Third Anniversary of the Social Security Act. August 15, 1938, in Report of the Committee, *supra* note 42, at 146, 148.

[95] Christopher Bone, *An Actuarial Perspective on How Social Security Reform Could Influence Employer-Sponsored Pensions*, in Prospects for Social Security Reform 333, 333 (Olivia S. Mitchell et al. eds., 1999)

save for retirement on their own initiative, individual investment risk is an inevitable element of the third leg of the retirement stool. Moreover, individual investment risk is increasingly common in the second leg of the retirement stool as employers shift from defined benefit plans to defined contribution plans.[96]

Individual investment risk, however, should play no role whatsoever in Social Security. Social Security was "designed to prevent destitution and dependency,"[97] and it has been enormously successful in that role.[98] When Social Security was enacted, about fifty percent of the elderly population lived in poverty.[99] "The poorhouse, toward the end of life, with all its horrors, was a very real part of America."[100]

Today, in contrast, only 8.5 percent of Social Security beneficiaries aged 65 or older have a total income that falls below the poverty line.[101] Without Social Security, though, the income of 48 percent of such beneficiaries would fall below the poverty line.[102]

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96 For a detailed history of the shift from defined benefit plans to defined contribution plans, see Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L. J. 451 (2004). *See also* Jefferson, *supra* note 58, at 1304–06 (discussing reasons for shift).

97 Report of the Committee on Economic Security, *in* Report of the Committee, *supra* note 42, at 1, 33. *See also* June E. O'Neill, *Why Social Security Needs Fundamental Reform*, 65 Ohio State L. J. 79, 89 (2004) ("Originally, the primary goal of Social Security, as stated in various government reports and presidential speeches, was to alleviate poverty among the elderly.").

98 *See* Joseph F. Quinn, *Criteria for Evaluating Social Security Reform*, in Prospects for Reform, *supra* note, at 44–45 ("One of the program's greatest accomplishments has been the dramatic reduction in elderly poverty, from about 30 percent (and twice the national average) in 1967, to half that rate only seven years later, following large increases in real social security benefits beginning in 1968. . . . Since 1982, the elderly poverty rate has been slightly below that of the entire population.")

99 *See* Jonathan Barry Forman, *Making Social Security Work for Women and Men*, 16 N.Y.L. Sch. J. Hum. Rts. 359, 365–66 (1999). *Cf. Helvering v. Davis*, 301 U.S. 619, 643 n.8 (1937) ("The Senate Committee estimated, when investigating the present act, that over one half of the people in the United States over 65 years of age are dependent upon others for support.").

100 Ball, *supra* note 72, at 12 (noting that only about six million Americans had jobs with pension coverage and only about 300,000 to 400,000 actually received a pension).

101 Soc. Sec. Admin., Income of the Population 55 or Older, 139 Tbl. 8.1 (2000).

102 *Id.* at 148, Tbl. 8.3.

Individual investment risk would undercut Social Security's ability to provide individuals with stable, dependable pensions[103] and thus individual investment risk should play no role in our country's core retirement program.[104]

§ 5.06 DISMANTLING SOCIAL SECURITY

Some may argue that creating personal security accounts would simply be an incremental step in the current shift from defined benefit plans to defined contribution plans.[105] The White House, however, recognizes the magnitude of its proposed change. In his private memo, Peter Wehner, President Bush's director of strategic initiatives, declared,

> I don't need to tell you that this will be one of the most important conservative undertakings of modern times. If we succeed in reforming Social Security, it will rank as one of the most significant conservative governing achievements ever. The scope and scale of this endeavor are hard to overestimate.
>
> . . .
>
> As you know, our advocacy for personal accounts is tied to our commitment to an Ownership Society — one in which more

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[103] Jefferson, *supra* note 58, at 1315 ("Whether these individuals [who depend on Social Security to keep them out of poverty] would accumulate sufficient amounts for retirement in their individual savings accounts would be determined by an element of chance."). *Cf.* Diamond and Orszag, *supra* note 22, at 39 (describing Social Security social purpose as one of "providing a basic, assured level of financial security during retirement or disability or after the death of a family's wage earner.").

[104] This is not to suggest that the current Social Security system is risk-free. But risks are shared broadly across society under the current system while each individual would be required to bear the risks alone under a system of personal accounts. *Cf.* Aaron and Shoven, *supra* note 32, at 68 ("The key point is simple: risk is inescapable. The practical question is: how should it be shared? Under a defined-contribution approach, each worker/retiree must bear these risks alone. Under a defined-benefit approach like social insurance these risks are shared more broadly across society.")

[105] *See* Zelinsky, *supra* note 91, at 509 ("The strength of the defined contribution paradigm is further confirmed by the many individual account proposals receiving serious consideration today from policymakers and analysts. These proposals (as well as those possibilities beyond the bounds of current debate) demonstrate the extent to which the individual account model defines the parameters of contemporary public discussion of tax and social policy.").

> people will own their health care plans and have the confidence of owning a piece of their retirement. Our goal is to provide a path to greater opportunity, more freedom, and more control for individuals over their own lives. That is what the personal account debate is fundamentally about — and it is clearly *the* crucial new conservative idea in the history of the Social Security debate.
>
> . . .
>
> For the first time in six decades, the Social Security battle is one we can win — and in doing so, we can help transform the political and philosophical landscape of the country. We have it within our grasp to move away from dependency on government and toward giving greater power and responsibility to individuals.[106]

The current Social Security system is a system of "social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare.' "[107] The essential purpose of social insurance "is to prevent hardship, poverty, or dependence that might be caused by the contingencies covered wherever and whenever these might occur among workers able to join their employers and the government in a national program."[108] Collective action[109] and solidarity[110] lie at the very heart of social insurance.[111]

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[106] Memo on Social Security, *supra* note 20.

[107] *Fleming v. Nestor*, 363 U.S. 603, 609, *rehearing denied,* 364 U.S. 854 (1960), *quoting Helvering v. Davis*, 301 U.S. 619, 640 (1937).

[108] J. Douglas Brown, Essays on Social Security 57–58 (1977).

[109] *See* E. J. Dionne, *Why Social Insurance*?, National Academy of Social Insurance Social Security Brief No. 6 4 (1999) ("The basic ideas behind Social Security, the need for collective provision against certain forms of insecurity, remain deeply and broadly popular despite the rise of the ideology of privatization.")

[110] *Helvering v. Davis*, 301 U.S. 619, 641 (1937) ("The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided.").

[111] Ted Marmor and Jerry Mashaw, *Private ownership, collective default: The Bush proposals for Social Security are about dismantling the current system — and not saving it* Newsday A31, 2005 WLNR 325149 (Jan. 9, 2005) (Social Security "is about social solidarity. It is built on the understanding that we run common risks that can be ameliorated only by collective action. And by making everyone a contributor as well as a recipient it affirms that we recognize our common fate and our obligations of both self and mutual support.")

President Bush's vision of an ownership society is the very antithesis of social insurance. It emphasizes individual risk and individual reward. As Henry Rogers Seeger wrote in 1910,

> Up to a certain point, it is moral and commendable for each to look after his own interests and the interests of those dependent upon him. . . . But along with our individual interests which can best be cared for by individual enterprise, industry, and forethought, there are other interests that call for a collective and cooperative action.[112]

Adequate income in old age remains one of the interests that calls for collective and cooperative action. President Bush's personal security accounts would negate the collective and cooperation action that lie at the very heart of the current Social Security system. Indeed, President Bush and other supporters of personal retirement accounts have distanced themselves from the terms "privatization of Social Security"[113] and "private" retirement accounts[114] because of their negative connotations.[115] But whether these accounts are

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[112] *See* Dionne, *supra* note 104, at 1–2, *quoting* Henry Rogers Seeger, Social Insurance (1910).

[113] *Cf.* Rep. Richard A. Gephardt, *Gephardt Statement Urging Colleagues to Sign Petition to Open Debate on Social Security Privatization*, 2002 TNT 196-42 (Oct. 9, 2002) (declaring that "one Republican pollster presentation advised his clients, don't use the word 'privatize' when you talk about Social Security on the campaign trail. Get a new word, he said: maybe personalize, maybe traumatize. I don't know what the right word is, but it sure isn't privatization."). *See also* Rep. E. Clay Shaw, Jr., *Shaw Praise, Criticism of Daschle's Social Security Stance* 2002 TNT 163-23 (July 16, 2002) (Republican Shaw contends that "no Republican plan that has been offered 'privatizes' Social Security. In fact, my plan leaves Social Security totally intact. It also adds the opportunity for workers to choose ownership and control of a personal account while guaranteeing current law benefits regardless of the account's investment performance.").

[114] *See, e.g., Phone campaign alarms backers of Social Security reform, Capito among the targets of anonymous, automated messages,* Charleston Daily Mail (WV) 13A 2005 WLNR 1224124 (Jan. 28, 2005) ("Shaw supports personal investment accounts, but he issued a statement saying that he does not support privatizing Social Security." An aide said the congressman believes that the use of the word 'private' is inaccurate. Many proponents of the accounts prefer to use the phrase 'personal accounts,' in part because some believe the term 'private' unsettles voters.")

[115] *Cf.* Martin Feldstein, *Introduction*, in Privatizing Social Security 1, 2 (Martin Feldstein, ed. 1998) ("Before going further, a word about the term *privatizing social security* is in order. The term *privatize* is ambiguous and raises political objections

called personal or private, they attack the basic principles of community that undergird our current Social Security system.

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if it suggests an abrogation of government responsibility for the income of the aged. In this volume, *privatizing social security* refers to the shift from unfunded pay-as-you-go programs to mandatory funded programs with individual accounts.").