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Lessons from the French Funding Debate

KATHRYN L. MOORE*

The French retirement system, like the American social security system, is facing long-term funding difficulties. As a result, the French are debating whether to expand the role of pre-funded retirement plans. The economic arguments presented in this debate are virtually identical to the economic arguments presented in the American debate on whether the American social security system should be partially privatized.

The French and American debates, however, diverge once history and ideology are considered. The French have a history of failed funded pensions in contrast to the United States where the failure of prominent underfunded pension led to the enactment of ERISA. And while individual choice and individual responsibility are quintessential American values, "solidarity" plays a much bigger role in the French debate.

I. INTRODUCTION

Currently, the American social security system¹ is funded principally on a pay-as-you-go basis.² In light of the long-term funding difficulties the system faces,³ policymakers and analysts throughout the country are seriously debating

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¹ In the United States, the term social security typically refers to cash benefits provided by the United States's Old-Age, Survivors, and Disability Insurance (OASDI) program. By contrast, in France, the term generally has a much broader meaning and typically refers to benefits for family, sickness, and work injuries in addition to old-age benefits. See Kathryn L. Moore, *The Best of Times and the Worst of Times: Lessons from Recent Reforms of the French Retirement System*, 29 GA. J. INT'L & COMP. L. 441, 443 n.2 (2001) and authorities cited therein. For purposes of this Article, the term will refer to each country's first tier base regime (or regimes) providing for old-age benefits.

² For a discussion of the funding structure of the American social security system, see Kathryn L. Moore, *Redistribution Under the Current Social Security System*, 61 U. PITT. L. REV. 955, 983-85 (2000) and authorities cited therein.

³ The Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds predicts that unless corrective action is taken, social security benefits will exceed dedicated tax revenues by the year 2018, and the social security system will become insolvent, that is, unable to pay benefits in full, by the year 2042. THE 2003 ANN. REP. OF THE BOARD OF TRUSTEES OF THE FED. OLD-AGE AND SURVIVORS INS. AND DISABILITY INS. TR. FUNDS, H.R. DOC. NO. 108-49, at 2-3 (2003) (referring to the combined OASDI Trust Funds and using intermediate assumptions), available at <http://www.ssa.gov/OACT/TR/TR03/tr03.pdf> (last visited Feb. 4, 2004).

whether, and to what extent, the system should be privatized.⁴ For this purpose, privatization refers to proposals that require or permit workers to invest some portion of their social security contributions in one or more private funds.

Like the American social security system, the French social security system is funded principally on a pay-as-you-go basis⁵ and is facing long-term funding difficulties.⁶ Policymakers and analysts in France, however, are not even considering proposals to privatize the French social security system. Indeed, Prime Minister Jean-Pierre Raffarin recently reaffirmed that the government's primary objective was to "save our pay-as-you-go system."⁷ Instead, the current funding debate in France is playing out on an entirely different level. Rather than debating whether social security, the first tier of the French retirement system, should be privatized, the country is debating whether, and to what extent, the first tier should be reduced and supplemented with a third tier, American-style pre-funded private pension system.⁸

⁴ For a discussion of some leading proposals to partially privatize social security, see, for example, Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341, 346–47 (2000).

⁵ The 1999 social security financing law created a special reserve to help finance the increases in benefits anticipated to begin in 2005. See *infra* notes 65–68 and accompanying text.

⁶ For a detailed discussion of the long-term funding difficulties the system faces, see generally CONSEIL D'ORIENTATION DES RETRAITES, PREMIER RAPPORT DU CONSEIL D'ORIENTATION DES RETRAITES (2001), available at <http://www.cor-retraites.fr/IMG/pdf/doc-124.pdf> (last visited Feb. 4, 2004) [hereinafter CONSEIL D'ORIENTATION]; and for a brief summary of the Conseil d'orientation's forecasts in English, see OBSERVATOIRE DES RETRAITES, RETIREMENT PENSIONS: A STATISTICAL ANALYSIS 22–23 (2003), available at <http://www.observatoire-retraites.org/versionanglaise/letters/lorc3eng.pdf> (last visited Feb. 4, 2004).

⁷ M. Raffarin: la retraite à 60 ans n'est pas remise en cause, LE MONDE, Feb. 3, 2003, available at <http://www.lemonde.fr/web/recherche/1,13-0,1-0,0.html> (last visited Feb. 4, 2004) (author's translation); see generally Projet de Loi: portant réforme des retraites, Exposé des Motifs, NOR: SOCX0300057L/B1, available at http://www.retraites.gouv.fr/IMG/retraites_expose_motifs_1_.pdf (last visited Feb. 4, 2004). [hereinafter Exposé des Motifs] (declaring that the reforms proposed in April 2003 will assure the permanence of the pay-as-you-go system).

⁸ Anne Lavigne, *Pension Funds in France: Still a Dead End?*, 28 THE GENEVA PAPERS ON RISK AND INS. 127, 128 (2003) ("Today there is still no consensus on pension funds in France. The only issue that seems not to be debatable is the willingness to maintain a PAYG [pay-as-you-go] public scheme for basic and complementary pension schemes. The debate concerns the introduction of pension funds as a third pillar."). Note also that:

The pension debate, in France, has essentially focused, until recently, upon ways of financing retirement, with a strong opposition between supporters of maintaining the quasi exclusivity for pay-as-you-go financing, and supporters of a progressive introduction of funded pensions, on top of existing PAYG basic and complementary schemes.

Although the American social security system is funded principally on a pay-as-you-go basis, pre-funded benefits currently play an important role in the American retirement system. About half of the American workforce participates in employer-sponsored retirement plans,⁹ and those plans hold about three trillion dollars in assets.¹⁰ In contrast, France's employer-sponsored pre-funded private plans currently play a negligible role in the retirement system.¹¹ French policymakers and analysts, however, are seriously debating whether the role of pre-funded private pensions should be expanded.

This Article will discuss the funding debate in France and the lessons that can be learned from that debate. The Article will begin with a brief description of the French retirement system and recent reforms made to that system. It will then describe the principal arguments presented in the funding debate. Finally, it will conclude with the lessons Americans can learn from this debate.

II. OVERVIEW OF THE FRENCH RETIREMENT SYSTEM

The French retirement system may be characterized by three principal features: (1) it is quite complex, (2) it is funded principally on a pay-as-you-go basis, and (3) it is rather generous relative to the pension systems in other countries.¹²

in SOCIAL SECURITY PROGRAMS AND RETIREMENT AROUND THE WORLD: MICRO-ESTIMATION 2 (Jonathan Gruber & David A. Wise eds., 2004).

Of course, these are not the only issues in the debate regarding reform of the French retirement system. Other significant issues in the debate include the disparity between the special regimes and the general regime, the propriety of increasing the retirement age in the general regime, and the proper role and function of the recently created reserve for the general regime. This Article will not address these issues.

⁹ See PATRICK J. PURCELL, RETIREMENT SAVINGS AND HOUSEHOLD WEALTH IN 2000: ANALYSIS OF CENSUS BUREAU DATA (2002), available at http://benefitslink.com/articles/RL30922_update.pdf (last updated Dec. 12, 2002).

¹⁰ EMPLOYEE BENEFITS SECURITY ADMIN., U.S. DEP'T OF LABOR, PRIVATE PENSION PLAN BULLETIN NO. 9: ABSTRACT OF 1996 FORM 5500 ANNUAL REPORTS tbl.A5 (Winter 1999–2000), available at <http://www.dol.gov/esba/programs/opr/bullet1996/cover.htm> (last visited Feb. 4, 2004).

¹¹ “According to survey data by INSEE [National Institute for Statistics and Economic Studies] in 2000, 12 per cent [sic] of French households have voluntary retirement savings through complementary collective pension schemes.” Lavigne, *supra* note 8, at 132; see also INT'L LABOUR OFFICE, SOCIAL SECURITY: A NEW CONSENSUS 87 tbl. 5.2 (2001) (showing that pension assets represent 3% of GNP in France compared to 66% of GNP in the United States); FRANÇOIS CHARPENTIER, RETRAITES ET FONDS DE PENSION: L'ÉTAT DE LA QUESTION EN FRANCE ET À L'ÉTRANGER 255–56 & tbl.1 (3d ed. 1997) (noting that in 1995, the first two tiers of the French retirement system paid about 900 billion francs in benefits compared to the third tier of the French retirement system which only collected about 10 billion francs in contributions).

¹² Lavigne, *supra* note 8, at 128; Didier Blanchet & Florence Legros, *France: The*

| OCCUPATIONAL CATEGORY | | 'PAY-AS-YOU GO' PENSIONS | | FUNDED PENSIONS SUPPLEMENTARY OCCUPATIONAL PLANS |
|---|---|--|--|---|
| | | BASE SCHEME | SUPPLEMENTARY REGIMES | |
| FARM SECTOR EMPLOYEES | Farm workers and employees | <i>MSA</i> <i>Social Insurance for Farmers</i> (83 funds) Obligatory for all farm employees | <i>ARRCO</i> (77 funds) Obligatory for all employees (executive and non-executive) within the limits of the Social Security ceiling | Optional plans, mainly company plans. Usually contracts art. 83, art. 39, and art. 82 of the Tax Code, managed by provident institutions, mutual associations, insurance companies, or supplementary pension groups |
| | Farm executives | | | |
| EMPLOYEES OF THE PRIVATE SECTOR | Executives of industry, commerce, and services | <i>Social Security General Regime</i> administered by the <i>CNAVTS</i> , the <i>CRAM</i> (Alsace, Moselle) 14 <i>CRAM</i> and 4 <i>CGSS</i> (overseas French departments) Obligatory for employees of the private sector and contract employees of the public and parapublic | <i>AGIRC</i> (34 funds) Obligatory for executives | |
| | Workers and employees of industry, commerce, and services | | | |
| | Civil aviation flight personnel | | | |
| EMPLOYEES OF THE PUBLIC AND PARAPUBLIC SECTOR | Contract employees of the public and parapublic sector | Obligatory for employees of the private sector and contract employees of the public and parapublic | CRPNPAC (Civil aviation flight personnel) | |
| | Salaried employees of the public and parapublic sector | | IRCANTEC Obligatory for State contract employees | |
| SELF-EMPLOYED | Farmers | <i>MSA</i> (83 funds) Obligatory | | 'Madelin law' type optional group insurance plans |
| | Shopkeepers and industrialists | <i>ORGANIC BASE</i> 26 inter-occupational and 5 occupational funds - Obligatory | | |
| | Craftsmen | <i>CANCAVA BASE</i> 30 inter-professional funds + <i>CANAVIA</i> (meat occupations) and Hairdressers - Obligatory | <i>CANCAVA SUPPLEMENTARY</i> 30 inter-occupational funds + <i>CANAVIA</i> and Hairdressers - obligatory regime | |
| | Liberal professions | <i>CNAVPL BASE</i> Obligatory regime | <i>CNAVPL SUPPLEMENTARY</i> Obligatory regime for most sectors | |
| | | CRN (notaries), CAVOM (ministerial officers), CARMF (doctors), CARCD (dentists), CAVP (pharmacists), CARSAF (midwives), CARPIMKO (medical auxiliaries), CARPV (veterinarians), CAVAMAC (insurance agents), CAVEC (accountants), CREA (arts, sports, tourism), CIPAV (architects) | | |
| | Lawyers | <i>CNBF BASE</i> Obligatory regime | <i>CNBF SUPPLEMENTARY</i> Obligatory regime | |
| | Clergy | <i>CAVIMAC</i> * Obligatory regime *formerly <i>CAMAVIC</i> | | |

Source adapted from: OBSERVATOIRE DES RETRAITES, RETIREMENT PENSIONS: A STATISTICAL ANALYSIS 4 (Special Edition No. 3 Jan. 2003).

The complexity of the French retirement system arises principally from the fact that it is organized along occupational lines.¹³ As the diagram on the previous page illustrates, there are four basic occupational categories: (1) farm sector employees, (2) private sector employees, (3) employees of the public and parapublic sectors, and (4) the self-employed. Of these categories, private sector employees are by far the most significant, and represent about two-thirds of the working population.¹⁴ Public and parapublic sector employees, representing about 20% of the working population, are the next most significant, with the self-employed representing about 12% of the working population, and farm workers representing about 3% of the working population.¹⁵

As the diagram on the previous page further illustrates, retirement income within these occupational categories is typically provided by a three tier system. The three tiers consist of (1) mandatory base regimes, (2) mandatory supplementary plans,¹⁶ and (3) optional supplementary occupational plans. The mandatory base regimes are similar to the American social security system. They typically use a defined benefit formula to calculate benefits, and the formula bases benefits, in part, on participants' earnings. The specific benefit formula varies between mandatory regimes,¹⁷ with the special regimes for public and parapublic employees typically providing the highest level of benefits, the regimes for the self-employed typically paying the lowest level of benefits, and the general regime for private sector employees typically paying a level of benefit that falls somewhere in the middle.¹⁸

The second tier of the French Social Security, mandatory complementary

¹³ CONSEIL D'ORIENTATION, *supra* note 6, at 51.

¹⁴ Cf. Conseil d'orientation des retraites, 3 *Lettre pour le débat sur les retraites: les retraites en France* 1 (Oct. 2002) (noting that the general regime covers the majority of private sector employees and includes 15 million participants, or two-thirds of the working population).

¹⁵ See Moore, *supra* note 1, at 450 and authorities cited therein. Technically, these figures may slightly overstate the number of private sector employees and understate the number of employees in the public and parapublic sector. This is because the figures are based on coverage by the various first tier regimes, discussed below, and because some public sector employees, specifically contract employees of the public and parapublic sector, are covered by the general regime and not a special regime. Nevertheless, the figures are adequate for purposes of a general overview of the French retirement system.

¹⁶ Because they are mandatory and funded principally on a pay-as-you-go basis, the mandatory complementary regimes are sometimes, such as for purposes of European Union law, viewed as forming a second stage of the first tier of the French retirement system. See OBSERVATOIRE DES RETRAITES, *supra* note 6, at 5; see also Moore, *supra* note 1, at 448 n.27 and authorities cited therein.

¹⁷ For a description of the benefit formula for each of the most significant base regimes, see PIERRE-ALAIN GRECIANO, *LES RETRAITES EN FRANCE: QUEL AVENIR?* 31–51 (2002).

¹⁸ See Moore, *supra* note 1, at 456 and authorities cited therein; see also Blanchet & Legros, *supra* note 12, at 111–13.

regimes, is unique to France and has no counterpart in the United States.¹⁹ Most of these regimes are pay-as-you-go systems that use a point system to distribute benefits. Throughout their working lives, participants accumulate points in proportion to their contributions. Their pension benefits are then based on their total accumulated points multiplied by the value of a point, which is fixed each year.²⁰ Not all occupational categories participate in a mandatory complementary regime. Of particular significance, salaried employees of the public and parapublic sector almost never participate in mandatory complementary regimes.²¹ Instead, the special regimes (the mandatory base regimes for public and parapublic sector employees) typically provide such generous benefits that the special regime benefits are about equal to or may even exceed the combined benefits that private sector employees receive from the general regime (the base regime for private sector employees) and ARRCO and AGIRC (the mandatory complementary regimes for private sector employees).²²

The third tier of the French retirement system consists of optional supplementary occupational plans. Like American employer-sponsored pension plans, optional supplementary occupational plans are usually pre-funded, receive favorable tax treatment, and are offered by individual employers.²³ These plans, however, play a much smaller role in the French retirement system than do employer-sponsored pensions in the United States.²⁴

As noted above, the second principal feature of the French retirement system is that it is funded principally on a pay-as-you-go basis; current contributions are used to fund current benefits. The first two tiers of the French retirement system—the mandatory base regimes and the mandatory complementary regimes—are funded principally on a pay-as-you-go basis. Although reserves are

¹⁹ The Netherlands and Sweden also have long histories of collectively bargained regimes which complement the base regimes. Unlike the French complementary retirement regimes, however, those of the Netherlands and Sweden have substantial reserves. Jacques-André Schneider, *Supplementary Pension Plans and Collectively Agreed Schemes*, in *PENSIONS IN THE EUROPEAN UNION: ADAPTING TO ECONOMIC AND SOCIAL CHANGE* 173, 174–75 (Gerard Hughes & Jim Stewart eds., 2000).

²⁰ For a more detailed description of ARRCO and AGIRC, the two principal mandatory complementary regimes, see Moore, *supra* note 1, at 459–67; and for a more detailed description of the second tier, see GRECIANO, *supra* note 17, at 51–60 (describing the second tier in more detail).

²¹ See GRECIANO, *supra* note 17, at 51 (noting that with a few exceptions, public sector employees do not participate in a complementary regime because their base benefits are judged to be sufficient).

²² See Lavigne, *supra* note 8, at 146 tbl.16; GRECIANO, *supra* note 17, at 27; Jean-Luc Gréau, *Fonds de pension: les grandes illusions*, 108 *LE DÉBAT* 18, 21 (Jan.–Feb. 2000).

²³ For a more detailed description of supplementary occupational plans, see Moore, *supra* note 1, at 469–71; GRECIANO, *supra* note 17, at 60–68; and CHARPENTIER, *supra* note 11, at 264–335.

²⁴ See *supra* note 11 and accompanying text.

maintained,²⁵ current benefits are funded principally with current contributions. Only the third tier of the French retirement system, the supplementary occupational plans, is pre-funded, and, as noted above, it currently plays a relatively minor role in the French retirement system. Whether, or how much, the role of the third tier should be expanded is a significant issue in the reform debate in France today.²⁶

The final principal feature of the French retirement system is its relative generosity.²⁷ In 1993, French public pensions provided a replacement rate of 69% of the average salary, compared to 42% in the United States.²⁸ Of course, this comparison does not take into account private employer-sponsored pensions, and these plans play a much more significant role in the United States than they do in France.²⁹

III. RECENT REFORMS OF THE FRENCH RETIREMENT SYSTEM

France, like the United States, is facing two significant demographic changes. First, life expectancy is increasing. In 1950, life expectancy at age sixty was 15.4 years for French men and 18.4 years for French women.³⁰ By 2000, life expectancy at age sixty had increased to 20.2 years for men and 25.6 years for women, and, by 2040, life expectancy is projected to further increase to 25.9 years for men and 31.0 years for women.³¹ Second, France has a large baby boom

²⁵ The 1999 social security financing law created a temporary reserve that will be used to pay general regime benefits between 2020 and 2040. See *infra* notes 67–68 and accompanying text. ARRCO maintains a reserve equal to about one year's worth of benefits. See FRANCIS KESSLER, *DROIT DE LA PROTECTION SOCIALE* 382 n.2 (2000).

²⁶ Of course, this is not the only significant issue in the debate today. See *supra* note 8. It is, however, the only issue that this Article addresses.

²⁷ See Martine Durand, Comment, in *SOCIAL SECURITY PENSION REFORM IN EUROPE* 127, 131 (Martin Feldstein & Horst Siebert eds., 2002) (citing Organization for Economic Cooperation and Development (OECD) study that shows the French replacement rate is among the highest in the major OECD countries); GRECIANO, *supra* note 17, at 69 (showing that France offers one of the highest replacement rates in Europe).

²⁸ Bruno Palier & Giuliano Bonoli, *La montée en puissance des fonds de pension: Une lecture comparative des réformes des systèmes de retraite, entre modèle global et cheminements nationaux*, 4 *L'ANNÉE DE LA RÉGULATION* 209, 217 (2000) (noting that the replacement rate in the Netherlands and Great Britain was 33%, compared to 36% in Switzerland, 42% in the United States, 34% in Denmark, 53% in Germany, 69% in France, and 78% in Italy).

²⁹ Cf. Giuliano Bonoli, *Pension Politics in France: Patterns of Co-operation and Conflict in Two Recent Reforms*, 20 *W. EUR. POL.* 111, 112 (1997) (noting that almost 70% of retirement income in France comes from public arrangements compared with less than 50% in Britain).

³⁰ CONSEIL D'ORIENTATION, *supra* note 6, at 24–25.

³¹ *Id.*

generation that is followed by relatively smaller generations.³² Principally as a result of these demographic changes, the elderly dependency ratio, the ratio of retirees to working age individuals, is expected to increase from .38 in 2000 to between .61 and .73 (depending on mortality assumptions) in 2040.³³ This increased dependency ratio is placing significant pressure on the French retirement system because it is funded principally on a pay-as-you-go basis.³⁴

French policymakers first began to recognize the need to reform the French retirement system in light of these demographic changes in the 1980s.³⁵ During that decade, the government published a number of reports explaining the need to reform the system,³⁶ but serious public debate did not occur until the publication of the White Book³⁷ in 1991.³⁸ The first major reform of the system was enacted in 1993,³⁹ and the French retirement system has been reformed a multitude of times in a multitude of ways since then. This Section will briefly describe the most significant of these reforms, as well as other significant reforms that were proposed, but ultimately failed.

A. First Tier Reforms

During the summer of 1993, the Balladur government reformed the general regime⁴⁰ in three different ways, and the effect of each was to reduce

³² *Id.* at 107.

³³ *Id.*

³⁴ See Moore, *supra* note 1, at 475 & n.246 and authorities cited therein.

³⁵ Bonoli, *supra* note 29, at 115 (“Perhaps one of the most striking features of French pension policy throughout the 1980s and early 1990s is the gap between the official debate, where the need for a reform is emphasised [sic], and the practice of pension policy, in which no action was taken until 1993.”); see also Blanchet & Legros, *supra* note 12, at 113 (“Questions have been intensively raised about the long-term viability of this system during the 1980s.”).

³⁶ Bonoli, *supra* note 29, at 115 (noting that “between 1985 and 1993 at least seven official reports were produced, which, moreover, made roughly the same suggestions as to how to reform pensions”); see also GRECIANO, *supra* note 17, at 173–74 (discussing reports that were issued during the 1980s).

³⁷ Commissariat Général du Plan, *Livre blanc sur les retraites: garantir dans l'équité les retraites de demain* (1991).

³⁸ Didier Blanchet, *Population Aging and French Economic Performance*, in AGING SOCIETIES: THE GLOBAL DIMENSION 111, 127 (Barry Bosworth & Gary Burtless eds., 1998).

³⁹ Contribution rates, however, were already increased between 1985 and 1991. See Palier & Bonoli, *supra* note 28, at 225 (noting that between 1985 and 1991 contribution rates for the general regime were increased from 4.7% to 6.55% of the general regime wage ceiling); Bonoli, *supra* note 29, at 115 (noting that an additional 1.6% employer contribution was added in 1990).

⁴⁰ These reforms also apply to the three base regimes that are “aligned” with the general regime: the base regime for salaried agricultural workers, the base regime for industrialists and merchants, and the base regime for craftsmen.

benefits.⁴¹ As noted above, the general regime uses a defined benefit formula to calculate benefits. That formula may be described as $P = S.A.M. \times t \times d/D$, where P represents pension, $S.A.M.$ is average annual salary (capped at the social security wage ceiling—which is roughly equivalent to the average wage),⁴² t stands for rate, d is duration of participation in the general regime, and D equals maximum duration of participation taken into account.⁴³ Prior to the 1993 reform, the first element of that formula, average annual salary, was based on the retiree's highest ten years of earnings.⁴⁴ The 1993 reform gradually increases the number of years of salary taken into account until it reaches twenty-five years of earnings for retirees who reach age sixty on or after January 1, 2008.⁴⁵ The second element of the formula, rate, is capped at fifty percent and is generally a function of both the age at which the retiree begins to collect benefits and the amount of time the retiree contributed to any base regime.⁴⁶ Prior to the 1993 reform, retirees were entitled to begin collecting benefits at age sixty at the maximum rate of fifty percent if they had 150 quarters, or 37.5 years, of participation in a base regime by age 60.⁴⁷ The 1993 reform gradually increases the number of quarters required for benefits at the maximum rate to 160 quarters or 40 years by 2008.⁴⁸ Finally, the third change wrought by the 1993 reform was a change in the method of indexing from one based on changes in wages to one based on changes in prices.⁴⁹

In conjunction with the three changes described above, the 1993 reform also established an "old-age solidarity fund" (*fonds de solidarité vieillesse* (FSV)) to provide general tax financing⁵⁰ for certain non-contributory retirement benefits.⁵¹

⁴¹ According to one study, these changes will reduce the average retirement benefit by about thirty percent. Palier & Bonoli, *supra* note 28, at 227–28 (citing A. Babeau, *Problèmes posés par l'introduction des fonds de pension en France*, in MIRE: III COMPARER LES SYSTÈMES DE PROTECTION SOCIALE EN EUROPE DU SUD: RENCONTRES DE FLORENCE 293, 295 (1997)).

⁴² See Blanchet & Legros, *supra* note 12, at 113.

⁴³ See JEAN-JACQUES DUPEYROUX, *DROIT DE LA SÉCURITÉ SOCIALE* 472 (13th ed. 1998).

⁴⁴ See Moore, *supra* note 1, at 452 and authorities cited therein.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 452–53 and authorities cited therein.

⁴⁸ *Id.* at 453 and authorities cited therein.

⁴⁹ *Id.* at 477. Actually, as a result of a series of laws that had been enacted prior to 1987, benefits had already been indexed to changes in prices rather than wages since 1987. *Id.* at 477 n.258. In addition, the 1993 reform was only to apply for five years but has been continued since then. See Palier & Bonoli, *supra* note 28, at 226.

⁵⁰ For a discussion of the sources of revenue for the FSV, see Moore, *supra* note 1, at 480–81 and authorities cited therein.

⁵¹ Specifically, it funds minimum retirement benefits and additional retirement benefits awarded for periods of unemployment, national service, and time out of the workforce to raise children. See *id.* at 480 n.273 and authorities cited therein; Bonoli, *supra* note 29, at 118.

Prior to the 1993 reform, these non-contributory benefits were partially financed by wage-related contributions to the retirement regimes.⁵² This shift in the financing of these non-contributory benefits was very important to the labor movement and is viewed as a key factor in the political success of the 1993 reform.⁵³

In November 1995, then-Prime Minister Alain Juppé sought to reform the special regimes (the base regimes applicable to public and parapublic employees) to create greater uniformity between the base regimes.⁵⁴ Among other things,⁵⁵ he proposed both to increase the number of years of participation required for retirement at the full rate from 37.5 years to forty years and base benefits on the best twenty-five (rather than ten) years of salary.⁵⁶ The proposed reform, however, met with such fierce public opposition that it was quickly abandoned.⁵⁷ Commentators contend that the failure of this proposed reform was due at least in part to the government's failure to negotiate with the country's trade unions prior to introducing this reform.⁵⁸

In the spring of 2003, French leaders renewed calls to bring the special regimes in alignment with the general regime.⁵⁹ Like the Juppé proposal, the

⁵² See Moore, *supra* note 1, at n.273 and authorities cited therein; Bonoli, *supra* note 29, at 118.

⁵³ See GIULIANO BONOLI, *THE POLITICS OF PENSION REFORM: INSTITUTIONS AND POLICY CHANGE IN WESTERN EUROPE* 138 (2000); Palier & Bonoli, *supra* note 28, at 226–27; Bonoli, *supra* note 29, at 118–19. *But see* GRECIANO, *supra* note 17, at 179 (suggesting that social partners did not object to 1993 reform because government reports issued during preceding decade had convinced them that the reform was necessary and unavoidable).

⁵⁴ See Bonoli, *supra* note 29, at 120 (noting that the content of the 1995 proposed reform of the special regimes was “roughly the same” as that of the 1993 reform of the general regime).

⁵⁵ The proposed reform also included measures aimed at increasing the state's control over the state's health insurance system. Although the pension reform was abandoned, the other proposals were gradually implemented throughout 1996 and 1997. See Bonoli, *supra* note 29, at 120–21.

⁵⁶ See Palier & Bonoli, *supra* note 28, at 227; Bruno Palier, *A 'Liberal' Dynamic in the Transformation of the French Social Welfare System*, in *SOCIAL INSURANCE IN EUROPE* 84, 104 (Jochen Clasen ed., 1997).

⁵⁷ In response to government plans to raise the retirement age for public sector employees, a rail strike virtually paralysed the French railway system for some three weeks. Rail workers were quickly joined in their protest by post-office employees, teachers and other civil servants. The result was a massive protest movement, with daily demonstrations in Paris and in other major cities. At its peak, some two million people were reported to have taken to the streets. Losses for the French economy were substantial. Because of the rail and underground strikes, central Paris could not be reached from its outskirts in less than four or five hours. Eventually, after having repeatedly rejected the trade unions' requests, Prime Minister Alain Juppé decided to abandon plans for public-sector pension reform. Bonoli, *supra* note 29, at 111.

⁵⁸ See, e.g., Palier & Bonoli, *supra* note 28, at 227; Bonoli, *supra* note 29, at 112.

⁵⁹ Recognizing the power of rail workers to disrupt the proposed reform, the plan does not

Fillon plan (named after the Minister for Labor and Social Affairs) proposed, among other things, to increase the number of years of participation required for retirement at the full rate from 37.5 years to forty years by 2008.⁶⁰ Although the trade unions organized demonstrations and strikes against the Fillon plan,⁶¹ the French government made more of an effort to negotiate with the trade unions⁶² and the proposed reform was approved by the National Assembly on July 3, 2003,⁶³ and received Senate approval soon thereafter.⁶⁴

Although the base regimes have historically been funded almost exclusively on a pay-as-you-go basis,⁶⁵ the 1999 social security financing law broke with this

apply to the special regimes for metro and railway workers. See Lara Marlowe, *Pension reforms prompt massive street protests*, THE IRISH TIMES, May 26, 2003, at 12.

⁶⁰ Exposé des Motifs, *supra* note 7, at 3. The required years of participation in all regimes will then increase to forty-one years in 2012 and thereafter in tandem with increases in life expectancy. *Id.* at art. 5, 10–11.

⁶¹ See Paul Webster, *Jam session Strikes and marches paralyse French cities*, THE GUARDIAN, June 4, 2003, at 14 (describing French strikes made in protest to Prime Minister Jean-Pierre Raffarin's proposal to bring the special regimes in alignment with the general regime); John Tagliabue, *Protest Strike in France Interrupts Travel*, N.Y. TIMES, April 4, 2003, at A6, available at <http://www.nytimes.com/2003/04/04/international/europe/04PARI.html> (same); Kim Housego, *Worker Strike Paralyzes France*, LEXINGTON HERALD-LEADER, April 4, 2003, at A11 (same).

⁶² See, e.g., Exposé des Motifs, *supra* note 7 at 2 (describing the Government's efforts to provide social partners with the opportunity to discuss principles of reform proposals before the principles were formally introduced and the "true negotiation" with social partners on May 14 and 15 that led to approval of proposed reform by five of the eight trade unions and employer organizations); François Wenz-Dumas, *Réforme des retraites: après les consultations, l'exécution*, LIBÉRATION, April 1, 2003, <http://www.liberation.fr/page.php?Article=100119> (noting that after a month and a half of "technical discussions," the Work Minister gave the social partners a document summarizing the "principles," "objectives," and "means" of reform; the social partners have about a week and a half to give their opinion on the text before it will be finalized and released on April 11, 2003); see also Carol Matlack, *Commentary: France: Labor Disarray Is Giving Reform a Chance*, BUSINESS WEEK, June 16, 2003, at 48 (contending that Prime Minister Raffarin's regular consultation with labor leaders played an important role making pension reform possible in 2003); Martin Rhodes & David Natali, *France's dialogue of the deaf over pensions*, FINANCIAL TIMES, June 13, 2003 at 19 ("President Chirac says the way of the dispute is 'social dialogue', referring to the consultation and negotiation that typically precedes any effective pensions reform in Europe.").

⁶³ See Béatrice Taupin, *L'Assemblée n'a modifié qu'à la marge le projet Fillon-Delevoye*, LE FIGARO ÉCONOMIE, July 4, 2003 at III.

⁶⁴ See Site d'information sur l'avenir des retraites, *Le Parlement adopte définitivement la réforme des retraites* (July 25, 2003), at <http://www.retraites.gouv.fr/article389.html> (noting the French Parliament definitively adopted reform on July 25, 2003) [hereinafter Article 389].

⁶⁵ See Blanchet & Legros, *supra* note 12, at 111 ("One characteristic [of the French pension system] is its almost exclusive reliance on PAYGO financing: French pension schemes did not accumulate more than marginal provisions, covering no more than a few months' worth of benefits.").

tradition and created a reserve to finance future general regime retirement benefits.⁶⁶ The law's objective is to accumulate financial reserves on the order of 150 billion Euros between 1999 and 2020 and use the reserve to pay benefits between 2020 and 2040.⁶⁷ The reserves had reached 7.9 trillion Euros by the end of 2001 and were expected to have reached thirteen trillion Euros by the end of 2002.⁶⁸

B. *Second Tier Reforms*

During the 1990s, the social partners amended the mandatory complementary retirement regimes for private sector employees (ARRCO and AGIRC) a number of times, in a number of ways, to increase contributions and reduce benefits.⁶⁹ According to management, the effect of these changes (combined with the 1993 amendments to the general regime) was to reduce the replacement rate for managers from 66% of final average salary in 1996 to 62% of final average salary in 2005 and to reduce the replacement rate for non-managers from 73% of final average salary in 1996 to 71% of final average salary in 2005.⁷⁰ According to the *Confédération Général du Travail*, a trade union of Communist inspiration,⁷¹ the effect of these changes was to reduce the rights of managers by 20% in five years and the rights of non-managers by 17.5% in five years.⁷²

In the spring of 2003, the French government proposed to create a new

⁶⁶ See Law No. 98-1194 of December 23, 1998, J.O., December 27, 1998, p. 19643, available at <http://www.legifrance.gouv.fr/html/index2.html> (last visited Feb. 14, 2004). Currently, the reserve only applies to the general regime and the base regimes that are "aligned" with the general regime. Of significance, it does not apply to the special regimes. J.F. Chadelat, *French Reserve Funds*, 12 LA LETTRE DE L'OBSERVATOIRE DES RETRAITES 9, 9, 10 (Nov. 2001).

⁶⁷ CONSEIL D'ORIENTATION, *supra* note 6, at 79; Chadelat, *supra* note 66, at 9, 10.

⁶⁸ CONSEIL D'ORIENTATION, *supra* note 6, at 80. For a more detailed discussion of the reserve, see GRECIANO, *supra* note 17, at 197-201. For a brief overview of some of the arguments made in opposition to the fund, see Lavigne, *supra* note 8, at 137.

⁶⁹ For a more detailed discussion of these changes, see Moore, *supra* note 1, at 476-79; GRECIANO, *supra* note 17, at 182-83. ARRCO and AGIRC were amended again in 2001 to reduce benefits. See CONSEIL D'ORIENTATION, *supra* note 6, at 74; GRECIANO, *supra* note 17, at 207-09.

⁷⁰ Laurent Caussat, *Les accords du 25 avril 1996 relatifs aux régimes interprofessionnels de retraite complémentaire: un exercice d'alerte avant l'arrivée du cyclone?*, 7/8 DROIT SOCIAL 729, 732-33 (1996).

⁷¹ See Bonoli, *supra* note 29, at 117 n.16 (describing the five major national federations of trade unions and noting that the CGT, of Communist inspiration, is the farthest left on the political spectrum).

⁷² Fabienne Muller, *Les accords du 25 avril 1996: un tournant pour les régimes obligatoires de retraite complémentaire?*, 32 REVUE DE DROIT SANITAIRE SOCIALE 647, 652 (1996).

mandatory complementary retirement regime for shopkeepers and industrialists.⁷³ The National Assembly adopted the proposal on July 3, 2003;⁷⁴ the Senate approved it shortly thereafter.⁷⁵

C. Third Tier Reforms

In 1994, the French legislature enacted a law (referred to as the Madelin law) which, among other things, permits the self-employed to make voluntary tax deductible contributions to supplementary retirement plans.⁷⁶ Contributions are tax deductible and benefits must be paid in the form of an annuity.⁷⁷ The law is viewed as a limited success with about two million self-employed individuals contributing about 700 million Euros to such plans in 2000.⁷⁸

In 1997, the French legislature enacted a law (referred to as the Thomas law after the Conservative deputy who drafted the proposal)⁷⁹ creating retirement savings plans (*plans d'épargne retraite*).⁸⁰ The retirement savings plans were quite similar to American 401(k) plans: they were optional, defined contribution plans for which employer and employee contributions were tax exempt.⁸¹ The principal difference between the retirement savings plans and American 401(k) plans was that benefits from the retirement savings plans were required to be distributed in the form of an annuity.⁸² The law provided that these retirement savings plans were to be available to all private sector workers covered by the general regime (or agricultural regime) and ARRCO and AGIRC and were to be managed by insurance companies.⁸³ The law was highly controversial from the outset,⁸⁴ and when a new government took power a few months after the law was

⁷³ Exposé des Motifs, *supra* note 7, at Titre IV, 35–41.

⁷⁴ See Taupin, *supra* note 63.

⁷⁵ See Article 389, *supra* note 64.

⁷⁶ Law No. 94-126 of February 11, 1994, J.O., February 12, 1994, p. 2493, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteLegi.jsp> (last visited Feb. 14, 2004).

⁷⁷ Fluvia Brunet, *Les travailleurs indépendants*, ENSSIB: RAPPORT DE RECHERCHE BIBLIOGRAPHIQUE 46 (Mar. 2002).

⁷⁸ Lavigne, *supra* note 8, at 133, 147, tbl.17. For a more detailed discussion of the reasons why the Madelin law is of limited success, see CHARPENTIER, *supra* note 11, at 310–18.

⁷⁹ Lavigne, *supra* note 8, at 128.

⁸⁰ See Law No. 97-277 of Mar. 25, 1997, J.O., Mar. 26, 1997, p. 4657, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteLegi.jsp> (last visited Feb. 14, 2004).

⁸¹ Lavigne, *supra* note 8, at 138; GRECIANO, *supra* note 17, at 184; Lawrence J. Speer, *French Government's Pension Reserve Fund Will Grow Dramatically in Future*, 26 *Pens. & Ben. Rep. (BNA)* 2362 (Oct. 4, 1999).

⁸² See Lavigne, *supra* note 8, at 138.

⁸³ Moore, *supra* note 1, at 472 and authorities cited therein.

⁸⁴ "The entire trade union movement—including the managers union (CGC)—strongly opposed the law mainly on the ground that exemption of taxation on employers' contributions

enacted,⁸⁵ it declined to promulgate the eleven decrees required to give effect to the law.⁸⁶ The law was officially abrogated in 2002.⁸⁷

In February 2001, French law introduced two new savings instruments: inter-company savings plans (*plan d'épargne interentreprises*) and voluntary salary savings plans (*plan parternarial d'épargne salariale volontaire*).⁸⁸ Although technically not retirement savings vehicles,⁸⁹ they were intended to "introduc[e] a retirement-like horizon to collective saving"⁹⁰ and may be viewed as close substitutes for private pension plans.⁹¹

Prior to the introduction of these new savings vehicles, French law recognized two types of profit-sharing plans: voluntary interest (*intéressement*) plans and mandatory participation (*participation*) plans.⁹² The interest plans were introduced in 1959 and provide for the voluntary sharing of profits pursuant to a contractually determined formula.⁹³ The participation plans, introduced in 1967, are mandatory for firms with more than fifty employees (and voluntary for smaller firms) and provide for the sharing of profits pursuant to a statutorily

jeopardised existing compulsory complementary schemes." BRUNO THÉRET & JEAN-CLAUDE BARBIER, ON THE ENDOGENOUS CAPACITY OF NATIONAL SYSTEMS OF SOCIAL PROTECTION TO ADDRESS THE GLOBALIZATION CHALLENGE: THE FRENCH CASE 27 (Feb. 2002); *see also* GRECIANO, *supra* note 17, at 185 (describing objections to Thomas law).

⁸⁵ "The new scheme being more substitutive than additional, left wing parties promised to scrap it if elected." Théret & Barbier, *supra*, note 84, at 27.

⁸⁶ *See* Moore, *supra* note 1, at 472 and authorities cited therein.

⁸⁷ *See* Lavigne, *supra* note 8, at 128; GRECIANO, *supra* note 17, at 185.

⁸⁸ Law No. 2001-152 of Feb. 19, 2001, J.O., February 20, 2001, at 2774, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteLegi.jsp> (last visited Nov. 3, 2003).

⁸⁹ *See* GRECIANO, *supra* note 17, at 206 (noting that the "retirement" is never expressly mentioned anywhere in the text of the February 19, 2001 law).

⁹⁰ Lavigne, *supra* note 8, at 138.

⁹¹ *Id.*; *cf. Still a dirty word—The courage needed to reform French pensions*, THE ECONOMIST, June 8, 2002, at 48 (" '[The voluntary salary savings plan is] a pension fund in disguise but the government avoided using that ideology-charged term,' says Stephane Deo at US Warburg, a bank. ").

In fact, some commentators include these new savings instruments as well as the closely related voluntary interest plans, mandatory participation plans, and company savings plans described below in their discussion of the third tier of the French retirement system. *See, e.g.*, GRECIANO, *supra* note 17, at 60–68, 201–06; *cf.* CHARPENTIER, *supra* note 11, at 318 (noting that profit-sharing plans and company savings plans are not part of the retirement regime but contending that they are worth including in a study of retirement and pension plans because few employees currently participate in a supplementary occupational plan and these savings mechanisms could constitute an excellent bridge toward pension plans).

⁹² Lavigne, *supra* note 8, at 137; GRECIANO, *supra* note 17, at 60.

⁹³ GRECIANO, *supra* note 17, at 60–61; Fathi Fakhfakh & Virginie Perotin, *The Effects of Profit-sharing Schemes on Enterprise Performance in France*, 3 ECONOMIC ANALYSIS 93 (2000).

mandated formula.⁹⁴ Among other places, profits from these plans (as well as voluntary employee or employer contributions) may be contributed to company savings plans (*plan d'épargne entreprise*) and are exempt from taxation if distributed after five or more years.⁹⁵

The inter-company savings plans, introduced in the February 2001 legislation, were designed to provide small and medium firms with incentives to offer company savings plans.⁹⁶ In 1998, only 3.5 percent of firms offered a company savings plan with larger firms far more likely to offer such plans than smaller firms.⁹⁷ The inter-company savings plans permit several firms, on an industry sector or geographic basis, to offer a joint company savings plan. The voluntary salary savings plans, also introduced in February 2001, promote a longer savings horizon by requiring participants to save for ten, rather than five, years in order to be eligible for favorable tax treatment.⁹⁸

In the spring of 2003, the Fillon plan proposed that a new product be added to the third tier of the French retirement system, the retirement savings plan (*le plan d'épargne pour la retraite*). These retirement savings plans are similar, but not identical to the retirement savings plans introduced by the Thomas law. First, unlike the first retirement savings plans, the new retirement savings plans are to be available to all workers, not just private sector workers.⁹⁹ Workers can participate in these plans individually, through their employer, or through a professional organization.¹⁰⁰ Like the Thomas retirement savings plans, the new retirement savings plans must be paid in the form of an annuity¹⁰¹ and are eligible for tax favorable treatment.¹⁰²

The Fillon plan also proposed to transform the voluntary salary savings plans, created in 2001, into voluntary salary savings plans for retirement (*plan*

⁹⁴ GRECIANO, *supra* note 17, at 61; Fakhfakh & Perotin, *supra* note 93, at 95. That formula is $RSP = 0.5 \times (B - 0.05C) \times S/VA$, where B is defined as annual profit, C as capital, S as salaries, and VA as the value added by the firm. Lavigne, *supra* note 8, at 137–38.

⁹⁵ GRECIANO, *supra* note 17, at 61–62; Lavigne, *supra* note 8, at 138. Employees' interest in participation plans vest after five years and may be invested in a variety of vehicles, including mutual funds, equity, company stock, and Company Savings Plans. Profits from interest plans may be immediately distributed—and taxed—to employees or invested in company savings plans and become tax exempt after five years. *See id.* at 138.

⁹⁶ Lavigne, *supra* note 8, at 138.

⁹⁷ *Id.*

⁹⁸ *Id.* For a more detailed discussion of the rules applicable to the Voluntary Salary Savings Plans as well as the rules applicable to participation plans, interest plans, Company Savings Plans, and Inter-Company Savings Plans, see GRECIANO, *supra* note 17, at 201–06.

⁹⁹ Exposé des Motifs, Art. 79, *supra* note 7, at 42.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Exposé des Motifs, Art. 81, *supra* note 7, at 42.

partenarial d'épargne salariale volontaire pour la retraite).¹⁰³ Under the new voluntary salary savings plans, the participant can choose to receive benefits in the form of a lump sum or annuity, but benefits cannot be distributed until the participant reaches retirement age.¹⁰⁴ The new law prohibits participants from investing more than five percent of their investments in employer stock.¹⁰⁵ Like the rest of the Fillon plan, these proposed changes were approved by the National Assembly on July 3, 2003, and approved by the Senate shortly thereafter.¹⁰⁶

IV. THE FUNDING DEBATE

As the preceding discussion illustrates, expansion of the third tier of the French retirement system has been a significant issue in the French retirement debate. One law enacted in the last decade, the Madelin law, clearly expanded the third tier of the French retirement system.¹⁰⁷ That expansion, however, was necessarily modest because it only affected the self-employed, who represent a mere twelve percent of the French working population.¹⁰⁸ A second law enacted in the 1990s, the Thomas law, had the potential to substantially expand the third tier because it applied to all private sector employees, the largest segment of the French working population.¹⁰⁹ That law, however, never went into effect and thus did not in fact expand the third tier. The third law, the February 2001 law introducing inter-company savings plans and voluntary salary savings plans, may be viewed as expanding the third tier because it introduces two new savings vehicles that are close substitutes for private pensions.¹¹⁰ The two vehicles, however, are not technically private pensions and thus do not technically expand the third tier. Finally, the most recent expansion of the third tier occurred in the summer of 2003, when the French Parliament approved the Fillon plan and its introduction of retirement savings plans.¹¹¹ At the time this Article went to press, however, it was too early to tell how widespread these plans would become and thus how effective they would be in expanding the third tier.¹¹² This Section will highlight the principal arguments presented in the debate regarding the expansion

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Exposé des Motifs, Art. 81, *supra* note 7, at 42.

¹⁰⁶ See Article 389, *supra* note 64.

¹⁰⁷ See *supra* notes 76–78 and accompanying text.

¹⁰⁸ For additional reasons why the change was of limited success, see CHARPENTIER, *supra* note 11, at 310–18.

¹⁰⁹ See *supra* notes 79–83 and accompanying text.

¹¹⁰ See *supra* notes 88–98 and accompanying text.

¹¹¹ See *supra* notes 99–106 and accompanying text.

¹¹² See Article 389, *supra* note 64.

of the third tier.¹¹³

First, proponents of expanding the third tier have argued that a pre-funded system would be able to better withstand the demographic shock France is facing.¹¹⁴ Opponents note that economists have shown that a pre-funded system is no better able to withstand demographic shocks than a pay-as-you-go system,¹¹⁵ and in fact, the current pay-as-you-go system may paradoxically benefit from the impending demographic changes.¹¹⁶

Proponents of expanding the third tier further contend that, with any given demographic variable, a pre-funded system offers a better long-term rate of return and thus constitutes a more globally efficient system.¹¹⁷ This argument rests on the beliefs that capital's higher rates of return are due to insufficient savings and pre-funding provides a means to increase savings.¹¹⁸ Not all opponents of expanding the third tier accept that there is a need to increase savings in France,¹¹⁹ and even those who accept that a pre-funded system may be more efficient in the long-term contend that the short and medium-term costs of shifting from a pay-as-you-go system to a pre-funded system outweigh the long-term

¹¹³ For a detailed description of the theoretical debate of pay-as-you-go versus funded pensions, see GRECIANO, *supra* note 17, at 126–37. For a chart summarizing the arguments, proponents, and philosophies in this debate on an international level, see Théret and Barbier, *supra* note 84, at 31.

¹¹⁴ WILLIAM D. CRIST & JEAN-CHRISTOPHE LE DUIGOU, POUR & CONTRE LES FONDOS DE PENSION 42 (2002); GRECIANO, *supra* note 17, at 189; Didier Blanchet, *Le débat répartition-capitalisation: un état des lieux*, in *Retraite et Épargne*, Rapport du Conseil d'analyse Économique 93 (1998).

¹¹⁵ GRECIANO, *supra* note 17, at 127, 189; Blanchet, *supra* note 114, at 94–95; CRIST & LE DUIGOU, *supra* note 114, at 42–43, 81–83, 124–26; Blanchet & Legros, *supra* note 12, at 119; see also Nicholas Barr, *Reforming Pensions: Myths, Truths, and Policy Choices*, IMF Working Paper WP/00/139, at 8–11 (Aug. 2000) (explaining why pre-funded systems are no better able to withstand demographic shocks than pay-as-you-go systems).

¹¹⁶ Blanchet & Legros, *supra* note 12, at 119 n.2; CRIST & LE DUIGOU, *supra* note 114, at 50–51.

¹¹⁷ See Blanchet, *supra* note 114, at 94; GRECIANO, *supra* note 17, at 189.

¹¹⁸ See GRECIANO, *supra* note 17, at 127–28; Blanchet, *supra* note 114, at 94–95; Blanchet & Legros, *supra* note 12, at 119.

¹¹⁹ CRIST & LE DUIGOU, *supra* note 114, at 93–94 (contending that French savings rate does not need to be increased but that savings simply need to be reallocated and creating third tier private pensions not necessary to reallocate savings); see also Florence Legros, *Pension Schemes: Limiting PAYG to Increase Savings?*, La Lettre du CEPII (Centre d'études prospectives et d'informations internationales) May 2002, at 2 (showing that contrary to expectations, France, with only pay-as-you-go pension schemes, has much higher savings rate than United States, with significant pre-funded pension schemes); ORG. FOR ECON. COOPERATION AND DEV., ECONOMIC OUTLOOK NO. 72 annex tbl. 24 (2002) (showing that household savings rate in France was 11.4% in 2001 compared with 2.3% in the United States that year).

benefits of such a system.¹²⁰

Proponents of expanding the third tier also contend that shifting to a pre-funded system will protect future retirees from the political risk that the future working generation will be unwilling to pay the high contribution rates necessary to fund their future benefits.¹²¹ In making this argument, proponents may note that the French already devote almost thirteen percent of their GNP to financing retirement benefits compared to only five percent in the United States.¹²² Opponents of expanding the third tier note that pre-funded systems are not riskless; they are subject to investment risk that can be quite substantial, particularly in light of the impending demographic shift which is likely to lead to much lower rates of return.¹²³ Indeed, opponents of expanding the third tier point to the failure of pre-funded schemes in France in the 1930s to unequivocally demonstrate that pre-funded schemes are subject to real and substantial risks.¹²⁴ The current pay-as-you-go system was actually established in large part in response to the fact that pre-funded schemes failed in the 1930s due in large part to inflation and other monetary pressures.¹²⁵

Proponents of expanding the third tier contend that private pensions are ideologically superior to a pay-as-you-go system because they promote individual choice. Each individual should have the power to determine how much of his income he wants to spend, how much he wants to save, and when he begins his retirement.¹²⁶ Opponents respond that greater choice will simply lead to greater

¹²⁰ See Blanchet, *supra* note 114, at 94; Blanchet & Legros, *supra* note 12, at 119–20; see also CRIST & LE DUIGOU, *supra* note 114, at 50–51 (contending that converting to pre-funded system would exacerbate problems the current system faces as a result of impending demographic changes).

¹²¹ See GRECIANO, *supra* note 17, at 126–27; Blanchet, *supra* note 114, at 94; CRIST & LE DUIGOU, *supra* note 114, at 127, 133–34.

¹²² Blanchet, *supra* note 114, at 105.

¹²³ CRIST & LE DUIGOU, *supra* note 114, at 95–96.

¹²⁴ *Id.* at 87–88; see GRECIANO, *supra* note 17, at 121.

¹²⁵ One author observed:

The preference for pay-as-you-go at the time of the Liberation undoubtedly owed much to the experience of inflation, to impoverishment across the country at large, and, above all, to the “failure” of social insurance; the latter institution had been funding retirement pensions since 14 March 1941 without a review of old-age insurance.

ANNE-MARIE GUILLEMARD, AGING AND THE WELFARE-STATE CRISIS 53 (2000); see also GRECIANO, *supra* note 17, at 20 (noting that pay-as-you-go financing was justified in 1945 by the strong uncertainties regarding the level and future evolution of economic activity (notably marked by high inflation which significantly reduced the value of annuities) which prohibited, at least in the short term, a return to a pre-funded system).

¹²⁶ See CRIST & LE DUIGOU, *supra* note 114, at 43–45; GRECIANO, *supra* note 17, at 189.

inequality.¹²⁷ Private pensions impose investment risk on individuals and provide participants with no guarantees regarding future returns. Moreover, expanding the third tier places the current pay-as-you-go system at risk.¹²⁸

Proponents of expanding the third tier also contend that creating private pensions will permit the French to regain control over their companies. They note that foreign investors, and particularly foreign pension plans, have invested so heavily in French companies that the French no longer have control of their own enterprises.¹²⁹ Proponents contend that creating private pensions would provide the long-term capital necessary for the French to regain control of their enterprises and thus their economy.¹³⁰ Opponents of expanding the third tier may concede that the French need to regain control of their economy and enterprises but argue that development of private pensions is not the only, or the best answer.¹³¹ Reorganizing existing savings rather than creating new savings is all that is needed for the French to regain control of their companies.¹³²

V. LESSONS FROM THE FUNDING DEBATE

The French funding debate offers Americans at least four different lessons. First, there simply is not much new under the sun. Most of the arguments in the French funding debate—particularly the economic arguments—are strikingly similar to the arguments made in the American privatization debate. Of course, the fact that the economic arguments are strikingly similar should come as no surprise. Economics is an international discipline. The work of American economists has appeared in the French debate,¹³³ and Americans have invited

¹²⁷ GRECIANO, *supra* note 17, at 189.

¹²⁸ See CRIST & LE DUGOU, *supra* note 114, at 51–52, 131–32; GRECIANO, *supra* note 17, at 189.

¹²⁹ See CRIST & LE DUGOU, *supra* note 114, at 46 (noting that American pension plans own about one-third of the 40 largest French companies); Lavigne, *supra* note 8, at 137 (noting that “about 40 per cent [sic] of equities issued by French quoted firms are held by foreign investors”); see also GRECIANO, *supra* note 17, at 134 (noting significant influence of Anglo/American pension funds on governance of large French corporations).

¹³⁰ GRECIANO, *supra* note 17, at 189.

¹³¹ CRIST & LE DUGOU, *supra* note 114, at 45–46.

¹³² *Id.* at 46 (noting that 150 billion French francs, often more, are invested abroad, and that French investments tend to be in public and private bonds rather than equities); see also GRECIANO, *supra* note 17, at 150–51 (describing overwhelmingly conservative nature of French investments).

¹³³ Of particular significance, William Dale Crist, economist and President of the California Public Employees’ Retirement Fund (CalPERS), and Jean-Christophe Le Duigou, the secretary national of the CGT (Confédération Générale du Travail, a trade union of Communist origin) responsible for economic questions, in CRIST & LE DUGOU, *supra* note 114.

French economists to participate in their international debates.¹³⁴

The second lesson is that although the economic arguments may be strikingly similar, the funding debates are not identical. First, and foremost, the French funding debate occurs at an entirely different level. The French are giving no consideration whatsoever to privatizing—that is, creating individual accounts in—their first tier base regimes. Instead, the funding debate focuses on expanding the role of third tier voluntary pre-funded pension plans.¹³⁵

This difference may be partially historical.¹³⁶ The current, extensive, pay-as-you-go system was established, in large part, in response to the failure of pre-funded retirement schemes in the 1930s. For example, in arguing for a pay-as-you-go system in 1945, one advocate declared:

[F]unded plans must be abandoned at once. We know their advantages. We know that the money deposited in them yields a profit and that we can gradually become entitled to larger sums than we have actually invested. But we are all aware of the sad experiences of the last few years. We know that devaluation has followed devaluation, that the value of money has gone down daily, that those of you who thought that a little pension of twenty thousand francs was ample for your needs now have hardly enough to live on for a month. It is therefore absolutely vital to replace this system with a pay-as-you-go plan that allows the real resources to be shared constantly among all members.¹³⁷

The United States does not have a shared history of failed funded schemes. Rather, the United States has a history of failed unfunded or underfunded plans

¹³⁴ For example, Didier Blanchet, an economist with the French National Institute of Demographic Studies, is a regular contributor to international economic conferences sponsored by such American groups as the National Bureau of Economic Research and the Brookings Institution. *See, e.g.*, Mahieu & Blanchet, *supra* note 8; Blanchet & Legros, *supra* note 12; Didier Blanchet & Louis-Paul Pelé, *Social Security and Retirement in France*, in *SOCIAL SECURITY AND RETIREMENT AROUND THE WORLD* 101 (Jonathan Gruber & David A. Wise eds., 1999); Blanchet, *supra* note 38.

¹³⁵ One may argue that expanding the third tier while cutting back on the first tier is economically identical to privatizing the first tier. However true that may be, these changes are quite different from a political and ideological standpoint.

¹³⁶ Lavigne, *supra* note 8, at 136:

The French history was plagued by the collapse of funded pension schemes in the 1930s due to the economic recession and runaway inflation. Many French families still remember this grievous episode, even if the persons who experienced it are less and less numerous. This may explain the reluctance of successive governments to implement pension funds in France

¹³⁷ GUILLEMARD, *supra* note 125, at 65 (internal quotations omitted).

which led to the enactment of ERISA,¹³⁸ the federal law which requires, among other things, that private pension plans be funded.¹³⁹

The difference may also be partially ideological. Although individual choice is occasionally raised as an interest worth promoting in the French funding debate, individual choice—and individual responsibility—is much more of an American value¹⁴⁰ than a French value. Indeed, the terminology used in the respective debates helps to illustrate the different ideological values. The French do not use the term “pay-as-you-go” to describe the principal funding mechanism of their retirement system. Instead, they use the term “*répartition*,” which means “distribution” in English.¹⁴¹ “Pay-as-you-go” seems to suggest something a little irresponsible about the funding mechanism while “distribution” appears a bit more neutral¹⁴² and perhaps even praiseworthy in a socialist society.¹⁴³ Moreover, the French do not use the Anglo/American term “funded,” “which gives an impression of seriousness and security”¹⁴⁴ in describing pension funding. Instead, they use the term “*capitalisation*,” which “evokes capitalism, a word which remains linked with the exploitation of workers in the nineteenth century in many minds.”¹⁴⁵

These ideological differences are further illustrated by the differing role of grass roots politics. The weekend before Prime Minister Raffarin was scheduled to officially launch the latest round of reform of the French retirement system, thousands of French citizens took to the streets to express their concerns and objections. Among the many banners and slogans seen during the demonstrations was “*Sauvons la répartition!*” (Save our pay-as-you-go system!).¹⁴⁶ It is hard to imagine thousands of Americans marching on the Mall in D.C. to save our pay-

¹³⁸ 29 U.S.C. §§ 1001–1461 (2002); see generally, James A. Wooten, “*The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*,” 49 BUFFALO L. REV. 683 (2001) (discussing the role of the failed underfunded Studebaker plan in the enactment of ERISA).

¹³⁹ ERISA §§ 301–08; 29 U.S.C. §§ 1081–86 (2002).

¹⁴⁰ Cf. CRIST & LE DUIGOU, *supra* note 114, at 103 American William Crist, President of CalPERS, contends that the principal advantage of private pensions is that we ourselves are responsible for our own destiny. *Id.*

¹⁴¹ CASSELL’S FRENCH DICTIONARY 640 (3d ed. 1979).

¹⁴² Observatoire des retraites, *The French System*, available at <http://www.observatoire-retraites.org/versionanglaise/frenchsystem/Introduction.htm> (last visited Feb. 4, 2004).

¹⁴³ Indeed, in March 2000, Lionel Jospin, then France’s prime minister declared, “*Répartition* is the symbol of the chain of solidarity which links the generations. It is one of the most important terms in the nation’s social pact.” *France Funks Pension Reform*, THE ECONOMIST, March 25, 2000, at 51.

¹⁴⁴ Observatoire des Retraites, *supra* note 142.

¹⁴⁵ *Id.*

¹⁴⁶ Francois Wenz-Dumas, *Raffarin tourne autour du pot des retraites*, LIBÉRATION, available at <http://www.liberation.fr/page.php?Article=85960> (Feb. 4, 2003).

as-you-go social security system! Moreover, it is worth noting that the French protests can not be lightly ignored. Then-Prime Minister Alain Juppé's proposed reform of the special regimes in 1995 failed in large part due to massive protests.¹⁴⁷

The third lesson to be learned from the debate is that many, if not all, of the arguments should be viewed with a healthy dose of skepticism because self-interest clearly appears to play a role in the debate. On the one hand, the strong opposition trade unions have to developing the role of savings in retirement preparation may be attributable, at least in part, to their fear that such a development risks reducing their power. They are currently co-managers of most of the pension regimes¹⁴⁸ and fear they would have little or no role in funded plans. On the other hand, the insurance companies, forceful proponents of developing supplementary funded regimes in the late 1980s and early 1990s are no less guilty of self-interest. They clearly envisaged themselves a playing a large role in the management of the newly expanded funded regimes.¹⁴⁹

The final, and perhaps most unfortunate lesson of the French debate, is that it does not offer a definitive answer to the American privatization debate. Because the French have not privatized their first tier benefits, their system does not provide any direct evidence on the advisability of privatizing. France's failed funded schemes in the early to mid-twentieth century, however, should give advocates of partial privatization of social security some pause for concern.

¹⁴⁷ See *supra* text accompanying notes 54–58.

¹⁴⁸ Blanchet & Legros, *supra* note 12, at 110.

¹⁴⁹ *Id.* at 113–14.