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Social Security Reform: Should the Retirement Age Be Increased?

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INTRODUCTION

Increasing the Social Security full retirement age is back on the political agenda.[1] In December 2010, President Obama's bipartisan National Commission on Fiscal Responsibility and Reform (Fiscal Commission)[2] recommended linking the retirement age to

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1 The full retirement age is the age at which a worker can claim full benefits. *See infra* Part II.B.1 (discussing the full retirement age); *see also* Part II.B (providing an overview of the benefits calculation).

2 President Obama created the Fiscal Commission by executive order to come up with recommendations "to improve the fiscal situation in the medium term and to achieve fiscal sustainability over the long run." Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 23, 2010). The Fiscal Commission's December 2010 report included recommendations on much more than just Social Security reform. The report contained recommendations on measures that would help reduce the national deficit, including spending caps, budget cuts, and tax reform. *See* NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH 14 (2010) [hereinafter FISCAL COMM'N, THE MOMENT OF TRUTH].

increases in longevity—in effect, raising the age from its current cap of sixty-seven to sixty-nine by 2075.[3] Increasing the retirement age was not the only Social Security reform proposed by the Fiscal Commission, but it is likely the most controversial because it reduces benefits.

Decreasing tax revenues and increasing costs are forcing legislators to propose strong measures to reform Social Security.[4] For the first time in over two decades,[5] the projected revenue generated from 2010 payroll taxes was insufficient to pay outgoing benefits.[6] Consequently, the U.S. Department of Treasury has to make up the difference.[7] The timing could not have been worse. The U.S. government faces historic budget deficits,[8] a declining tax base,[9] increased government spending,[10] and a weak economy.[11] External

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3 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50; *see infra* notes 226–28 and accompanying text (providing details on the Fiscal Commission's plan regarding the retirement age). The indexing proposal could potentially raise the normal retirement age beyond sixty-nine. *See infra* note 226 and accompanying text.

4 The term "Social Security" in its common usage refers to the Old-Age, Survivors, and Disability Insurance (OASDI) program. The Social Security Administration runs the Old-Age and Survivors Insurance (OASI) program and the Disability Insurance (DI) program. Unless otherwise noted, this Article discusses only the OASI program, which provides monthly income to "retired workers and their families and to survivors of deceased workers." BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, THE 2010 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 1 (2010) [hereinafter BOARD OF TRUSTEES, 2010 ANNUAL REPORT].

5 *See Performance of Social Security Trust Funds 1937–2006*, SOC. SEC. ADMIN., http://www.ssa.gov/history/trustfunds.html (last visited Feb. 16, 2011) (detailing historic performance regarding income and costs associated with Social Security).

6 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2.

7 The difference is paid through the Social Security Administration OASDI Trust Fund, which at the end of the 2009 fiscal year held $2.3 trillion. *Id.* at 5. However, because the trust fund is invested entirely in nonmarketable U.S. government bonds, Treasury, in effect, has to pay out interest on the bonds to the Social Security Administration in order to fund benefits. *See infra* notes 29–40 and accompanying text.

8 GENE L. DODARO, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-483T, U.S. GOVERNMENT FINANCIAL STATEMENTS: FISCAL YEAR 2009 AUDIT HIGHLIGHTS FINANCIAL MANAGEMENT CHALLENGES AND UNSUSTAINABLE LONG-TERM FISCAL PATH 11 (2010).

9 U.S. DEP'T OF THE TREASURY, A CITIZEN'S GUIDE TO THE 2009 FINANCIAL REPORT OF THE U.S. GOVERNMENT, at iii (2009) (stating that, for the 2009 fiscal year, federal government tax revenue—personal income tax, payroll tax, and corporate tax—declined $463 billion to approximately $2.2 trillion because of the recession and tax changes provided by the government stimulus programs).

10 *Id.* at iii–iv (stating that, although the government reported decreased net costs in fiscal year 2009, spending actually increased, and the reduction in cost was due to a re-estimation of future liabilities by the Department of Veterans' Affairs).

pressure is also mounting. The International Monetary Fund has suggested that the United States reduce Social Security benefits in order to lower its deficit.[12] Social Security is an easy target for budget cutters "partly because of its size and partly because it is often mistakenly characterized as an out-of-control entitlement."[13]

It is widely acknowledged that reform proposals for Social Security require bipartisan support,[14] and getting agreement between the political parties on this issue has historically been difficult.[15] Increasing the Social Security retirement age is one benefit cut that found traction among both Democrats and Republicans in 2010.[16] While increasing the retirement age is not a panacea to the problems Social Security faces, it could make a significant improvement to the system's financing. Proposals to increase the full retirement age might reduce the long-term Social Security deficit anywhere from 18% to one-third, depending on how the change is implemented.[17]

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11 OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS: APRIL 20, 2010, at 5 (2010), *available at* http://www.sigtarp.gov/reports/congress/2010/April2010_Quarterly_Report_to_Congress .pdf (stating that, while the financial crisis that started in 2007 appeared stabilized by 2010, there was still uncertainty about the economic outlook for the U.S. economy).

12 Tom Barkley, *IMF Urges U.S. to Consider Higher Taxes, Social Security Cuts*, WALL ST. J., July 8, 2010, http://online.wsj.com/article/SB10001424052748703609004575354891924005002.html.

13 Nancy J. Altman, *Social Security and Intergenerational Justice*, 77 GEO. WASH. L. REV. 1383, 1397 (2009).

14 Kathryn L. Moore, *The Future of Social Security: Principles to Guide Reform*, 41 J. MARSHALL L. REV. 1061, 1087 (2008).

15 Jackie Calmes, *Elephant in the Room: Budget Wish Lists Come and Go, But 'Entitlements' Outweigh All*, WALL ST. J., Feb. 3, 2006, at A1.

16 As the Democratic House Majority Leader in 2010, Steny Hoyer stated that Congress "could and should consider a higher retirement age." Press Release, Office of Democratic Whip Steny Hoyer, Majority Leader Hoyer Delivers Speech on Deficit Reduction at Third Way Event (June 22, 2010), *available at* http://democraticwhip.house.gov/content /majority-leader-hoyer-delivers-speech-deficit-reduction-third-way-event. At nearly the same time, Republican House Minority Leader John Boehner tentatively supported raising the age. Sam Stein, *Boehner, Pence: Raising Social Security Retirement Age an Option*, HUFFINGTON POST, Aug. 8, 2010, http://www.huffingtonpost.com/2010/08/08/boehner -pence-social-security-retirement-age_n_674793.html.

17 U.S. SENATE SPECIAL COMM. ON AGING, SOCIAL SECURITY MODERNIZATION: OPTIONS TO ADDRESS SOLVENCY AND BENEFIT ADEQUACY, S. REP. NO. 111-187, at 52–53 (2010). The Fiscal Commission's retirement age proposal by itself would improve the Social Security funding deficit by 18%. FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 54. However, the Fiscal Commission's proposed Social Security reforms were not limited to increasing the retirement age. For details on the complete proposal, see *infra* notes 82–83 and accompanying text.

Despite some agreement on both sides of the aisle in Congress, the issues surrounding the retirement age remain controversial.[18] Proponents maintain that longer life expectancies justify an increase in the retirement age.[19] Opponents argue that increasing the retirement age would adversely affect certain subpopulations that have shorter life spans, such as the poor, workers with physically demanding jobs, persons who did not complete high school, and African Americans.[20] The disagreement over the retirement age is not new, but recent reports on retirement trends have injected new vigor into the debate. In the last five years, economists have released several detailed reports on the retirement age;[21] however, the last law review article entirely dedicated to a detailed analysis of the retirement age was published nearly ten years ago.[22]

This Article reassesses the policy option of increasing the retirement age, considering recently published studies on longevity, capacity to work, labor force participation, and poverty rates. Additionally, the Article considers recent work in behavioral economics in order to craft policy initiatives that result in a secure retirement. Part I of this Article analyzes the funding crisis facing Social Security and puts it into the context of the larger budget challenges facing the federal government. Part II discusses the history of retirement age provisions in the Social Security Act and presents a descriptive analysis of the current law. Part III considers the main arguments—pro and con—concerning the retirement age as

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18 The full retirement age was last raised with the passage of the 1983 Amendments to the Social Security Act. Social Security Amendments of 1983, H.R. 1900, 98th Cong. (1983). However, proposals to further increase the age were made by a majority of the 1994–1996 Social Security Advisory Council. Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 544, 559–60 (2001).

19 *See infra* notes 148–58 and accompanying text (discussing the arguments set forth by advocates of an age increase).

20 *See infra* notes 159–61 and accompanying text (discussing the arguments made by opponents of an age increase).

21 Many studies have been conducted under the auspices of the Retirement Research Consortium, a group of three research centers that receive funding from the Social Security Administration to conduct research related to the agency's mission. *See Retirement Research Consortium*, SOC. SEC. ADMIN., http://www.ssa.gov/policy/rrc/index.html (last visited Feb. 18, 2011).

22 While recent articles have discussed the retirement age, Kathryn Moore wrote the most thorough article in the law review literature in 2001. *See* Moore, *supra* note 18. Much of Professor Moore's analysis, such as her account of the legislative history of the retirement age provisions, remains relevant and need not be replicated here. *See id.* This Article analyzes studies published since Professor Moore's article was written.

well as an analysis of values that should guide reform. The extent to which the Social Security deficit is affected by various proposals is discussed in Part IV, and Part V analyzes the economic effects on workers. Employment trends and ability to work are analyzed in Parts VI and VII, respectively. Last, policy recommendations are made in Part VIII.

I
THE SOCIAL SECURITY FUNDING CRISIS

The Social Security Administration (SSA) predicts that the combined Old-Age, Survivors and Disability Insurance (OASDI) trust funds will be insolvent by 2037.[23] This figure combines data for two programs that the SSA administers—the Old-Age, Survivors (OASI) program that is generally referred to as "Social Security" and the Disability Insurance program.[24] News media predictions of insolvency often refer to the combined OASDI trust funds for both programs, though each program is distinct and has separate funding sources. This Article pertains to OASI, which I generically refer to as Social Security. When looked at separately, the Disability Insurance program will be exhausted by 2018—much earlier than OASI, which by itself has an exhaustion date of 2040.[25]

Despite years of knowledge about the shortfall facing Social Security, Congress has lacked the political will to institute significant changes.[26] Little substantive reform to the retirement age has been made since the Social Security Amendments of 1983 (1983 Amendments),[27] which adjusted the retirement age, increased the payroll tax, and established other changes affecting benefits.[28] In order to put the policy option of increasing the retirement age into context, it is first important to understand the financing problem that

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23 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2–3.

24 The OASI program pays benefits to retirees, their families, and survivors, whereas Disability Insurance provides benefits "to disabled workers and their families." *Id.* at 1.

25 *Id.* at 3.

26 Kathryn L. Moore, *Reforming Retirement Systems: Why the French Have Succeeded When Americans Have Not*, 22 ARIZ. J. INT'L & COMP. L. 251, 289 (2005).

27 Social Security Amendments of 1983, H.R. 1900, 98th Cong. (1983).

28 One important reform to the retirement earnings test was made in 2000. *See infra* notes 125–26 and accompanying text. For a legislative history of amendments to the Social Security Act since 1983, see *Social Security Related Legislation Enacted Since 1983*, SOC. SEC. ADMIN., http://www.ssa.gov/legislation/history/ (last visited Feb. 18, 2010).

Social Security faces and the forces driving reform efforts. The answers are found not only in the population data and the current economic climate but also within the structural system of Social Security financing—a system called pay-as-you-go (PAYGO).

A. The Breakdown in PAYGO

Under PAYGO, the payroll tax levied on the younger working generation is the principal source of revenue to pay benefits for the older retired generation.[29] However, the payroll tax is not the only income source for the SSA. In the 2009 fiscal year, the SSA received $698.2 billion in revenue from three sources: (1) payroll taxes provided 82%,[30] (2) income taxes levied on Social Security benefits accounted for 3%,[31] and (3) interest earned on government bonds held in the trust fund yielded 15%.[32] In any given year, most of the income (79.8% in 2009) is immediately paid out in benefits.[33] Some of the revenue also goes to pay administrative costs ($3.4 billion in 2009) and to help fund retirement for railroad workers ($3.7 billion in 2009).[34]

Any surplus accumulates in the Social Security Trust Fund—a rainy day fund that is tapped only when tax revenues in any given year are not enough to pay benefits.[35] The Social Security Act mandates that the trust fund invest all surplus money in non-marketable special issue U.S. government bonds.[36] In 2009, the difference between payroll tax revenues and benefits was $13.2

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29 This statement simplifies the reality of PAYGO because some older workers stay in the workforce and therefore are still contributing to the system through payroll taxes. Additionally, benefits are paid to some younger beneficiaries who are eligible as dependents. BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2.

30 *See id.* at 5. Payroll tax includes the Federal Insurance Contributions Act (FICA) and the Self Employment Contributions Act (SECA) taxes assessed on income for workers who are subject to Social Security rules. U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 26.

31 *See* BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 5; *see also* U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 28 (stating that the benefits received under Social Security are levied only on taxpayers with incomes above a certain threshold).

32 *See* BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 5.

33 *See id.*

34 *Id.*

35 *Id.* at 5–6.

36 BARBARA D. BOVBJERG, U.S. GEN. ACCOUNTING OFFICE, GAO/T-AIMD/HEHS-98-152, SOCIAL SECURITY FINANCING: IMPLICATIONS OF STOCK INVESTING FOR THE TRUST FUND, THE FEDERAL BUDGET, AND THE ECONOMY 3 (1998).

billion, which was added to the trust fund balance.[37] The interest earned on the trust fund in 2009 amounted to $107.9 billion[38]—an effective rate of 4.8%[39]—and by the end of the fiscal year, the balance held in the trust fund was pegged at $2.3 trillion.[40]

PAYGO systems are not an ideal way of financing retirement funds for countries with aging populations.[41] One metric used to predict the solvency of PAYGO systems is the worker-beneficiary ratio, which measures the number of workers paying into the system per beneficiary. When the predicted worker-beneficiary ratio drops, the change potentially indicates less money available to pay out benefits and acts as a red flag signaling a financing problem.[42]

Declining birth rates, longer life expectancies, and the bulge in the population created by the baby boom generation have led to a significant decline in the worker-beneficiary ratio.[43] Between 1974 and 2008, the ratio of workers to beneficiaries remained steady—fluctuating at between 3.2 and 3.4 workers per beneficiary.[44] In 2009, the ratio dropped to 3.0 due to the high rate of unemployment during the recession.[45] Even if the economy recovers, the worker-beneficiary ratio will continue to drop because of the retiring baby boom generation. The SSA predicts the ratio to be at 2.1 by 2035 with further declines expected due to increasing longevity.[46]

Additionally, SSA revenue from the payroll tax has not been as high as originally predicted because of a spike in unemployment that

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37 *See* BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 5 (stating that tax revenue in 2009 was $570.4 billion and that $557.2 billion was paid out in benefits).

38 *Id.*

39 *Trust Fund Data: Effective Interest Rates*, SOC. SEC. ADMIN., http://www.ssa.gov/OACT/ProgData/effectiveRates.html (last visited Mar. 29, 2011).

40 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 5. The Social Security Act provides a formula that sets the rate of the special issue bonds based on an "average market yield on marketable interest-bearing securities of the Federal government." *Interest Rate Formula for Special Issues*, SOC. SEC. ADMIN., http://www.ssa.gov/OACT/ProgData/intrateformula.html (last visited Feb. 18, 2011).

41 *See generally* Wade Donald Pfau, *Reforming Social Security: Issues and Challenges for Personal Retirement Accounts*, 19 E. & W. STUD. 215 (2007).

42 However, a decrease in the worker-beneficiary ratio does not necessarily mean that less revenue is paid into the system if the reduction in workers is offset by increases in productivity. *See* Neil H. Buchanan, *Social Security and Government Deficits: When Should We Worry?*, 92 CORNELL L. REV. 257, 288 (2007).

43 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2–3.

44 *Id.* at 10.

45 *Id.*

46 *Id.*

started when the subprime financial crisis began in 2007. For the first time since 1983, the projected revenue from payroll taxes in 2010 did not cover the cost of benefits.[47] Consequently, the government will need to dip into the Social Security Trust Fund reserves in order to keep sending out checks to the roughly 42 million Americans who rely on benefits.[48]

Tapping into the trust fund at this time is how a rainy day fund is designed to work. The trust builds up savings for those periods of time when tax revenues are down. Theoretically, the system currently runs a surplus when taking into account all sources of revenue—e.g., including the interest earned in the trust fund portfolio. One problem is that the trust fund portfolio is entirely invested in non-marketable, special issue U.S. bonds.[49] Redeeming the bonds to pay benefits means that Treasury has a net outflow as to the Social Security program. In order to keep the status quo, Treasury will have to find some source other than the payroll tax to pay Social Security benefits.[50]

However, Treasury is already under pressure given increased costs and lower tax revenue. For the government's overall general budget (excluding Social Security) in the 2009 fiscal year, Treasury reported that the general deficit rose from $455 billion in 2008 to $1.4 trillion in 2009.[51] Net operating costs also rose about 30% to $1.3 trillion in the same period.[52] The reasons for the general financing shortfall are well known. The United States faced declining tax revenues because of the 2007–2009 recession and tax cuts passed as part of a stimulus package. Costs went up in part because of increased government spending through the programs passed to address the economic downturn—principally the Emergency Economic Stabilization Act of

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47 *See id.* at 38, 143–44.

48 *See id.* at 2 (stating that, in 2009, there were "36 million retired workers and dependents" plus "6 million survivors of deceased workers" receiving benefits from the OASI program).

49 If the trust fund were diversified—invested in a portfolio of stocks, bonds, and other assets in the same way that pension funds are normally invested—Treasury could sell off some assets in the trust fund in order to pay benefits. For an analysis of the potential of diversifying the trust fund into a broader portfolio, see Benjamin A. Templin, *Full Funding: The Future of Social Security*, 22 J.L. & POL. 395, 432–33 (2006), and Benjamin A. Templin, *The Public Trust in Private Hands: Social Security and the Politics of Government Investment*, 96 KY. L.J. 369, 400–01 (2008).

50 *See* U.S. DEP'T OF THE TREASURY, *supra* note 9, at 11–14.

51 *Id.* at i.

52 *Id.*

2008 (EESA)[53] and the American Recovery and Reinvestment Act of 2009 (ARRA).[54] In the short term, the government's options to pay interest on the bonds held in the Social Security Trust Fund are limited and include (1) cutting other government spending and diverting that money to Social Security, (2) borrowing money by issuing bonds on the public market, or (3) increasing the money supply (i.e., printing more money) thus risking inflation. None of these options are particularly attractive or practical in the long term.

The immediate funding crisis is expected to get better in the short term but will soon worsen as more of the baby boom generation retires. If the economy recovers and payroll tax revenues rise, the SSA estimates that the program's costs should be financed through the payroll tax without resorting to the trust fund by 2012.[55] However, that short-term recovery may never happen. After the SSA released its predictions, the Federal Reserve lowered its expectations on the recovery and predicted that unemployment levels would continue to stay high through 2012.[56] Even if the SSA is correct in its estimates and tax revenues increase in the short term, the incoming payroll tax revenues may still be insufficient to pay benefits by 2015 because more workers will begin to retire and there are fewer replacement workers to pay into the system.[57] By the time most baby boomers have retired in 2040, the OASI Trust Fund will be exhausted.[58]

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53 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

54 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. Most of the money spent under the EESA was in the form of investments through the Troubled Asset Relief Program (TARP) and other programs; therefore, a portion, but not all, is expected to be repaid to Treasury. Under a theory of Keynesian economics, the spending programs under the ARRA—although not literally investments—will also result in a return to the government in the form of taxes if the government spending works to stimulate the economy and increase gross domestic product (GDP). For a discussion of the EESA and ARRA as tools of Keynesian economics, see Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127 (2010).

55 *See* BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2–3, 38.

56 Neil Irwin, *Fed Lowers Economic Expectations for 2011*, WASH. POST, Nov. 23, 2010, http://voices.washingtonpost.com/political-economy/2010/11/fed_officials_expect_9_percent.html.

57 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 2–3.

58 *Id.*

Insolvency, in the context of Social Security, does not mean that benefit payments will stop entirely.[59] Once the combined OASI and Disability Insurance trust funds are exhausted in 2037, the projected payroll tax will fund only 78% of the projected benefits.[60] The SSA is prohibited from borrowing and can pay out benefits only to the extent that it has revenue.[61] Consequently, one solution to the financing crisis will be to simply reduce benefits by 22% when the trust fund is exhausted in 2037.[62]

B. The Politics of the Government Deficit

Given the limited options to finance benefits, the drive in Washington to either reduce Social Security benefits or raise taxes has gained momentum.[63] In February 2010, President Obama established by executive order the bipartisan National Commission on Fiscal Responsibility and Reform (Fiscal Commission), which was charged to report in December 2010 with recommendations to reduce the federal deficit.[64] President Obama instructed the Fiscal Commission that "'everything has to be on the table,'" including Social Security.[65] One way to reduce the overall federal deficit is to delay Treasury's obligation to pay interest on the bonds in the Social Security Trust Fund by reducing costs or raising the payroll tax.

The Fiscal Commission proposed a number of reforms for Social Security, including increasing the retirement age.[66] Not every member of the Fiscal Commission was behind the recommendations. In fact, only eleven members of the eighteen-person commission voted to adopt the measures—falling short of the fourteen people needed to bring the overall plan to a vote in Congress.[67] Congress

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59 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 76.

60 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 9.

61 Altman, *supra* note 13, at 1397–98.

62 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 20–21.

63 *See, e.g.*, Jackie Calmes, *Panel Seeks Social Security Cuts and Higher Taxes*, N.Y. TIMES, Nov. 10, 2010, http://www.nytimes.com/2010/11/11/us/politics/11fiscal.html?_r=1&partner=rss&emc=rss.

64 Exec. Order No. 13,531, *supra* note 2.

65 Jackie Calmes, *Obama Tells Debt Commission 'Everything Has to Be on the Table,'* N.Y. TIMES, Apr. 27, 2010, http://www.nytimes.com/2010/04/28/business/economy/28fiscal.html.

66 *See* FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 54.

67 Jonathan Weisman & Damian Paletta, *Majority of Panel Backs Deficit Plan*, WALL ST. J., Dec. 4, 2010, http://online.wsj.com/article/SB10001424052748703989004575652621383159484.html.

member Stephanie Condon, a dissenter on the Fiscal Commission, condemned the benefit cuts to Social Security and offered up a new plan, mainly consisting of payroll tax increases on the salaries of high-wage earners.[68]

Congress has not been idle either. On the eve of the seventy-fifth anniversary of the signing of the Social Security Act[69] in August 2010, some Congress members initiated new calls for reform. Hearings were held by the House Subcommittee on Social Security and the Senate Finance Committee,[70] and reports on the funding crisis were released by the Senate Special Committee on Aging,[71] the Congressional Budget Office,[72] and the Government Accountability Office,[73] among others. The electorate is also primed for reform, with one poll showing that 90% of voters (including large majorities from both parties plus independents) think it is important that Congress act by 2011.[74]

Dozens of reform proposals have been discussed and analyzed by the SSA, academics, and think tanks.[75] Reform proposals generally fall into one of four categories: (1) tax increases,[76] (2) benefit cuts,[77]

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68 Stephanie Condon, *Rep. Jan Schakowsky Counters Deficit Commission Leaders' Plan with More Liberal Plan*, CBSNEWS.COM, Nov. 16, 2010, http://www.cbsnews.com/8301-503544_162-20023006-503544.html.

69 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

70 The House Subcommittee on Social Security conducted hearings on July 15, 2010. Press Release, Chairman Pomeroy Announces a Hearing on Social Security at 75 Years: More Necessary Now Than Ever (July 8, 2010), *available at* http://democrats.waysandmeans.house.gov/press/PRArticle.aspx?NewsID=11256. The Senate Finance Committee addressed the same issues on the same day. *See Choosing to Work During Retirement and the Impact on Social Security*, U.S. SENATE COMM. ON FIN. (July 15, 2010), http://finance.senate.gov/hearings/hearing/?id=994b091c-5056-a032-52a6-97cee60ebe87.

71 The Senate Special Committee on Aging Chair, Herb Kohl, concluded that "Congress should enact modest changes to Social Security in the near future in order to bring its long-term financing into balance and improve benefits for those who need them most." U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at V.

72 CONG. BUDGET OFFICE, CBO PUB. NO. 4140, SOCIAL SECURITY POLICY OPTIONS 30–31 (2010), *available at* http://www.cbo.gov/ftpdocs/115xx/doc11580/07-01-SSOptions_forWeb.pdf.

73 DODARO, *supra* note 8, at 11.

74 VIRGINIA P. RENO & JONI LAVERY, NAT'L ACAD. OF SOC. INS., ECONOMIC CRISIS FUELS SUPPORT FOR SOCIAL SECURITY: AMERICANS' VIEWS ON SOCIAL SECURITY 5, 15 (2009).

75 The SSA provides funding to the Retirement Research Consortium, a group of three institutions that conduct studies related to Social Security and retirement issues. *See Retirement Research Consortium*, *supra* note 21.

76 Tax increase proposals include raising the payroll tax, increasing the mandatory cap, or designating that the estate tax pay for Social Security. *See Actuarial Publications:*

(3) diversifying the trust fund,[78] and (4) structural changes.[79] While some proposals claim to completely eliminate the deficit, such proposals tend to have a disproportionate effect on some groups.[80]

As with most Social Security policy proposals, the retirement age increases do not—by themselves—solve the financing problem. Most analysts agree that any long-term fix will have to include some mix of reform proposals including both reductions to benefits and a concurrent increase in taxes.[81] The Fiscal Commission's proposed Social Security reforms include a number of measures, some of which would raise costs. Recommended reforms from the bipartisan commission include establishing a minimum benefit to combat poverty among the elderly, broadening the tax base to include 90% of taxable payroll, increasing the progressivity by reducing benefits for higher-income workers, changing the method by which cost-of-living adjustments are made, and moving new state and local government employees into the Social Security system, among others.[82] With these measures, the Social Security system is expected to have a surplus.[83]

There is also the possibility that Congress will be able to agree on only a partial fix for the Social Security deficit. The problem in

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Summary of Provisions That Would Change the Social Security Program, SOC. SEC. ADMIN., www.ssa.gov/OACT/solvency/provisions/summary.html (last visited Feb. 20, 2011).

77 The number of benefit-cut proposals that have been discussed are too numerous to mention for purposes of this Article; they include not only increasing the retirement age but also across-the-board reductions in benefits. *See id.*

78 Diversifying the Social Security Trust Fund into a portfolio that contains equities could, according to one estimate, eliminate up to one-third of the deficit over time. U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 50–51.

79 Structural changes include the personal accounts proposal put forward by President Bush in 2001, which would have changed Social Security from a defined benefit plan to a defined contribution plan. *See* Kathryn L. Moore, *Social Security Reform: Fundamental Restructuring or Incremental Change?*, 11 LEWIS & CLARK L. REV. 341, 345 (2007). Commentators do not think the possibility of an ownership interest is meaningful enough to compel taxpayers to take on the risk of lower returns. *See* Pfau, *supra* note 41.

80 For example, one proposal would completely wipe out the deficit by eliminating the payroll cap and applying the payroll tax to all earnings without any increase in benefits for high earners. U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 52–53. However, such an approach would be inconsistent with the generally accepted principles of Social Security that benefits be a wage-related earned right. *See* Moore, *supra* note 14, at 1066–67 (discussing the principles behind Social Security).

81 Moore, *supra* note 14, at 1078–82.

82 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 49–53.

83 *Id.* at 54.

Social Security reform is not so much creating a solution as it is getting agreement on the type of reform.[84] Raising the retirement age is a reform that some Democratic and Republican leaders have agreed on.[85] However, the issue ignites controversy. Even among policy analysts who generally agree, there is strong disagreement on increasing the retirement age.[86]

II
RETIREMENT AGE IN THE SOCIAL SECURITY ACT

In the original Social Security Act passed in 1935, the age to start claiming benefits was simply sixty-five for everyone.[87] However, more complexity was introduced as the program progressed, and the last major revision affecting the full retirement age was made with the 1983 Amendments. Under the current law, the age at which a worker starts to claim benefits is a key factor in calculating lifetime monthly benefits. If a worker retires at the earliest possible age of sixty-two, he receives reduced benefits; if he waits to retire beyond his full retirement age and works until seventy, he receives an increase in benefits beyond the normal level.[88] Although simple in concept, there are a number of age-related factors that go into the calculation, and different standards are applied for different cohorts.

This Part briefly reviews the policy origins of the retirement age in the original Social Security Act and then tracks important changes that have been made to the present. The purpose is not only to describe the details of the interplay of the various age-related factors that determine benefits but also to discern the policy intentions behind those factors in order to give a context for the discussion of the current policy debate over retirement age.

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84 *See* Calmes, *supra* note 15.

85 *See supra* note 16 and accompanying text.

86 Two prominent policy analysts, Professor Kathryn Moore and Nancy Altman, agree on two reform options but differ on the retirement age. In prior articles, both have advocated increasing the payroll tax cap to include 87% or 90% of taxable payroll and redirecting the estate tax to fund Social Security. Moore favors an increase in the retirement age. Moore, *supra* note 14, at 1088–89. Altman is adamantly against cutting benefits and would rather diversify the trust fund. *Social Security at 75 Years: More Necessary Now Than Ever: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 111th Cong. (2010) [hereinafter *Social Security at 75 Years Hearings*] (statement of Nancy J. Altman, Co-Director, Social Security Works).

87 Social Security Act, Pub. L. No. 74-271, § 202(a), 49 Stat. 620, 623 (1935).

88 *See infra* Part II.B (providing details on benefits calculations).

A. Historical Perspective: The 1935 Social Security Act

The retirement age provisions in the Social Security Act have evolved considerably since 1935.[89] The original retirement age of sixty-five was chosen more as a matter of compromise and consensus than for any "scientific or gerontological" reason.[90] During the decision process, some policy makers called for a retirement age of sixty; however, those proposals did not merit serious consideration because of the cost.[91] While seventy was the prevailing age for private pensions at the time, it was rejected as too high because life expectancies at birth in 1935 were only sixty-three years for women and fifty-nine years for men.[92] Sixty-five became politically acceptable as a retirement age in part because it was thought that factions would oppose any higher age, given widespread unemployment at the time.[93]

Congress first changed the retirement age in the Social Security Amendments of 1956, extending full benefits at age sixty-two to dependent mothers of deceased workers.[94] The amendments also established the early eligibility age (EEA) of sixty-two for working women but at an actuarially reduced percentage.[95] Full benefits could still be had if working women waited until age sixty-five, which was deemed the normal retirement age (NRA).[96] Normal retirement age is now generally referred to as the full retirement age (FRA), though some references in the literature still refer to the "NRA."[97] Congress extended benefits at sixty-two to women before it did so for men for three reasons: (1) women generally faced age discrimination in the workforce more often than did men, (2) women who became widows before sixty-five and who had never worked before often had difficulty finding employment, and (3) the change allowed many

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89 *See generally* Moore, *supra* note 18 (detailing the political debate over the choice of sixty-five as the original age to receive benefits and the legislative history behind the subsequent revisions).

90 *Id.* at 559.

91 *Id.* at 547–48.

92 *Id.*

93 *Id.* at 548.

94 *Id.* at 550–51.

95 *Id.*

96 *Id.* at 549–51.

97 *See* U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 75.

married couples to retire at the same age because wives often were younger than their husbands.[98]

The Social Security Amendments of 1961 expanded the EEA of sixty-two to include men, though eligibility and benefits were based on wages earned through age sixty-five so that there would be no additional cost.[99] In the Social Security Amendments of 1972, Congress allowed eligibility and benefits for men to be based on earnings at age sixty-two in order to achieve parity between women and men in terms of Social Security benefits.[100] Proposals to increase the normal retirement age from sixty-five were considered in 1975,[101] and changes were ultimately made in the 1983 Amendments in order to improve the solvency of the system.[102]

B. Current Law: Calculating Benefits

The 1983 Amendments form the core structure of retirement age provisions as currently implemented, though Congress has made some adjustments since 1983.[103] This Part reviews the age-related factors used to determine benefits.

The terms "retirement age" and "retirement" can be misleading when discussing Social Security benefits. Retirement is commonly understood to occur when a worker ceases employment and starts to receive benefits under Social Security. In some of the Social Security literature, retirement equates with the start of receiving Social Security benefits regardless of whether one is still working. However, workers can simultaneously receive benefits and work and therefore be classified as working beneficiaries because they are paying into the system through the payroll tax. In this Article, "retirement" equates with receiving benefits and ceasing work—i.e., a nonworking beneficiary.

Calculating benefits under the current law is a three-step process. First, the SSA computes a worker's average indexed monthly earnings (AIME), which is calculated from a worker's highest thirty-

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98 Moore, *supra* note 18, at 549–50.

99 *Id.* at 552–53.

100 *Id.* at 553–54.

101 *Id.* at 554 (stating that the 1975 Advisory Council on Social Security took up the issue and made recommendations to increase the retirement age gradually starting in 2005).

102 Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65.

103 *See infra* notes 125–26 and accompanying text.

five years' worth of wages, as adjusted for wage inflation.[104] Second, the AIME is used to calculate the primary insurance amount (PIA), which is the monthly benefit amount if someone retires at the full retirement age.[105] Third, the PIA is adjusted downward if the person claims benefits early (before his FRA) or upward if the person claims benefits late (after his FRA).[106] The age adjustment in benefits relies on four interrelated factors: the full retirement age, the early eligibility age, the delayed retirement credit, and the retirement earnings test.

1. Full Retirement Age (FRA)

Workers who start claiming benefits at their FRA receive 100% of their PIA. However, not all cohorts have the same FRA. The FRA for an individual differs according to the year in which that individual was born. The FRA for people born in 1937 or earlier is sixty-five.[107] One key provision of the 1983 Amendments was to gradually increase the FRA from sixty-five to sixty-seven for cohorts born later than 1937.[108] For people born after 1937, the FRA increases an additional two months for each birth year after 1937 until it reaches sixty-six for those born in 1943.[109] For those born between 1943 and 1954, the FRA was stabilized at sixty-six.[110] For those born in 1955 to 1960, the FRA again gradually increases two months for every year until it stabilizes at sixty-seven years old for those born in 1960 and later.[111] The purpose of the gradual increase was to allow for planning and to reduce the shock of a sudden increase in the retirement age for those close to the retirement age.

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104 SOC. SEC. ADMIN., SSA PUB. NO. 05-10070, YOUR RETIREMENT BENEFIT: HOW IS IT FIGURED? (2010), *available at* http://ssa.gov/pubs/10070.pdf.

105 *Id.* The PIA is a progressive benefit formula, such that "the ratio of benefits to average earnings is higher for those with low average earnings than for those with high average earnings." Moore, *supra* note 79, at 349. For a more thorough discussion of how the PIA is calculated, see *id.* at 349–50.

106 SOC. SEC. ADMIN., *supra* note 104. Other adjustments occur if a beneficiary is a government worker with a pension. *Id.*

107 *Retirement Planner: Full Retirement Age*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/retire2/retirechart.htm (last visited Feb. 20, 2011).

108 *See id.*

109 *See id.*

110 *See id.*

111 *See id.*

2. Early Eligibility Age (EEA)

Rather than wait until their FRA, workers can elect to start receiving benefits at the early eligibility age (EEA) of sixty-two, though their benefits are reduced to a fraction of their PIA. For every month before their FRA, benefits are reduced at five-ninths of 1% for the first thirty-six months (which is about 6.7% per year) before the FRA and five-twelfths of 1% for any additional month (which is an additional 5% per year).[112] For a worker with an FRA of sixty-six, electing early retirement at sixty-two would reduce that person's benefits by 25%—a deduction that would apply for the rest of that person's life.[113]

If the FRA were raised to sixty-eight, workers subject to the new age who claim at sixty-two would have benefits reduced by 35%—20% for the first three years and 15% for the second three years. If the FRA is raised to seventy, workers subject to that new retirement age who elect to receive benefits at sixty-two would be subject to a reduction of 45%—20% for the first three years and 25% for the additional five years. Given that raising the FRA results in large reductions in benefits for early claimers, some proposals to increase the retirement age include proposals to increase the EEA as well.[114]

3. Delayed Retirement Credit (DRC)

In addition to increasing the FRA, the delayed retirement credit (DRC) offers increased benefits as incentive for workers to delay retirement past their FRA. The benefit increase is two-thirds of 1% per month delayed, which is an 8% increase per year that retirement is delayed past the FRA.[115] The benefit increase stops at the age of seventy regardless of whether that person takes benefits or stays in the workforce.[116] A worker with an FRA of sixty-seven who chooses to keep working until he is seventy would raise his benefits by 24%. For workers who planned for a delayed retirement at seventy, an increase

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112 *See Social Security Benefits: Benefit Reduction for Early Retirement*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/OACT/quickcalc/earlyretire.html (last visited Mar. 29, 2011).

113 *Retirement Planner: Retirement Benefits by Year of Birth*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/retire2/agereduction.htm (last visited Feb. 20, 2011).

114 *See infra* Part IV.C.

115 *Retirement Planner: Delayed Retirement Credits*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/retire2/delayret.htm (last visited Feb. 20, 2011). This is the rate that applies to those born in 1943 and later. *Id.*

116 *Id.*

in the FRA from sixty-seven to sixty-eight would deny them an 8% increase in benefits.[117]

4. Retirement Earnings Test (RET)

Finally, the retirement earnings test (RET) further reduces the benefit amount for some workers who choose to claim early but continue to work.[118] This earnings test applies only to income earned by workers who claim benefits before they reach their FRA. The allowable amount of income without a benefit reduction depends upon whether a worker reached his FRA in a given year.

For example, a worker who had elected to receive benefits at sixty-two could earn only up to $14,160 without a reduction in Social Security benefits.[119] For such workers, benefits are reduced by $1 for every $2 in wages earned above the limit.[120] However, in a year that a worker-beneficiary reaches his FRA, benefits are reduced by a lesser amount—$1 for every $3 in wages above $37,680 for those workers who reached their FRA in 2010.[121] Any income earned after a worker reaches his FRA is not subject to the earnings test.

To the extent that a worker has his benefits reduced by the earnings test, the calculation of his benefit rate is actuarially increased for benefits payments after he reaches his FRA.[122] Despite this actuarial adjustment, the RET is perceived by many as a disincentive to stay in the labor force.[123] Consequently, there have been efforts to reform and limit the RET. Prior to 1983, the RET applied to any earnings after retirement up to age seventy-one, regardless of whether a beneficiary elected to start benefits at the EEA or his FRA; however, in 1983, the upper age limit was reduced to sixty-nine.[124]

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117 *See* CONG. BUDGET OFFICE, *supra* note 72, at 30 n.43.

118 *See Automatic Increases: Exempt Amounts Under the Earnings Test*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/OACT/COLA/rtea.html (last visited Feb. 20, 2011).

119 *Id.*

120 *Id.*

121 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 108–10.

122 Steven J. Haider & David S. Loughran, *The Effect of the Social Security Earnings Test on Male Labor Supply: New Evidence from Survey and Administrative Data*, 43 J. HUM. RESOURCES 57, 59, 61 (2008).

123 *Id.* at 58.

124 *Automatic Increases: Exempt Amounts, 1975–1999*, SOC. SEC. ADMIN., http://www.ssa.gov/oact/cola/rteahistory.html (last visited Mar. 29, 2011).

In 2000, the RET and earnings limits were removed for income received after a beneficiary reaches his FRA.[125] The legislative purpose in removing the RET for post-FRA employment was an attempt to keep generating revenues for the trust fund—i.e., to encourage beneficiaries to continue to work so that those workers' current payroll taxes would help fund current benefits. In other words, the outflow in benefits would be partially replaced by the inflows from working beneficiaries.[126]

The Commissioner of Social Security did not support elimination of the RET for lower ages in 2000 because it was thought that it would lead to a significantly higher percentage of the elderly in poverty.[127] Working on the assumption that the repeal of the RET for lower ages would lead some workers to claim earlier than planned, researchers estimated that the lower benefits for those early claimers could have increased the poverty level from 12% to 13.9%, using data from 1993.[128] Further discussion of eliminating the RET is considered in Parts VI.B and VIII.A of this Article.

Given the interplay of these four age related factors—FRA, EEA, DRC, and RET—eligible workers have two key decisions that affect their Social Security benefits and income: (1) when to start claiming benefits and (2) whether to continue to work. As an eligible worker turns sixty-two, there are essentially four categories of worker-beneficiary status within the eligible age ranges: nonworking beneficiaries, working beneficiaries, working non-beneficiaries, and nonworking non-beneficiaries. Each category carries importance in terms of crafting policy.

5. Actuarial Fairness and the Four Factors

The adjustments in benefits were designed to be actuarially neutral in terms of when a beneficiary makes a claim.[129] Actuarial neutrality

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125 Senior Citizens' Freedom to Work Act of 2000, H.R. 5, 106th Cong. (2000).

126 Bo MacInnis, *Social Security and the Joint Trends in Labor Supply and Benefits Receipt Among Older Men* 4 (Ctr. for Ret. Research at Bos. Coll., Working Paper No. 2009-22, 2009), *available at* http://crr.bc.edu/images/stories/Working_Papers/wp_2009-22 .pdf.

127 Michael A. Anzick & David A. Weaver, *The Impact of Repealing the Retirement Earnings Test on Rates of Poverty*, 63 SOC. SEC. BULL., no. 2, 2000, at 3.

128 *Id.* at 6–7.

129 GAYLE L. REZNIK, DAVID A. WEAVER & ANDREW G. BIGGS, SOC. SEC. ADMIN., ISSUE PAPER NO. 2009-02, SOCIAL SECURITY AND MARGINAL RETURNS TO WORK NEAR RETIREMENT 3 (2009). In the literature, policy analysts use the terms "actuarial fairness" and "actuarial neutrality" as synonyms. However, a technical distinction can be drawn

means that the present value of benefits received for claiming early will be roughly equal to the present value of benefits claimed after or at the FRA.[130] Therefore, claimers should be indifferent as to when they claim benefits.[131] On average, the deduction in benefits from claiming early and the increase in benefits for claiming later are meant to roughly balance one another so that workers receive the same amount of lifetime benefits regardless of the age at which they elect to receive benefits. Actuarial neutrality is important to the system's financing so that there is no additional cost associated with early or late benefits claiming.[132]

Some controversy surrounds whether the system is truly actuarially neutral.[133] While actuarial neutrality works on a macro level, there is strategic decision making at the individual and subpopulation levels because demographic groups have different longevity rates[134] and individuals can often assess their own longevity.[135] Not surprisingly,

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between the two terms. *See* Monika Queisser & Edward Whitehouse, *Neutral or Fair? Actuarial Concepts and Pension-System Design* 4 (OECD Soc., Emp't & Migration Working Papers, Paper No. 40, 2006), *available at* http://www.oecd.org/dataoecd/2/42/37811399.pdf. I follow the example of Reznik, Weaver, and Biggs and use the terms interchangeably.

130 Queisser & Whitehouse, *supra* note 129, at 4.

131 Hugo Benítez-Silva & Na Yin, *An Empirical Study of the Effects of Social Security Reforms on Benefit Claiming Behavior and Receipt Using Public-Use Administrative Microdata*, 69 SOC. SEC. BULL., no. 3, 2009, at 77, 79.

132 *Id.*

133 *See* James E. Duggan & Christopher J. Soares, *Actuarial Nonequivalence in Early and Delayed Social Security Benefit Claims*, 30 PUB. FIN. REV. 188, 188–89 (2002). Although the authors use the term "actuarial equivalence," its meaning is the same as how actuarial neutrality or actuarial fairness is described in much of the Social Security literature—i.e., that the present value of total benefits is equal regardless of when benefits are claimed. *Id.* at 188.

134 For an example of how financial advisors advise clients in strategic decision making, see William Meyer & William Reichenstein, *Social Security: When to Start Benefits and How to Minimize Longevity Risk*, J. FIN. PLAN., March 2010, at 49, 57–58.

135 The SSA provides workers with information on average life expectancy for different demographics. Additionally, a number of longevity calculators are available on the Internet that use health and survey data to give an estimate of an individual's life expectancy based on his or her characteristics (e.g., gender, race), status (e.g., married, single), and behavior (e.g., smoking and drinking habits). *See* Mark Stibich, *Top Longevity Calculators and Longevity Tests—Review*, ABOUT.COM, http://longevity.about.com/od/longevitytools/tp/top-longevity-calculators.htm (last updated June 24, 2008) (providing a review of longevity calculators).

people with health problems that may affect life expectancy have a higher probability of claiming benefits earlier.[136]

Problems might arise if benefit adjustments are not actuarially neutral on a broad scale because they will alter claiming behavior in ways that policy makers did not expect—possibly affecting the cost of the program as well as resulting in unintended redistribution.[137] Actuarial neutrality comes into question when discussing the policy objective of encouraging workers to retire late. One purpose behind the retirement age provisions of the 1983 Amendments was to encourage workers to stay in the labor force longer.[138] The upside of encouraging later retirement includes greater inflows into the Social Security Trust Funds because workers contribute to the system through the payroll tax[139] as well as increased income tax revenue for the general fund.[140] Moreover, by continuing to work, individuals reduce the risk of outliving their resources (e.g., savings, IRAs, 401(k)s, etc.) by maximizing their Social Security benefits.[141]

To the extent that the 1983 Amendments have not achieved that goal—i.e., that there is a bias towards early claiming—policy makers should make adjustments. Duggan and Soares found that the adjustments were not neutral when taking into account gender and lifetime earnings.[142] They found that men as a group—particularly low income males—have incentives to claim early, and women have incentives to claim late.[143] The implication from a policy point of view is that, when considering gender, the Social Security system is not actuarially neutral because there are "substantial lifetime actuarial premiums for males who claim early and actuarial losses for early claiming females."[144] Duggan and Soares also found that the 8%-per-

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136 *See* Selahattin Imrohoroglu & Sagiri Kitao, *Social Security, Benefit Claiming and Labor Force Participation: A Quantitative General Equilibrium Approach* 1 (Ctr. for Ret. Research at Bos. Coll., Working Paper No. 2010-2, 2010).

137 Duggan & Soares, *supra* note 133, at 188–89.

138 Moore, *supra* note 18, at 568.

139 Giovanni Mastrobuoni, *Labor Supply Effects of the Recent Social Security Benefit Cuts: Empirical Estimates Using Cohort Discontinuities*, 93 J. PUB. ECON. 1224, 1224 (2009) (noting that continued labor force participation results in greater revenues); *see also* Moore, *supra* note 18, at 567.

140 *See infra* note 240 and accompanying text (discussing the increase of income tax revenues).

141 Meyer & Reichenstein, *supra* note 134, at 57–58.

142 Duggan & Soares, *supra* note 133, at 188–89.

143 *Id.* at 198–99.

144 *Id.* at 205.

year benefit adjustment provided by the DRC was not enough to result in actuarial neutrality.[145] These results suggest that further adjustments need to be made to the DRC in order to encourage labor force participation among the elderly. Other studies show similar findings. Queisser and Whitehouse found that the reduction in benefits for early claiming was too low to be actuarially fair, thereby creating incentives to retire early and a penalty for retiring late.[146]

III
ARGUMENTS AND VALUES DRIVING REFORM

While some Democratic and Republican leaders seem to favor an increase in the retirement age, the policy initiative can have harsh consequences for those unable to work later into life.[147] This Part outlines the arguments for and against an increase and then discusses what values should guide reform.

A. Policy Debate: Pros and Cons

Proponents of increasing the retirement age make the following arguments to justify the reform:

1. Longer life expectancies are putting a burden on the financing system because benefits are being paid out for a longer period than in the past. Increasing the retirement age will reduce the aggregate amount of benefits paid out, thus easing the stress in the system.[148]
2. Increasing the retirement age will encourage people to stay in the workforce longer,[149] and this will result in greater net inflows through payroll taxes, thereby also improving solvency.[150]

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145 *Id.* at 189.

146 Benítez-Silva & Yin, *supra* note 131, at 92 n.15; Queisser & Whitehouse, *supra* note 129.

147 MELISSA M. FAVREAULT & RICHARD W. JOHNSON, URB. INST., RAISING SOCIAL SECURITY'S RETIREMENT AGE (2010), *available at* http://www.urban.org/uploadedPDF/412167-Raising-Social-Security.pdf (noting that raising the retirement age "appears to be gaining political traction").

148 Tom Terry, *Raising the Retirement Age Will Help Save Social Security*, U.S. NEWS & WORLD REP., Sept. 20, 2010, http://www.usnews.com/opinion/articles/2010/09/20/raising-the-retirement-age-will-help-save-social-security.

149 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 52.

150 *See infra* Part IV.A–C.

3. Working longer will improve the retirement savings of individuals, reducing the possibility of exhausting their resources in old age.[151]
4. Health is better among the elderly than in previous generations, thereby allowing a longer work life.[152]
5. A decrease in physically demanding jobs also allows people to work longer.[153]
6. Education levels have improved, and a correlation exists between higher education and the ability to work longer.[154]
7. Elderly Americans are underutilized, and a higher "retirement age would make better use of the skills and abilities of . . . older workers."[155]
8. The elderly stand to gain in noneconomic ways because employment "may contribute to an older person's mental acuity and provide a sense of usefulness."[156]
9. The demand for skilled older workers will remain high given that there are fewer younger workers to replace them.[157]
10. Increasing the number of people in the labor force will also increase gross domestic product, thereby "creating more resources that could be split between workers and retirees."[158]

In addition to disputing many of these contentions and the assumptions upon which they are made, the opponents' principal arguments are:

1. The reduced benefits will increase the poverty rate because many of those at risk—the poor, the less educated, those with

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151 FAVREAULT & JOHNSON, *supra* note 147.

152 HYE JIN RHO, CTR. FOR ECON. & POL'Y RES., HARD WORK? PATTERNS IN PHYSICALLY DEMANDING LABOR AMONG OLDER WORKERS 2 (2010), *available at* http://www.cepr.net /documents/publications/older-workers-2010-08.pdf.

153 Terry, *supra* note 148.

154 FAVREAULT & JOHNSON, *supra* note 147.

155 AARP PUB. POLICY INST., INSIGHT ON THE ISSUES: REFORM OPTIONS FOR SOCIAL SECURITY 1, 4 (2008).

156 JOANNA N. LAHEY, CTR. FOR RET. RESEARCH AT BOS. COLL., DO OLDER WORKERS FACE DISCRIMINATION? 1 (2005), *available at* http://crr.bc.edu/images/stories /Briefs/ib_33.pdf.

157 Terry, *supra* note 148.

158 FAVREAULT & JOHNSON, *supra* note 147, at 2.

health problems, and those who work in physically demanding jobs—have no choice but to retire early.[159]

2. Not all groups have seen the same increase in life expectancy, so those with historically shorter life expectancies—African Americans, the poor, the less educated, and blue collar workers—are affected disproportionally by an increase in the retirement age because they stand to reap fewer benefits.[160]
3. Older workers have more difficulty finding new employment and, when they do, often earn less than they did in previous jobs.[161]

Given these two positions, a number of questions arise: To what extent will the Social Security financing deficit be improved by increasing the retirement age? Will an increase in the FRA actually compel people to work longer, or will they just take the reduction in benefits? Has the increase in life expectancy also resulted in an increase in work capacity? To what extent are certain subpopulations unfairly disadvantaged through lower benefits? Can the imbalance created by an increase in the retirement age be offset through other means, such as increased access to disability programs or the establishment of a minimum benefit?

The analysis that follows is centered on two interrelated themes—(1) economic consequences of an increase in the retirement age and (2) employment issues. In analyzing economic consequences, I address both the macro and micro levels by looking at the effect of raising the age on Social Security's long-term deficit and how raising the retirement age will affect workers' finances during retirement. Employment issues cover a spectrum of topics, including whether raising the retirement age will achieve the policy goal of encouraging workers to retire later and whether workers have the capacity and the ability to retire later in life.

Any proposal for reform should also consider the purpose, principles, and value system inherent within the Social Security Act.

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159 RHO, *supra* note 152, at 2; *see also* Ross Eisenbrey, *Cutting Benefits Isn't the Way to Save Social Security*, U.S. NEWS & WORLD REP., Sept. 20, 2010, http://www.usnews.com/opinion/articles/2010/09/20/cutting-benefits-isnt-the-way-to-save-social-security.

160 *Social Security at 75 Years Hearings*, *supra* note 86, at 8–9 (statement of Nancy J. Altman, Co-Director, Social Security Works).

161 *See infra* Part VII.C–D.

It is not necessarily the case that the option that provides the best financing solution is consistent with the values of Social Security.[162]

B. Social Security's Value System

In a recent article, Professor Kathryn Moore analyzed Social Security's value system in order to distill a general set of principles that should guide any reform.[163] Additionally, I discuss values and norms that help inform policy-making decisions as to retirement age issues specifically.

Although the Social Security Act does not lay out a value system, there is wide agreement that it currently embodies nine principles set forth by former Social Security Commissioner Robert Ball.[164] These principles are (1) Universal, or Nearly Universal, Coverage,[165] (2) Earned Right,[166] (3) Wage Related,[167] (4) Contributory and Self-Financed,[168] (5) Redistributive,[169] (6) Not Means Tested,[170] (7) Wage

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[162] Not everyone agrees with this statement. President Bush presented his 2001 Commission to Strengthen Social Security with a different set of principles that would have partially transformed Social Security to a system of private accounts. Moore, *supra* note 14, at 1072.

[163] *See id.*

[164] *Id.* at 1064. Next to President Franklin D. Roosevelt, Robert Ball, the Social Security Commissioner under Presidents Kennedy, Johnson, and Nixon, is considered one of the staunchest supporters of the present social insurance system. *Id.*

[165] *Id.* at 1065 (stating that Social Security covers 96% of American workers).

[166] *Id.* at 1066.

[167] *Id.* at 1066–67 (stating that benefits are tied to long time earnings and that higher wage earners will have a larger monthly check than lower wage earners, which helps mitigate the redistributive effects of Social Security).

[168] By designating the payroll tax as a funding mechanism in the original Social Security Act, President Roosevelt sought to protect the system from political maneuvering by giving taxpayers the "'legal, moral, and political right to collect their pensions and their unemployment benefits.'" *Id.* at 1067 (quoting ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 308–09 (1958)). This principle also self-regulates excessive growth in the benefits calculation because employers and workers would have to increase their taxes in the event of a jump in benefits. *Id.* at 1067–68.

[169] The benefits calculation for Social Security redistributes wealth from higher wage earners to lower wage earners, as well as between generations. While nearly all workers contribute—whether rich or poor—the lower wage earners receive a higher replacement rate (i.e., the amount of earnings that are replaced through Social Security's monthly check) than higher wage earners. *Id.* at 1068.

[170] *Id.* at 1069. Means testing is a welfare-related concept where benefits are awarded to those deemed in need, whereas those with the means to survive are denied benefits.

Indexed,[171] (8) Inflation Protected,[172] and (9) Compulsory.[173] Tension exists among the nine principles as the system attempts to balance social adequacy with individual equity.[174] For example, the principle of redistribution of wealth to the poor contradicts the wage-related principle because higher wage earners reap higher benefits.[175] Some consider the balance between these opposing goals the inherent strength of a collectivist program, while others point to the contradicting principles as an indication of flaws within the structure.[176]

While the Social Security system can be characterized as embodying these principles, "there is no[] universal agreement on the principles that should guide reform."[177] President George W. Bush articulated a set of principles that would have fundamentally changed the structure of Social Security from a defined benefit plan to a defined contribution plan,[178] which would have fundamentally altered the collectivist nature of the system.[179]

Professor Moore suggests that any reform "retain Social Security's fundamental structure but gradually introduce changes on both the revenue and benefit side so as to distribute the burden of reform widely across generations and within generations."[180] Toward this end, Moore advocates a set of reform principles that include (1) retaining the collectivist approach of Social Security;[181] (2) fixing the

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171 *Id.* at 1070 (stating that a wage-indexed system provides that, as the national average wage for a cohort fluctuates, benefits are adjusted through indexing in order to reflect the living standard for a particular generation of workers).

172 *Id.* (stating that cost-of-living adjustments are made automatically in order to adjust to rising prices).

173 *Id.* at 1071 (stating that everyone contributes, which results in a more collectivist responsibility for old age rather than individual responsibility).

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 1072.

178 *See* PRESIDENT'S COMM'N TO STRENGTHEN SOC. SEC., STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS 38 (2001), *available at* http://www.ssa.gov/history/reports/pcsss/Final_report.pdf.

179 Moore, *supra* note 14, at 1073–75.

180 *Id.* at 1088.

181 The collectivist approach contrasts with that of individual responsibility. Collectivism pools together risks, whereas individualism maintains decision making over one's resources with the individual taxpayer, rather than the government. *See id.* at 1073–75.

long-term deficit;[182] (3) increasing revenue, reducing benefits, or both;[183] (4) implementing sooner than later;[184] (5) sharing burdens widely;[185] (6) retaining Social Security's safety net;[186] and (7) ensuring that reform encompasses true bipartisan effort.[187] Moore suggests that a gradual increase in the normal retirement age would be consistent with these principles because it helps achieve the goals of solvency by spreading the burden of the benefit across many cohorts.[188]

Finally, an additional value system that should be discussed that is specific to retirement age proposals is the evolving norms surrounding the age at which people should retire—i.e., the usual retirement age.[189] Within U.S. laws and regulations, there is no universal norm as to a retirement age. Tax laws provide for penalty free withdrawals at age fifty-nine and six months from 401(k) plans[190] and individual retirement accounts (IRAs),[191] while the earliest age for Social Security benefits is sixty-two. Although formal laws might not peg a specific age at which people can start to retire, informal social norms and mores are extraordinarily important in influencing formal rules.[192] There may be "noneconomic channels, such as changes in social norms or the 'focal' retirement age" that

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182 *See id.* at 1075–78.

183 Moore rejects structural changes, such as the individual accounts proposals, and advocates some set of reforms that would gradually increase taxes, reduce benefits, or a combination of the two. *See id.* at 1078–82.

184 *See id.* at 1082–84.

185 *See id.* at 1084–85.

186 *See id.* at 1085–86.

187 *See id.* at 1087–88.

188 *Id.* at 1088–89. Increasing the normal retirement age is only one of three proposed reforms that Moore discusses. She also advocates increasing the taxable wage base and using the estate tax to fund Social Security as two other reforms that are consistent with the principles she sets out. *Id.*

189 Charles Brown, *The Role of Conventional Retirement Age in Retirement Decisions* 8 (Univ. of Mich. Ret. Research Ctr., Working Paper No. 2006-120, 2006).

190 *Topic 424—401(k) Plans*, IRS.GOV, http://www.irs.gov/taxtopics/tc424.html (last updated Mar. 1, 2011).

191 *Topic 451—Individual Retirement Arrangements (IRAs)*, IRS.GOV, http://www.irs.gov/taxtopics/tc451.html (last updated Mar. 1, 2011).

192 The literature surrounding the study of institutional change discusses the importance of informal customs on the development of formal rules and laws. *See* PETER A. HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1–8 (Oxford Univ. Press 2001) (describing the importance of institutions—both formal and informal—as rules of the game governing an economy).

also affect the decision on when to retire.[193] To the extent that workers perceive there is a usual retirement age for their job, they tend to retire at that age.[194] If there is no perceived usual retirement age, workers tend to retire early.[195] Additionally, there is a growing trend that people prefer working to retirement.[196] According to one survey, the age at which workers expect to retire has increased. In 1991, 50% of workers expected to retire before sixty-five, but only 28% expect to do so as of 2010.[197]

The trend in other Organization for Economic Cooperation and Development (OECD) countries can help inform the social norm in the United States. In the last four years, many countries have increased their retirement age or have proposals to do so. Australia, Denmark, France, and Germany have passed measures to increase their normal retirement age from sixty-five to sixty-seven, and the United Kingdom increased its age from sixty-five to sixty-eight.[198] Proposals exist to make similar reforms in Ireland, Spain, and the Netherlands.[199] Notably, most of the countries increased their retirement age to align with the current target of sixty-seven in the United States rather than moving to the more aggressive seventy-year-old standard. While international standards provide a comparative context, it should be noted that each of these countries has different traditions as to retirement as well as differences in longevity, health, and employment.

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193 David M. Blau & Ryan M. Goodstein, *Can Social Security Explain Trends in Labor Force Participation of Older Men in the United States?*, 45 J. HUM. RESOURCES 328, 354 (2010).

194 Brown, *supra* note 189, at 11.

195 *Id.* at 12.

196 Xiaoyan Li, Extending the Working Lives of Older Workers: The Impact of Social Security Policies and Labor Market 56–57 (June 2010) (unpublished Ph.D. dissertation, Pardee RAND Graduate School), *available at* http://www.rand.org/content/dam/rand/pubs/rgs_dissertations/2010/RAND_RGSD265.pdf.

197 EMP'T BENEFIT RESEARCH INST. & MATHEW GREENWALD & ASSOCS., RETIREMENT CONFIDENCE SURV., 2010 RCS FACT SHEET #2: CHANGING EXPECTATIONS ABOUT RETIREMENT 1 (2010), *available at* http://www.ebri.org/pdf/surveys/rcs/2010/FS-02_RCS-10_Expectns.pdf.

198 MARTIN HERING & THOMAS R. KLASSEN, IS 70 THE NEW 65? RAISING THE ELIGIBILITY AGE IN THE CANADA PENSION PLAN 14 (2010), *available at* http://www.mowatcentre.ca/pdfs/mowatResearch/28.pdf.

199 *Id.*

IV

REDUCTION OF THE LONG-TERM SOCIAL SECURITY DEFICIT

Not all proposals to increase the retirement age result in the same level of savings. The SSA's Office of the Actuary lists eleven different plans that would adjust benefits by making changes involving the FRA, the EEA, or both.[200] Each plan affects birth-year cohorts differently and results in different levels of reduction for the long-term deficit.[201] While it is not the purpose of this Article to provide a catalog of the various initiatives and studies, I will compare three proposals to increase the FRA as well as issues surrounding increasing the EEA and other factors. First, however, I will discuss the methods by which the SSA measures solvency in order to give a basis for understanding the impact of any given reform proposal.

A. Measuring Solvency: The Actuarial Balance and Unfunded Obligations

Actuaries at the SSA gauge the solvency of the system using a variety of methods that measure the deficit over a seventy-five-year period.[202] One metric to gauge solvency is the actuarial balance, which is "the difference between income and cost of the program expressed as a percentage of taxable payroll over the [next seventy-five years]."[203] In the 2010 annual report, the SSA reported a negative actuarial balance of 1.92% of taxable payroll.[204] Thus, increasing the payroll tax by slightly more than 1.92%—i.e., from the current level of 12.4% (combining both employers' and employees' contributions) to 14.38%—would eliminate the shortfall.[205]

200 Eight of the plans affect the FRA, and three plans modify rules that affect either the EEA or both the FRA and EEA. *See Actuarial Publications: Provisions Affecting Retirement Age*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/OACT/solvency/provisions/retireage.html (last visited Feb. 22, 2011) [hereinafter *Provisions Affecting Retirement Age*].

201 *See id.*

202 BOARD OF TRUSTEES, 2010 ANNUAL REPORT, *supra* note 4, at 35.

203 *Id.* at 11.

204 *Id.* at 11–12 (calculating actuarial balance using the intermediate assumptions).

205 *Id.* at 61. The SSA predicts the payroll would need to be raised slightly higher that the 1.92% shortfall in order to achieve solvency because it is assumed that some employers and employees would quit because of the higher taxes, thus shrinking the tax base. *Id.*

Alternatively, an immediate reduction in benefits by 12.8% would eliminate the seventy-five-year deficit without increasing taxes.[206]

Another method used to estimate the deficit is to measure the cumulative unfunded obligation. This is derived by calculating the present value of the cumulative value of income, minus cost for each of the next seventy-five years.[207] In any given year, a positive balance indicates that there are reserves in the trust funds to pay benefits, and a negative balance shows the point at which trust fund reserves are exhausted.[208] This cumulative unfunded obligation is sometimes also compared as a percentage of future gross domestic product (GDP).[209] For 2010, the SSA estimated that the present value of the shortfall was $5.4 trillion for the period through 2084, which represents 0.6% of the future GDP for the period.[210]

The SSA is continually revising its projections and readily admits the uncertainty of its assumptions.[211] The SSA actuaries make predictions using low, high, and intermediate cost assumptions. Following the example of most commentators, I rely on the intermediate figures in this Article.

B. Proposals to Increase the FRA

For the purpose of illustrating the way in which the deficit reduction might be affected, I will analyze three different proposals. One proposal gradually increases the retirement age, while the second increases the age at a more rapid rate. The third proposal indexes the age to increases in longevity. These comparisons illustrate how the timing and method of increasing the retirement age affects the degree of savings and the impact on different cohorts.

For the first two proposals, the first step is to "[s]horten the hiatus in the normal retirement age (start increasing to age 67 for those age 62 in 2010, rather than those age 62 in 2017)."[212] Under the gradual-

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[206] *Id.* If projections go beyond the seventy-five-year horizon, the SSA predicts a shortfall of "3.3 percent of taxable payroll under the intermediate assumptions," thereby requiring an immediate tax increase to 15.9% or an immediate reduction of 20.7% in benefits to achieve solvency. *Id.*

[207] *Id.* at 12.

[208] *Id.*

[209] *Id.* at 13.

[210] *Id.* at 12.

[211] *Id.* at 15.

[212] *See Actuarial Publications: Summary of Provisions That Would Change the Social Security Program*, *supra* note 76 (discussing Proposals C1.2 and C1.4). I use the label

increase proposal, the FRA for later cohorts continues to increase by a factor of one month for every two years until the full retirement age rises to a new high of age sixty-eight.[213] Although some retirees expecting an FRA of sixty-six would now have a higher age, the subsequent increase for other cohorts is eased in slowly.[214] The gradual-increase approach would improve the shortfall by 0.46% of the present value of taxable payroll over seventy-five years and would reduce the long-range actuarial deficit by 22.5%.[215]

In comparison, the rapid increase proposal would improve the shortfall by 0.57% of payroll and reduce the long-term deficit by 28.5%.[216] The improved savings come at the expense of a gradual increase. Under this plan, however, the FRA would increase at a pace of two months for every year, thereby phasing in the increase much more rapidly than under the first plan.[217] Of course, if the FRA is increased to seventy rather than sixty-eight, even greater savings would result. Under the first plan discussed, if the increase continues to seventy rather than sixty-eight, then 0.62% of taxable payroll is saved, and the long-range deficit is reduced by 31%.[218]

"gradual increase" to describe Proposal C1.2 and "rapid increase" to describe Proposal C1.4.

213 *Id.* (discussing Proposal C1.2).

214 *See id.* The rate of increase of one month for every two birth years is more gradual than currently scheduled increases in the FRA. Under the current Social Security Act, the rate of increase—for those cohorts experiencing an increase—is a two month increase in the FRA for every one birth year. *See supra* note 109 and accompanying text.

215 *See Detailed Single Year Tables, Category of Change: Retirement Age*, SOC. SEC. ADMIN., https://docs.google.com/viewer?url=http%3A%2F%2Fwww.ssa.gov%2FOACT%2Fsolvency%2Fprovisions%2Ftables%2Ftable_run305.pdf (last visited Mar. 29, 2011) (discussing Proposal C1.2). These percentage improvements were based upon the 2009 projected actuarial balance deficit of 2% of taxable payroll. *Id.* Proposal C1.2 would decrease the long-range actuarial balance from -2% to -1.55%, which is a 22.5% improvement. *Id.* Other projections reported in this Article are assumed to use the more current deficit figures reported in 2010 by the Social Security Administration.

216 *See Detailed Single Year Tables, Category of Change: Retirement Age*, SOC. SEC. ADMIN., https://docs.google.com/viewer?url=http%3A%2F%2Fwww.ssa.gov%2FOACT%2Fsolvency%2Fprovisions%2Ftables%2Ftable_run312.pdf (last visited Mar. 29, 2011) (discussing Proposal C1.4). Proposal C1.4 would decrease the long-range actuarial balance from -2% to -1.43%, which is a 28.5% improvement. *See id.*

217 *Actuarial Publications: Summary of Provisions That Would Change the Social Security Program*, *supra* note 76 (discussing Proposal C1.4).

218 *See id.* (discussing Proposal C1.3). Proposal C1.3 would decrease the long-range actuarial balance from -2% to -1.39%, which is a 31% improvement. *See Detailed Single Year Tables, Category of Change: Retirement Age*, SOC. SEC. ADMIN., https://docs.google.com/viewer?url=http%3A%2F%2Fwww.ssa.gov%2FOACT%2Fsolvency%2Fprovisions%2Ftables%2Ftable_run306.pdf (last visited Mar. 29, 2011) (discussing Proposal C1.3).

Another innovative approach to solving the problem of increasing life expectancies would be to index increases in the retirement age to increases in longevity. In this way, the retirement age would automatically adjust upwards as life expectancies increase without the need to pass additional legislation. Such an approach to maintain solvency provides more certainty to the system and avoids "large program changes made in crisis mode."[219] Twelve other countries have adopted some form of life expectancy indexing for their public pension programs.[220]

Indexing proposals have been considered by both congressional committees and the Social Security Administration[221] and have formed the basis of the retirement age increase in the Fiscal Commission's December 2010 report.[222] One plan examined by the Senate mandates a gradual increase in the retirement age that "roughly matches assumptions about increasing life expectancy."[223] The FRA would be increased by one month for every two birth years, starting with workers born after 1960. Under this schedule, the FRA would reach sixty-eight for workers born in 1984, gradually increase to sixty-nine for those born in 2008, and ultimately reach seventy for people born in 2032.[224] The indexing approach is presumably fairer to individual cohorts because it tries to match increases in longevity to benefits. Although fairer, this approach results in a smaller reduction of the deficit. Under this plan, the long-term shortfall would be reduced by 0.40% of taxable payroll, resulting in approximately an 18% reduction of the shortfall.[225]

The Fiscal Commission's December 2010 recommendation to increase the retirement age is similar to the Senate report, though it proposes increases in both the FRA and EEA that would be indexed to longevity. Under the Fiscal Commission's plan, the retirement age would gradually rise from the current cap of sixty-seven to an estimated sixty-nine by increasing at a rate of one month for every

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219 AARP PUB. POLICY INST., IN BRIEF: SOCIAL SECURITY FINANCING: AUTOMATIC ADJUSTMENTS TO RESTORE SOLVENCY 1 (2009), *available at* http://assets.aarp.org/rgcenter/econ/inb166_socsec.pdf.

220 *Id.* at 1–2.

221 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 53; *see also Provisions Affecting Retirement Age*, *supra* note 200.

222 *See* FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50.

223 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 53.

224 *Id.*

225 *Id.*

two birth years.[226] The EEA would increase at the same rate in order to "maintain a constant ratio of years in retirement to years in adulthood."[227] The Fiscal Commission anticipates that its recommendations for raising the retirement age would improve the Social Security funding deficit by 18%.[228]

C. Proposals to Increase the EEA

Some analysts believe that the current EEA provides incentives to workers to retire early, and they suggest that raising the EEA would keep more workers in the labor force.[229] To the extent that workers remain in the labor force longer, the result is better retirement income.[230] Raising the EEA would mean that the earliest claimers would have less of a reduction in their monthly benefit given that the number of months between the EEA and FRA would be reduced. This might have a positive effect on keeping the elderly poor out of poverty by requiring labor force participation at a later age, assuming, of course, that they have the capacity and ability to find work.[231]

Opponents to an increase in the EEA cite many of the same reasons as those used in arguing against an increase in the FRA—i.e., unfairness to at-risk groups and a disproportionate effect on groups with shorter life expectancies.[232] A hike in the EEA would result in hardship for those at risk of poverty because of poor health, a lack of assets, and poor prospects for employment because they might not be able to provide for themselves between the ages of sixty-two and sixty-four.[233] For groups with lower life expectancies, such as African Americans and low wage earners, an increase in the EEA

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226 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50.

227 *Id.*

228 *Id.* at 54. The Fiscal Commission also proposed other reform measures that would eliminate the financing deficit. *See supra* notes 82–83 and accompanying text.

229 JOHN A. TURNER, CTR. FOR RET. RESEARCH AT BOS. COLL., PROMOTING WORK: IMPLICATIONS OF RAISING SOCIAL SECURITY'S EARLY RETIREMENT AGE 1 (2007); *see also* Hugo Benítez-Silva & Frank Heiland, *Early Retirement, Labor Supply, and Benefit Withholding: The Role of the Social Security Earnings Test* 32 (Univ. of Mich. Ret. Research Ctr., Working Paper No. 2008-183, 2008).

230 BARBARA A. BUTRICA, KAREN E. SMITH & C. EUGENE STEUERLE, WORKING FOR A GOOD RETIREMENT 2 (2006), *available at* http://www.urban.org/UploadedPDF/311333_good_retirement.pdf.

231 For a discussion of these issues, see *infra* Part VII.

232 NATALIA ZHIVAN ET AL., CTR. FOR RET. RESEARCH AT BOS. COLL., AN "ELASTIC" EARLIEST ELIGIBILITY AGE FOR SOCIAL SECURITY 2–4 (2008).

233 *Id.* at 4.

would reduce the value of lifetime benefits more than it does for comparable groups. In the case of African Americans, the lifetime value of retirement benefits received is currently 89% of what whites receive, and it would decrease to only 87% if the EEA were increased to sixty-four.[234]

Most studies conclude that adjusting the EEA would not improve the Social Security funding problem.[235] In fact, one study suggests that raising the EEA might slightly increase the Social Security deficit.[236] Another report concluded that a two-year increase in the EEA would "not have any significant effect on the budget of the Social Security system."[237] The reasons for this are that the reduction in benefits are calculated to be actuarially fair, so the present value of lifetime benefits when retiring at sixty-two with partial benefits would roughly equal the present value of lifetime benefits when retiring at one's FRA with full benefits.[238]

However, more nuanced studies suggest that trust fund solvency could be improved because longer work lives would increase payroll tax revenue. One analysis suggests that the increase in revenues will be negligible;[239] however, there might be significant residual effects in terms of general income tax revenue. Butrica, Smith, and Steuerle predict that, if every nondisabled worker delayed retirement by one year, the trust fund deficit would be reduced by 2%, plus it would generate an extra $170 billion in general tax revenues.[240] Under this model, the increase in general revenues and the increase in payroll tax revenue together represent 28% of the Social Security deficit.[241] Of course, raising the EEA would not necessarily result in all workers delaying retirement, and the issue of continued labor force participation is speculative.[242]

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234 *Id.* at 3.

235 Benítez-Silva & Heiland, *supra* note 229, at 32.

236 One proposal to gradually increase the EEA from sixty-two to sixty-five was projected to actually make the deficit worse by 0.01% of taxable payroll. Memorandum from Steve Goss et al., Soc. Sec. Admin., to John Gist and Sara Rix, AARP Pub. Policy Inst. 3 (June 19, 2008), *available at* http://www.socialsecurity.gov/OACT/solvency/AARP_20080619.pdf.

237 Imrohoroglu & Kitao, *supra* note 136, at 28.

238 *See supra* Part II.B.5.

239 Imrohoroglu & Kitao, *supra* note 136, at 22.

240 BUTRICA, SMITH & STEUERLE, *supra* note 230, at 17.

241 *Id.*

242 For a discussion of the effect of certain reforms on labor force participation, see *infra* Part VI.A.

Some proposals combine an increase in the EEA with changes to the FRA. One plan calls for increasing the EEA in conjunction with increases in the FRA in order to maintain a four-year spread. In this scenario, the earliest eligibility date would always be four years away from the FRA. Additionally, the proposal calls for acceleration of the scheduled FRA increases plus indexing after the FRA reaches sixty-seven.[243] The deficit could be reduced by 0.56% of taxable payroll, a 28% reduction.[244] The Deficit Commission's proposal takes a similar approach, such that the indexed increase in the FRA also results in an increase in the EEA. Under that approach the spread will be no more than five years.[245]

One possible outcome of increasing the EEA is that it would "likely increase labor supply in the years leading to the new [EEA]."[246] For early claimers, this would result in higher benefits than if the FRA were raised without an adjustment in the EEA. Additionally, workers would have the opportunity of saving more than if they had retired at the original EEA. Both outcomes could help reduce the poverty level among the elderly, provided that the at-risk population can remain employed.

One result of proposed increases in the EEA is to maintain some sense of proportion between working years and retirement years, so that a certain percentage of life is spent working and a certain percentage is spent in retirement, regardless of life expectancy. Turner discusses a model where, for every two years of work, there is one year of retirement.[247] For example, if the average age of entry into the workforce were twenty years old and life expectancy were eighty, there would be forty years of work and twenty years of retirement. As life expectancy increases, the retirement age provisions would adjust to maintain the balance.[248] This attempt at providing some sort of proportional rule of thumb surrounding time

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243 Memorandum from Stephen C. Goss, Soc. Sec. Admin., to Mark Warshawsky 4 (Sept. 17, 2008), *available at* http://www.socialsecurity.gov/OACT/solvency/Warshawsky_20080917.pdf.

244 This study used the 2009 Trustee's Report data, which had not been updated with 2010 data. The 28% figure reflects the 0.56% reduction based on a deficit of 2.00 of taxable payroll in 2009. *See Actuarial Publications: Summary Measures and Graphs*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/OACT/solvency/provisions/charts/chart_run073.html (last visited Feb. 28, 2011).

245 *See* FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50.

246 Benítez-Silva & Heiland, *supra* note 229, at 32.

247 TURNER, *supra* note 229, at 2.

248 *Id.*

spent working and time spent in retirement creates a sense of fairness between generations. However, the question remains whether the increase in life expectancy has also resulted in an increase in work capacity.

While increasing the EEA has been discussed extensively among analysts, commentators have previously noted that the policy change "appears to have little support."[249] Yet, as the solvency issue becomes more urgent, discussion of raising the EEA may find its way onto the political agenda.[250] Interestingly, the Fiscal Commission's initial draft proposal did not contain a component to increase the EEA.[251] In the twenty days between the draft and final report, the EEA increase must have gained some importance as a bargaining chip in the discussions, given its inclusion in the final draft.[252]

D. Proposals to Change the RET and DRC

Proposals to change the RET and DRC are relevant to reducing the Social Security deficit to the degree that changes would increase labor force participation and therefore increase tax revenues.

The RET has been much criticized as constituting an unfair tax on older workers.[253] The earnings test was originally designed to prevent taxpayers from receiving benefits if they were still engaged in "gainful employment."[254] This is consistent with the original purpose of Social Security benefits, which was to serve as social insurance to guard against inadequate income in old age and not as a pension or annuity.[255] Therefore, the RET is an attempt to "target[] benefits at those persons likely to be in need of transfer income to replace lost earnings."[256] Critics, however, charge that the RET acts as a

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249 Benítez-Silva & Heiland, *supra* note 229, at 31.

250 *Id.*

251 *See* CO-CHAIRS' PROPOSAL: 11.10.10 DRAFT DOCUMENT 44–46 (2010), *available at* http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/CoChair_Draft.pdf.

252 This is speculation on my part. The fact that the EEA was not included in the initial draft could have been an oversight.

253 Michael V. Leonesio, *Social Security and Older Workers*, 56 SOC. SEC. BULL., no. 2, 1993, at 47, 51.

254 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 25.

255 *See* Leonesio, *supra* note 253, at 51.

256 *Id.*

disincentive to work.[257] Much has been written about workers who stop or limit work in order to avoid the loss of benefits.[258]

Retirees widely consider the RET to be a penalty for working.[259] Many analysts point out that this is a misunderstanding, and workers should adjust their behavior because any loss of benefits due to the earnings test is later made up by an actuarially fair increase in that worker's benefits after he reaches his FRA.[260] Some policy analysts contend that most workers, their advisors, and the media do not take the increase into account when advising on or making retirement decisions,[261] but economists disagree on whether the RET actually does cause beneficiaries to limit their work.[262]

One argument made in this Article is that, if the RET is largely misunderstood, then either the Social Security Administration should make greater efforts to educate the public about retirement options or Congress should modify or eliminate the RET.[263] If eliminating the RET were to result in greater labor force participation by early claimers, two positive economic effects would result: (1) there would be enhanced revenues for the Social Security Trust Fund, and (2) individuals would be earning additional income that would extend their monetary resources into old age, thus reducing the longevity risk of outliving one's resources.

There are few proposals to increase the DRC. For the most part, the workers who retire late are wealthier, so an increase in the DRC would be perceived as shifting benefits to those who are not in need. That said, some evidence exists that the current benefit increase given by the DRC is not actuarially neutral. The marginal return in Social Security benefits of working an additional year is low for men (except for low earners), so there is little to be gained in terms of increased benefits for most men, and they might be better off claiming early.[264] In contrast, most women would be better off claiming later.[265]

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257 *See, e.g.*, *id.*

258 *See id.*

259 Haider & Loughran, *supra* note 122, at 57–58.

260 *See id.* at 61.

261 *Id.*

262 *See id.* at 58.

263 For an analysis of eliminating the RET and how retirement behavior might change, see *infra* Part VI.B–C.

264 REZNIK, WEAVER & BIGGS, *supra* note 129, at 1.

265 Duggan & Soares, *supra* note 133, at 188–89. Although the authors use the term "actuarial equivalence," its meaning is the same as how actuarial neutrality or actuarial

V

ABILITY TO RETIRE: FINANCIAL CONSIDERATIONS AND LONGEVITY

People are living longer; consequently, Social Security benefits are paid out over a longer period of time than in the past, and this has put a strain on the financing.[266] In this Part, I discuss increased longevity, the financial ability to retire, the impact of raising the retirement age on poverty rates, and alternatives that might mitigate that impact, such as increasing disability benefits and a minimum benefit rate.

A. Increasing Life Expectancy

Advocates of an age increase principally argue that, because people are living longer and are healthier in old age, they should also work for a longer period of time.[267] On the face of it, the argument sounds reasonable. From 1940 to 2007, the average life expectancy for men at age sixty-five increased 42% from 12.1 to 17.2 years, and for women, the average life expectancy increased 46% from 13.6 to 19.9 years.[268] It should be noted that, for purposes of considering retirement age reforms, life expectancy increases over time should be measured at sixty-five rather than life expectancy at birth. There have been even greater changes in life expectancy at birth since 1940 because of large declines in infant and teen mortality.[269]

While some studies point to the changes since 1940, a more appropriate measure of change would be a comparison with 1983 since that was the last time Congress made comprehensive changes to the retirement age. Since the 1983 Amendments were passed, life expectancies at sixty-five for men have increased 19% (from 14.4 years in 1983 to 17.2 years in 2007) and 7% (from 18.6 years in 1983

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fairness is described in much of the Social Security literature (that the present value of total benefits is equal regardless of when benefits are claimed).

266 Terry, *supra* note 148.

267 *Id.*

268 *See* Elizabeth Arias, *United States Life Tables, 2006*, NAT'L VITAL STAT. REP., June 28, 2010, at 29–30 tbl.11 (providing data from the 1940s); Jiaquan Xu et al., *Deaths: Final Data for 2007*, NAT'L VITAL STAT. REP., May 20, 2010, at 26 tbl.7 (providing data from 2007).

269 DAVID ROSNICK, CTR. FOR ECON. & POLICY RESEARCH, SOCIAL SECURITY AND THE AGE OF RETIREMENT 1 (2010), *available at* http://www.cepr.net/documents/publications/ss-2010-06.pdf.

to 19.9 years) for women.[270] Even when considering only the increase in life expectancy since 1983, enough years have been added to life expectancy that the argument for an increase in the retirement age gains some merit.

However, different racial and socioeconomic demographics have lower life expectancies. For example, African Americans have shorter life spans; consequently, any increase in the retirement age will result in lower benefits for this group. At birth, whites are expected to live 4.8 years longer than African Americans, according to 2007 data.[271] At sixty-five, the life expectancy for black males is only 15.2 years—two years less than that for white males.[272] Black females have a life expectancy of 18.7 years at age sixty-five compared with 19.9 years for white females.[273] Interestingly, in 1960 there was only a small difference in life expectancy between blacks and whites at age sixty-five.[274] The difference between black and white life expectancies at birth widened and reached a high of 7.1 years in 1989 but has since been on a steady decline.[275] As to socioeconomic status, a number of studies have confirmed that those with higher lifetime income live longer.[276] In a study that included black and white males and females, researchers found a difference of two to three years in life expectancy between low and high income groups.[277]

One question that arises when looking at disparities is the degree to which Social Security should take into account lower life expectancies for some subpopulations in the calculation of benefits. In other words, even if someone has the capability and ability to work, should they be exempt from retirement age increases or

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270 See *Table 24. Life Expectancy at Birth, at 65 Years of Age, and at 75 Years of Age, by Race and Sex: United States, Selected Years 1900–2007*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/data/hus/hus2009tables/Table024.pdf (last visited Mar. 29, 2011).

271 ROSNICK, *supra* note 269, at 2.

272 *See id.* at 26 tbl.7.

273 *Id.*

274 TURNER, *supra* note 229, at 2.

275 Xu et al., *supra* note 268, at 6–8.

276 James E. Duggan, Robert Gillingham & John S. Greenlees, *Mortality and Lifetime Income: Evidence from U.S. Social Security Records*, 55 IMF STAFF PAPERS 566, 567, 582–83 (2008), *available at* http://www.imf.org/external/pubs/ft/staffp/2008/04/pdf/duggan.pdf (reviewing the literature and confirming a link between socioeconomic status and longevity).

277 *Id.* at 568.

otherwise have a benefit adjustment because they belong to a subpopulation that has a lower life expectancy? Currently, the benefits calculation for Social Security does not explicitly adjust for race, gender, or income level; however, the differences in life expectancy across these groups can result in an unintended redistribution of benefits to higher income workers given their higher longevity rate.[278]

B. Financial Ability to Retire and Poverty Rates

Opponents argue that an increase in the retirement age would disproportionally affect some socioeconomic groups who have lower life expectancies and would also result in some workers dropping below the poverty level because of reduced benefits.[279] In particular, the benefit cut would have an adverse effect on three subpopulations: (1) the poor, (2) those who have to retire early because of poor health or incapacity to work, and (3) African Americans because of shorter life expectancies. If benefit reductions result in the retirees slipping beneath the poverty line, then the increase in the retirement age would be inconsistent with Social Security's goal of social adequacy in retirement for these populations.[280]

By most measures, Social Security has been extraordinarily effective in combating poverty among the elderly. The official overall poverty rate in the United States for 2009 was 14.3%.[281] The rate for Americans age sixty-five and older in 2009 is at 8.9%, which is nearly 38% below the average rate.[282] Some analysts contend that the official poverty rate underestimates actual spending needs, and the percentage of older workers without adequate income is actually higher than the numbers reported.[283] The dispute comes in part because increases in the poverty level are indexed to prices rather than

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278 *Id.* at 567.

279 Richard W. Johnson & Gordon B.T. Mermin, *Financial Hardship Before and After Social Security's Early Eligibility Age* 22–23 (Ctr. for Ret. Research at Bos. Coll., CRR WP 2009-8, 2009).

280 For a discussion of the goal of adequacy, see *supra* note 174 and accompanying text.

281 *Table 4, People and Families in Poverty by Selected Characteristics: 2008 and 2009*, CENSUS BUREAU, http://www.census.gov/hhes/www/poverty/data/incpovhlth/2009/table4.pdf (last visited Mar. 1, 2011).

282 The poverty rate of 8.9% among older Americans in 2009 actually decreased compared with 9.7% in 2008. *Id.* However, the absolute number of the elderly in poverty increased between 2008 and 2009. The rate, though not the absolute number, in 2009 is likely lower because a large number of younger workers became unemployed in 2009.

283 Johnson & Mermin, *supra* note 279, at 7.

wages. Because wages rise more quickly than prices over the long term, "the gap between the official poverty threshold and the median household income has grown."[284] When defining financial hardship as 125% of the current poverty rate, the incidence among those aged sixty-three to sixty-five rises from 8% to 12%.[285]

The lower poverty rate among the elderly is likely due to an increase in income from Social Security benefits. According to some estimates, if it weren't for Social Security payments, 44% of the recipients would be living below the poverty level.[286] The poverty rate increases in the years just before some workers reach the early eligibility age of sixty-two and then decreases once those workers become eligible for Social Security benefits. The poverty rate increases "about one-third as people age from their early fifties to their early sixties," with most of the increase occurring among low-skilled, poorly educated workers.[287] Research has shown that the poverty rate for workers aged sixty to sixty-two is 11%, and it drops to 8% for ages sixty-three to sixty-five.[288] The drop in the poverty rate could be due to other sources of income. However, investigators conclude that, given the populations involved and the early eligibility age of sixty-two, it is likely that the decline in the poverty rate is attributed to Social Security.[289]

Increasing the retirement age lowers benefits; consequently, the poverty rate will likely rise for older Americans if they continue to retire at an age below their FRA. Over 73% of all workers claim benefits before they reach their FRA,[290] and the number claiming at sixty-two has been in a relatively stable range of 48% to 52%.[291] While the system provides incentives to some workers to retire early,[292] one question that arises is the degree to which claiming early is voluntary. Some of the workers who retire at sixty-two do so

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284 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 42.

285 Johnson & Mermin, *supra* note 279, at 11.

286 KATHLEEN ROMIG, CONG. RESEARCH SERV., SOCIAL SECURITY REFORM: POSSIBLE EFFECTS ON THE ELDERLY POOR AND MITIGATION OPTIONS 1 (2008), *available at* http://www.globalaging.org/elderrights/us/2008/socreform.pdf.

287 Johnson & Mermin, *supra* note 279, at 21–22. Hardship rates for college graduates do not change much between their early fifties and early sixties, while the hardship rate for adults lacking a high school diploma increases from about "2 in 10" to about "3 in 10." *Id.*

288 *Id.* at 11.

289 *Id.*

290 Benítez-Silva & Yin, *supra* note 131, at 84.

291 *Id.* at 80.

292 *See supra* Part II.B.5.

because of poor health or because of a lack of capacity to work. Additionally, some are financially dependent on Social Security to keep them above the poverty level.

An increase in the retirement age would put some workers at risk of slipping below the poverty level.[293] Workers with low wages and a low net worth "are generally more financially dependent on Social Security to maintain prior living standards."[294] Typically, the workers at risk of poverty at early retirement or before do not have other sources of income, such as pension benefits.[295] Additionally, the incidence of financial hardship is higher among certain demographics, including "African Americans, Hispanics, people who did not complete high school, . . . unmarried adults[,] . . . adults with work-limiting health problems[,] . . . and women."[296] For women, employment benefits are 25% below those for males, and single women "face up to twice the risk of poverty in retirement than do men."[297]

While researchers agree that some workers are at risk of being adversely affected, there is wide disagreement about the size of this segment of the population.[298] The answer to the question can depend on how "at risk" is defined.[299] At risk is sometimes defined as one or a combination of the following factors: (1) being at the poverty level, (2) not having a pension other than Social Security, or (3) lacking the ability to work.[300] More specific factors suggesting risk include tracking net worth, income, health, health insurance, and employment opportunity.[301] If measuring on the basis of poverty alone, one study concluded that the at-risk population is about one-quarter to one-third of early retirees.[302] However, if at risk is defined as requiring both "being poor and having a work-limiting disability," the figure drops

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293 Johnson & Mermin, *supra* note 279, at 23.

294 Eric R. Kingson & Maria T. Brown, *Are Age-62/63 Retired Worker Beneficiaries At Risk?* 3 (Ctr. for Ret. Research at Bos. Coll., CRR WP 2009-13, 2009).

295 Johnson & Mermin, *supra* note 279, at 4.

296 *Id.* at 11.

297 Kingson & Brown, *supra* note 294, at 5.

298 *Id.* at 3.

299 *Id.* at 6.

300 *Id.*

301 *Id.*

302 *Id.*

down to 10%.[303] Yet another study establishes that the number of at-risk workers is only 3%.[304]

For purposes of this analysis, I adopt the measure of an at-risk population as one that includes both being poor and having a work-limiting disability. While poverty and unemployment among the poor is a serious social issue, the personal responsibility component found within the value system of Social Security[305] should require people in financial need of a job to continue to work if they have the capacity and ability to find a job.[306] While Social Security is one tool to address poverty rates among the elderly, other government programs can and should address the problem as well. To the extent that an age increase raises the poverty rate for those unable to work, a minimum benefit could mitigate if not reduce the number of people in poverty.[307]

C. Sources of Retirement Income

One of the recent challenges facing policy makers is assessing the role that Social Security plays in retirement income. In other words, policy makers need to answer the following question: To what extent is Social Security meant to replace income? Traditionally, Social Security was never meant to provide the sole source of retirement income.[308] The government's retirement policy has been famously analogized "as a 'three-legged stool,' with Social Security representing one of the legs and employer-sponsored pension plans and individual savings representing the other two legs."[309] On average, Social Security's income replacement rate—the income in retirement as a proportion of pre-retirement income—is around 40%, though the rate is expected to decline to around 36% by 2030.[310] Given that Social Security is designed as a safety net rather than a retirement plan, workers need to be personally responsible for their

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303 *Id.*

304 TURNER, *supra* note 229, at 5.

305 *See infra* note 311 and accompanying text.

306 *See infra* Part VII.

307 *See infra* notes 345–48 and accompanying text.

308 Moore, *supra* note 14, at 1069.

309 *Id.*

310 ALICIA H. MUNNELL, ANTHONY WEBB & FRANCESCA GOLUB-SASS, CTR. FOR RET. RESEARCH AT BOS. COLL., THE NATIONAL RETIREMENT RISK INDEX: AFTER THE CRASH 2 fig.1 (2009), *available at* http://crr.bc.edu/images/stories/Briefs/IB_9-22.pdf.

retirement income, proactively save for old age, and participate in employee pension plans, or they will face financial hardship.[311]

The second source of retirement income, employee-sponsored pension plans, has changed dramatically in the last twenty-five years as employee-sponsored defined-benefit pension plans have largely been replaced with defined-contribution plans, such as 401(k)s.[312] Under defined-benefit plans, retirees receive a guaranteed benefit even if it exceeds their contribution rate. Whereas, in a defined-contribution plan, workers' benefits are limited by the amount they contribute and the proceeds from any investments made from their contributions. Since 1979, there has been a dramatic shift from defined-benefit plans to defined-contribution plans, such as Individual Retirement Accounts (IRAs) and 401(k)s.[313] Defined-contribution plans are subject to market fluctuations, and workers who have the bad luck to retire on the cusp of a recession or market downturn face a higher risk of having their retirement savings depleted before they die.[314]

As for savings, in the last ten years, surveys report that a declining number of workers overall are saving for retirement, though older workers have increased their savings.[315] The percentage of all workers saving for retirement dropped from 78% in 2000 to 69% in 2010.[316] However, the percentage of workers aged fifty-five and up saving for retirement increased from 66% in 2000 to 81% in 2010.[317] The actual savings for Americans is a puny 5% of disposable income, despite survey results suggesting that workers want to save for

311 Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans' Retirement Savings Decisions*, 70 SOC. SEC. BULL., no. 4, 2010, at 1.

312 *See id.*

313 *See* EMP. BENEFIT RESEARCH INST., FACTS FROM EBRI: RETIREMENT TRENDS IN THE UNITED STATES OVER THE PAST QUARTER-CENTURY 1 (2007), *available at* http://www.ebri.org/pdf/publications/facts/0607fact.pdf (showing that traditional defined-benefit plans now account for only 10% of retirement plans (compared with 62% in 1979) and defined contribution plans represent 63% of all plans (compared with only 16% in 1979)).

314 *See* Wade D. Pfau, *Will 2000-Era Retirees Experience the Worst Retirement Outcomes in U.S. History? A Progress Report After 10 Years* 2 (Nat'l Graduate Inst. for Policy Studies, Working Paper, 2010), *available at* http://ssrn.com/abstract=1717283.

315 EMP. BENEFIT RESEARCH INST. & MATHEW GREENWALD & ASSOC., RETIREMENT CONFIDENCE SURV., 2010 RCS FACT SHEET #4: AGE COMPARISONS AMONG WORKERS 1 (2010), *available at* http://www.ebri.org/pdf/surveys/rcs/2010/FS-04_RCS-10_Age.pdf.

316 *Id.*

317 *Id.*

retirement.[318] Part of this trend can be explained by the behavioral economics literature, which has found that people do not behave as rational economic actors and often make poor financial decisions despite best intentions to do otherwise.[319]

Given Social Security's declining replacement rate and the risks involved with defined contribution plans, retirees need to accept "personal financial responsibility" for their retirement savings or risk being left without adequate resources.[320] Policy makers can help, however, by creating incentives to retire later and by designing savings systems that will encourage workers to save for retirement.[321] Advocates of an increase in the FRA maintain that there are benefits to providing incentives for workers to retire later because working longer "substantially increases worker's retirement well-being."[322] In addition to the increased Social Security benefits that would come from a later retirement, workers could also acquire additional savings for retirement, and, by working longer, there is a shorter time period over which workers would draw upon their non–Social Security resources.[323] While workers sacrifice some leisure time by working longer, this may be offset for some people who gain "improved physical and mental well-being" by continuing to work.[324]

One study estimated that, by delaying retirement and staying in the labor force, workers could increase their annual retirement income by roughly 9% for one extra year worked and 56% for five years of additional work.[325] For low income workers, the increase is even more dramatic. One extra year in the workforce increases retirement income by 16%, and five extra years increases it by 98%.[326] The dramatic difference is partially explained by the higher mortality rates among poor people, because additional income is spread out over fewer years.[327]

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318 Knoll, *supra* note 311, at 2–3.

319 *Id.* at 1–3.

320 *Id.* at 1.

321 *See infra* notes 531–34 and accompanying text.

322 BUTRICA, SMITH & STEUERLE, *supra* note 230, at 1.

323 REZNIK, WEAVER & BIGGS, *supra* note 129, at 2.

324 BUTRICA, SMITH & STEUERLE, *supra* note 230, at 5.

325 *Id.* at 13.

326 *Id.* at 14.

327 *Id.*

D. Mitigating the Impact: Minimum Benefits and Disability

Given that some populations—the less educated and minorities—would be adversely affected by an increase in the retirement age, proponents of an increase in the FRA suggest any adjustment should be accompanied by an "expansion of eligibility for disability insurance"[328] or the introduction of a minimum benefit for those who don't qualify for disability.[329]

To the degree that a worker must retire early because of health problems, disability insurance may be an alternative way to finance retirement. Disability benefits for workers under Social Security Disability Insurance (SSDI) are considered "more generous" than regular Social Security benefits for workers aged between sixty-two and their FRA because SSDI benefits equal the full Social Security benefit as if the worker had retired at his FRA without any actuarial reduction.[330]

Concern has been raised that another increase in the FRA will create incentives for workers in physically demanding jobs to apply for disability at an early eligibility age, even if they are not technically disabled. To the extent that an increase in applications results in an increase in disability benefits granted, these increased payouts may harm the gains sought by increasing the FRA.[331] Loosening the disability rules so that more workers qualify will result in higher outflows than if the present system is maintained.

Based on past increases to the FRA, there do not appear to be significant consequences in terms of rising disability application rates. For every four-month increase in the FRA, the disability application rate rose only 0.34% when considering workers who were affected by the FRA increase.[332] As might be expected, the increase in the application rate among workers with health problems was significantly greater, but still only 0.77%.[333] What effect does this have on assumptions about cost savings by increasing the FRA? It

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328 DAVID CUTLER, ESTIMATING WORK CAPACITY AMONG NEAR ELDERLY AND ELDERLY MEN 13 (2009), *available at* https://docs.google.com/viewer?url=http://www.nber.org/programs/ag/rrc/09-18%2520Cutler%2520FINAL.pdf.

329 Gordon B.T. Mermin & C. Eugene Steuerle, *Would Raising the Social Security Retirement Age Harm Low-Income Groups?*, URBAN INST. BRIEF SERIES, no. 19, 2006, at 1.

330 Li, *supra* note 196, at 2–6.

331 *Id.* at 2–3.

332 *Id.*

333 *Id.* at 33.

may be negligible, but a two-year increase in the FRA might reduce the predicted cost savings by 3.2%.[334]

Would disability be an effective alternative for those who presently have to retire at sixty-two because they lack the capacity to work? Disability may not be available for everyone whose benefits are reduced dramatically by an age increase. Most people who need the additional assistance will also be deemed "'too healthy' to meet the SSA's definition of disability."[335] Qualifying for disability requires that applicants "navigate an arduous and unpredictable application process" where the outcome is not certain given rigid requirements.[336] Additionally, not everyone who is insured under Social Security is also insured under SSDI. SSDI eligibility requirements vary by age but generally require that a worker has recently paid a minimum amount into SSDI.[337] So, for example, a worker who is sixty-two may have Social Security eligibility because he accumulated forty quarters of covered employment. However, in order to qualify for disability, twenty of those quarters of covered employment must have been in the last ten years.[338]

In addition to SSDI, other government programs might also supplement the income of the very poor. For example, Supplemental Security Income (SSI) is based on financial need, rather than work history.[339] Unlike SSDI, which is funded by the payroll tax, SSI is funded by general tax revenues.[340] However, SSI is administered by the Social Security Administration, so sometimes the terms SSDI and SSI are used interchangeably.[341] SSI is not available until age sixty-five unless a person is blind or physically or mentally disabled.[342] Those eligible for SSI are usually eligible for other programs as well, such as food stamps and Medicaid.[343]

Because many at-risk workers will likely not qualify for disability, some proponents of an increase in the FRA try to address concerns

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334 *Id.* at 32.

335 *Id.* at 34.

336 Johnson & Mermin, *supra* note 279, at 1.

337 *See* Li, *supra* note 196, at 4.

338 *Id.*

339 *What Is the Difference Between SSI and SSDI?*, WISEGEEK, www.wisegeek.com/what-is-the-difference-between-ssi-and-ssdi.htm (last updated Jan. 20, 2011).

340 *Id.*

341 *Id.*

342 Li, *supra* note 196, at 2 n.2.

343 *What Is the Difference Between SSI and SSDI?*, *supra* note 339.

about the adverse impact by proposing a minimum benefit provision and a hardship exemption to increases in the retirement age.[344] The Fiscal Commission's December 2010 report included a minimum benefit provision that "provides full-career (30-year) minimum wage workers with a benefit equivalent to 125 percent of the poverty line in 2017 and wage-indexed thereafter."[345] According to other studies, the addition of a minimum benefit to an increase would certainly mitigate—if not eliminate—the effect of an increase in the retirement age.[346] Under one plan that envisions increasing the FRA to seventy and two months and the EEA to sixty-five, a minimum benefit component could actually improve the current Social Security lifetime benefits of poor workers by 6%.[347]

In addition to the minimum benefit, the Fiscal Commission also proposed the creation of a hardship exemption to increases in the EEA and FRA.[348] Under this proposal, workers who do not qualify for either SSDI or SSI but who are otherwise unable to work past sixty-two could start to claim benefits without any additional actuarial reduction than that which already exists.[349]

VI
EMPLOYMENT TRENDS AMONG THE ELDERLY

If advocates of reform are correct, increasing the retirement age should cause people to delay retirement and stay in the workforce longer. A spate of new studies in the economics literature address the issue of whether increases in the FRA and other factors from the 1983 Amendments were the cause of a rise in the number of older workers in the labor force.[350] Most studies conclude that the increase in the retirement age that resulted from the 1983 Amendments was one of the important factors that caused an increase in labor participation

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344 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 52, 55–64.

345 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50.

346 Mermin & Steuerle, *supra* note 329, at 4. Depending on the size of the minimum benefit, there could be a reduction in the poverty rate. *Id.*

347 *Id.* at 4–5.

348 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50–51.

349 *Id.* The Fiscal Commission would charge the SSA with developing eligibility criteria, which would likely include "factors such as the physical demands of labor and lifetime earnings." *Id.* at 51. Other reform proposals have shown that lifetime earnings can be a good indicator of capacity to work. *See infra* notes 510–16 and accompanying text.

350 Benítez-Silva & Yin, *supra* note 131, at 77–78.

among the elderly, though subsequent changes in the DRC and RET are also credited with affecting the increase.

A. Labor Force Participation

Labor force participation (LFP) rates for older men[351] were moving downward from the 1960s until the mid-1990s when the trend reversed itself. The downward trend coincided with an increase in Social Security benefits, and the reversal coincided with the implementation of the 1983 Amendments, which provided incentives for later retirement and penalties for early retirement.[352] Given the coincidence, policy analysts have tried to determine whether the coinciding trends and policy changes to Social Security are correlated. That determination has important implications in accurately predicting the impact of future FRA increases on behavior.

Labor force participation among older men declined significantly during the latter half of the twentieth century. The labor force participation rate for men aged fifty-five to sixty-nine fell from approximately 75% in 1962 to about 70% in the early 1970s, and then it rapidly declined to 55% in the mid-1980s.[353] The rate hovered around 55% until 1994 when the trend reversed itself and climbed back to around 60% by 2004.[354] The studies on the effect of the retirement age on LFP focus on men because other societal trends are generally credited with a significant increase in LFP among women during the same period. In the latter half of the twentieth century, the labor force participation rate of women tripled as more women began pursuing careers.[355]

One question facing researchers is whether the decline in LFP among older men was due to the increases in benefits that occurred from the mid-1960s through the mid-1970s. However, there is disagreement among economists as to the degree to which the benefits increase accounted for the decrease in LFP. Stewart concludes that up to 40% of the decline can be explained by men leaving the

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351 The economic studies tend to focus on older men rather combining data on both genders because of the belief that some married women base their labor participation decision not only on their own FRA but also on their husband's FRA because many claim spousal benefits. Li, *supra* note 196, at 47.

352 Blau & Goodstein, *supra* note 193, at 329.

353 *Id.* at 338 fig.2.

354 *Id.*

355 *Id.* at 332.

workforce because of the increase in benefits.[356] However, Blau and Goodstein found that the increased benefits accounted for only 16% of the decline[357] and concluded that the decline in LFP "would have been substantial even if there had been no changes in Social Security retirement rules."[358] Numerous other studies using different time periods, cohorts, data sets, and models have found varying results ranging from benefit changes having only a 7% influence to 100%.[359]

Most studies conclude that the rise in Social Security benefits had only a little influence on the decline in labor force participation.[360] There is wide agreement that the degree to which one's Social Security benefits provide a sense of security becomes a factor in the decision of whether to leave the workforce.[361] However, Social Security benefits alone are not significant enough to account for that sense of security. The decline in LFP during this period probably occurred because the growth in real wages made retiring earlier more affordable.[362]

The more pressing question facing policy makers is the degree to which the retirement age provisions in the 1983 Amendments and subsequent reforms were behind the increases in LFP. Several studies conducted within the last five years demonstrate that the increase in worker participation in the labor force that started in the mid-1990s is correlated with the rise in the FRA from sixty-five to sixty-seven.[363] The studies vary substantially in the data sets used,[364] methodologies, and reporting criteria, which makes comparison of the results difficult. However, the multiple methodologies lend credence to the generally agreed conclusion that the rise in both the FRA and LFP among older men is correlated.

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356 *Id.* at 331.

357 *Id.* at 355.

358 *Id.* at 348.

359 *Id.* at 330–31.

360 *Id.*

361 Kingson & Brown, *supra* note 294, at 7.

362 Blau & Goodstein, *supra* note 193, at 331. However, the growth in real wages continued during the period in which the LFP rate for men reversed and started to climb. *Id.*

363 *See* MacInnis, *supra* note 126, at 1.

364 *See* Li, *supra* note 196, at 50, 57, 65. There are a variety of data sets that economists use, including the 1994–2009 Basic Monthly Current Population Survey (CPS), Survey of Income and Program Participation (SIPP), and the Health and Retirement Study (HRS). *See id.*

To what degree did the changes in Social Security benefits drive the decision, or were there other factors influencing the decision? Blau and Goodstein found that, for men aged fifty-five to sixty-nine, LFP rose 4.7% from 1988 to 2005.[365] The researchers concluded that changes in both the FRA and DRC were responsible for anywhere from a quarter to half of the increase and were "the single most important factor in accounting for rising LFP of older men, but not the only factor."[366] Other factors affecting the increase in LFP include average lifetime earnings, a spouse's decision on whether to retire, and education level.[367] Other studies confirm the results.[368] Gustman and Steinmeier concluded that, when taking into account all reforms in Social Security benefits, the effect was to increase LFP from 2% to 4% depending on age.[369]

The effect of the DRC is a matter of substantial disagreement. Pingle focused on the effect of changes in the DRC over time on employment rates among the elderly and concluded that the effect of increases in the incentive to work longer was "substantial—every percentage point increase in the DRC led to a percentage point increase in the employment rate of men age 65 to 70."[370] However, Benítez-Silva and Yin focused on claiming behavior and concluded that the DRC had little effect on LFP rates because the claiming behavior among those older than sixty-five decreased slightly since increases in the DRC were implemented.[371]

In addition to higher incidences of labor force participation, the percentage of men who claim benefits without working has decreased.[372] The incidence of nonworking beneficiaries dropped from 67.5% in 1995 to 57.9% in 2006, showing a 15% decline.[373] The drop was most pronounced among the sixty-two to sixty-four age

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365 Blau & Goodstein, *supra* note 193, at 349, 351 tbl.6.

366 *Id.* at 349.

367 *Id.*

368 *See, e.g.*, Mastrobuoni, *supra* note 139, at 1224 (finding that older male workers delayed their retirement in response to increases in the FRA and that "the mean retirement age . . . increased by about half as much as the increase in the [FRA]").

369 Alan L. Gustman & Thomas Steinmeier, *How Changes in Social Security Affect Recent Retirement Trends*, 31 RES. ON AGING 261, 286 (2009).

370 Jonathan F. Pingle, *Social Security's Delayed Retirement Credit and the Labor Supply of Older Men* 26 (Div. of Research & Statistics & Monetary Affairs, Fed. Reserve Bd., Working Paper No. 2006-37, 2006).

371 Benítez-Silva & Yin, *supra* note 131, at 81.

372 MacInnis, *supra* note 126, at 1.

373 *Id.* at 10.

group.[374] Additionally, the percentage of non-beneficiary workers climbed from 9.8% in 1995 to 15.1% in 2006, registering a 54% increase.[375] Again, the largest percentage decline occurred in younger workers—the sixty-two to sixty-four group who are eligible for early retirement—thus showing an increase in the percentage of workers opting to wait until their FRA or later to claim benefits.[376] One study confirmed the trend and found that a one-year increase in the FRA could reduce the probability of electing early retirement at sixty-two by 8.5% for men and 7.3% for women.[377]

B. Retirement Earnings Test: A Disincentive to Work?

Another factor that might affect labor force participation is the retirement earnings test (RET).[378] As the FRA increases to sixty-seven by 2022, the number of workers potentially subject to the RET will increase dramatically.[379] If the FRA is raised to sixty-eight or seventy, the RET will apply to an even greater number of workers. Therefore, two important policy questions are (1) whether the earnings test affects LFP and (2) whether the RET affects the number of early claimers. If the RET keeps workers out of the labor force and the elimination of the RET brings workers into the labor force, a reasonable policy change would be to eliminate the RET entirely in order to increase Social Security payroll tax revenue and savings for workers who elect to remain in the workforce.

The economics literature is split on whether changes to the RET affected the labor supply.[380] Most early studies suggest that prior reforms to the RET had little effect on the labor supply of older males.[381] However, in a more recent study, Haider and Loughran suggest that dropping the RET in 2000 had a "substantial effect on male labor supply" in that "at least 4.8 percent of workers adjust their earnings in response to the earnings test."[382] The study confirmed

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374 *Id.*

375 *Id.*

376 *Id.* at 9.

377 Jae Song & Joyce Manchester, *Revisiting the 1983 Social Security Reforms, 25 Years Later*, 31 RES. ON AGING 233, 257 (2009).

378 *See supra* Part II.B.4 (providing an overview of the RET).

379 *See* Benítez-Silva & Heiland, *supra* note 229, at 1, 4.

380 *See* Haider & Loughran, *supra* note 122, at 58.

381 *Id.*

382 *Id.* at 81.

that some workers saw the RET as a disincentive to work and reduced their hours so that their income was at the threshold where no benefit reduction would take place.[383] As workers age and get to the point that the RET no longer applies, earnings go up.[384]

Those who support the RET point out that the test does not permanently deprive an individual of a benefit because future benefits are increased through an actuarially fair calculation. However, it appears that workers do not fully understand the increase and simply view the RET as a disincentive to work.[385] These results suggest that workers' behavioral response to the RET is to decrease their LFP when the RET applies and to increase their LFP when the RET no longer applies.[386]

Policy makers who are opposed to eliminating the RET argue that the RET discourages workers from retiring early, and if the RET is removed, there will be an increase in early claimers.[387] An increase in early claimers would be undesirable for low wage earners because early claiming results in lower benefits and hence a greater likelihood of being below the poverty level in old age.[388]

Yet, the presence of the RET has resulted in behavior that does not necessarily maximize income for working beneficiaries. Some workers who claim early reduce their income to avoid the benefit reduction and then reenter the workforce upon reaching their FRA; however, older workers generally have more difficulty finding new jobs and have to accept lower salaries when work is found.[389]

Older workers who claim early would be in a better position in terms of salary and job security if they were to keep their jobs rather than quit or reduce hours during the early claiming period. Given the LFP patterns attributed to the RET, some analysts have concluded that the RET is widely considered a disincentive for older Americans to work and constitutes "an unfair tax on the earnings of older workers."[390] If the policy goal is to maximize lifetime LFP in order

383 *Id.* at 74–75.

384 *Id.* at 75.

385 *See id.* at 59, 61.

386 *See id.* at 81.

387 Benítez-Silva & Heiland, *supra* note 229, at 32; MacInnis, *supra* note 126, at 5.

388 Anzick & Weaver, *supra* note 127, at 6–7.

389 *See infra* Part VII (discussing work capacity and ability to find employment).

390 Haider & Loughran, *supra* note 122, at 58.

to provide enough income security during retirement, then eliminating the RET entirely would be consistent with that goal.

C. Conclusions

Economists seem to agree that the increase in the FRA boosts the probability that workers will not retire early, though there is disagreement over the degree to which increases in the FRA affect LFP.[391] Additionally, the DRC increases monthly benefits to those who delay retirement,[392] thereby increasing the probability that workers will delay retirement. In contrast, the RET has a negative effect on worker participation rates.[393]

While economists seem to agree that the 1983 Amendments resulted in an increase in the labor force among older men, that does not necessarily mean that the trend will continue. Blau and Goodstein predict that absent any changes, the rate of growth in LFP among older men will slow down rather than accelerate.[394] In their view, many of the factors that have driven an increase in LFP—such as the 1983 Amendments and an increase in education—have already worked their way into the decision-making process of older men.[395] In order to further increase LFP, additional changes would need to be made to the FRA and DRC.

While the 1983 Amendments seem to have positively increased LFP, most studies agree that there are many other factors at work in the retirement decision. Li concluded that the increase in the labor force may not be a direct result of the increase in the FRA but "the result of a complex combination of birth cohort, time, and age effects."[396] Li identified

> potentially confounding trends [that] include: the rise in average educational attainment, the cross-cohort trend among women towards higher labor force participation rate, improvement in health status and life expectancy, the decline in traditional employer-sponsored defined benefit (DB) plans (and the rise in defined

391 MacInnis, *supra* note 126, at 4.

392 *Id.* at 1.

393 Haider & Loughran, *supra* note 122, at 58 (discussing the Friedberg study).

394 Blau & Goodstein, *supra* note 193, at 356.

395 *Id.* at 355–56.

396 Li, *supra* note 196, at 49.

> contribution (DC) plans), the decline in physically demanding jobs, and the reduction in employer-sponsored retiree health benefits.[397]

Additionally, MacInnis suggested that other factors include "preferences for work, capacity to work, and perceptions of mortality risks and the security of future retirement benefits."[398] The next Part will explore other factors that might influence the retirement decision.

VII
CAPACITY TO WORK AND ABILITY TO FIND EMPLOYMENT

Even though people are living longer, are they healthy enough to work at older ages? What are the trends in terms of physically demanding jobs for older workers? Even if older workers are healthy enough, can they find employment given the character of the labor market for older workers? These issues have also been the focus of recent research as well as ongoing longitudinal studies on the health and welfare of older Americans.[399]

A. Health

Health is the second most important factor in the decision to retire early.[400] Poor health has "a large negative impact on LFP."[401] Common health problems, such as heart conditions, strokes, and psychological difficulties, reduce employment by 30% to 50% for older men.[402] Because health declines with age, one naturally expects capacity to work to decline as well. However, if work capacity among elderly workers is improving, that suggests the FRA or EEA could be increased.[403]

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397 *Id.* at 56.

398 MacInnis, *supra* note 126, at 19.

399 A wealth of research and data has been collected through the U.S. Health and Retirement Study (HRS)—a government-funded longitudinal study of the economic and health conditions of older Americans that has been conducted since 1992. NAT'L INST. ON AGING & NAT'L INSTS. OF HEALTH, GROWING OLDER IN AMERICA: THE HEALTH & RETIREMENT STUDY 10 (2007) [hereinafter GROWING OLDER IN AMERICA]. Although the HRS survey has allowed numerous researchers to look at the overall trends of health among the elderly as well as among subpopulations, there are a variety of other data models used as well.

400 Kingson & Brown, *supra* note 294, at 7.

401 Blau & Goodstein, *supra* note 193, at 346–47.

402 CUTLER, *supra* note 328, at 10.

403 *Id.*

Generally, health among the elderly has improved since the 1983 Amendments. One study reports that the percentage of older Americans reporting their health as either fair or poor has dropped from 24% (for women) and 23% (for men) in 1982 to 16% (for both genders) in 2005.[404] The incidence of disability among elderly Americans has steadily and dramatically decreased since 1984 with the number of elderly reporting that they could not operate independently dropping from 26.2% in 1984 to 19.0% in 2004.[405] While there has been heightened awareness of the problem of dementia in recent years, the actual incidence of significant cognitive impairment for the elderly decreased from 1993 to 2002.[406] The general improvement in health has been attributed to better health care,[407] reduced exposure to diseases during childhood,[408] improved lifestyles,[409] a reduction in occupational hazards,[410] and better education.[411]

However, studies differ on the degree to which the health-related capacity to work among the elderly is improving.[412] One report found that, although older workers are slightly healthier than in previous generations, "the difference is not statistically significant."[413] Another study found only small improvement in

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404 TURNER, *supra* note 229, at 3 fig.3A.

405 ALICIA H. MUNNELL & JERILYN LIBBY, CTR. FOR RET. RESEARCH AT BOS. COLL.WILL PEOPLE BE HEALTHY ENOUGH TO WORK LONGER? 3 (2007), *available at* http://crr.bc.edu/images/stories/Briefs/ib_2007-3.pdf.

406 Kenneth M. Langa et al., *Trends in the Prevalence and Mortality of Cognitive Impairment in the United States: Is There Evidence of a Compression of Cognitive Morbidity?*, 4 ALZHEIMER'S & DEMENTIA 134, 137 (2008) (stating that, for people seventy and older, the incidence of cognitive impairment dropped from 12.2% in 1993 to 8.7% in 2002).

407 MUNNELL & LIBBY, *supra* note 405, at 4 (stating that medical advances in the diagnosis and treatment of arthritis, heart disease, and stroke have improved the health of the elderly).

408 *Id.* (stating that studies have shown that the incidence of disease in childhood is linked to health problems later in life).

409 *Id.* (stating that fewer people are smoking and that diabetics are taking better care of themselves, thereby reducing the risk of health problems).

410 *Id.* (stating that blue-collar workers experience more health problems than white-collar workers, and the reduction in physically demanding jobs has been a factor in the improved health of the elderly).

411 *Id.* at 5 (suggesting that the increase in the average education level is tied to better health because "more educated people will follow what can be complicated regimens and better manage their diseases").

412 CUTLER, *supra* note 328, at 12.

413 Li, *supra* note 196, at 65.

work capacity among the elderly in 2006 when compared with the same age ranges in 1996.[414] Recent research also suggests that the decline since the 1980s in the disability rate among older Americans may be reversing. When taking into account only people living in the community and not those in institutions, the rate of disability to perform daily activities rose 9% from 2000 to 2005.[415] This increase, however, reflects that fewer people are using long-term care facilities because more living options have developed in recent years for people who have moderate health problems.[416]

A third study takes a more positive note and concludes that, although work capacity naturally declines with age, male workers have a high capacity for work through their mid-seventies.[417] From age fifty-five to sixty-five, male workers experience only an 8% decline in capacity to work.[418] Between ages fifty-five and seventy-five, the decline in work capacity is only 20%.[419] After age seventy-five, work capacity declines rapidly.[420] The absolute numbers are more telling. At age fifty-five, the predicted work capacity is 75%, which slips to 69% at age sixty-five and 60% at age seventy-five.[421]

As with life expectancy, less-educated males and African Americans fare worse than their counterparts. For both groups, work capacity is 10% to 20% worse among less-educated men and 10% to 15% worse for African American males.[422] For both groups, the reason for low work capacity is health related.[423]

Additionally, a correlation exists between health and income. The Health & Retirement Study reported that people who were in excellent health had a mean income over twice that of those who were in poor health.[424] Measuring household wealth with health showed an even greater disparity. Married couples in excellent health had an

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414 CUTLER, *supra* note 328, at 10, 22 fig.4.

415 E. Fuller-Thomson et al., *Basic ADL Disability and Functional Limitation Rates Among Older Americans from 2000–2005: The End of the Decline?*, 64 J. GERONTOLOGY 1333, 1334 (2009).

416 *Id.* at 1335.

417 CUTLER, *supra* note 328, at 12.

418 *Id.*

419 *Id.*

420 *Id.* at 9.

421 *Id.* at 18.

422 *Id.* at 13.

423 *Id.* at 11.

424 GROWING OLDER IN AMERICA, *supra* note 399, at 60–61 figs.3 & 4.

average household wealth three times that of couples in poor health, and singles in excellent health were fives time wealthier on average than singles in poor health.[425]

Some concern has been voiced over the rise in obesity and diabetes, which could indicate a reversal of the trend of better health for the elderly.[426] One study has concluded that members of the baby boom generation "on the verge of retirement are in poorer health [than] their counterparts 12 years ago"[427] and "are less accepting of physiological changes that are not pathologic."[428] If the health problems persist for the baby boom generation, the general trend toward an improvement in capacity to work among the elderly may reverse. That said, to the extent that the health problems are the result of personal behavior—e.g., nongenetic related obesity—those suffering have the capacity to make changes in order to increase their capacity to work.

Although a majority of workers retire earlier than their FRA, enough evidence shows that "work capacity remains high even through age 74."[429] When considering the population at large, there is no health-related reason that the potential benefit cut by raising the retirement age could not be absorbed by requiring beneficiaries to work longer. To the extent that work capacity varies among different subpopulations, the proposals of expanded disability benefits and a hardship exception to increases in the retirement age would help mitigate the impact.[430]

B. Physically Demanding Jobs

Advocates of a retirement age increase also point to the decrease in physically demanding jobs as another trend that allows people to

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425 *Id.*

426 MUNNELL & LIBBY, *supra* note 405, at 6.

427 Beth J. Soldo et al., *Cross-Cohort Differences in Health on the Verge of Retirement* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 12762, 2006) (reporting that baby boomers experience "more pain, more chronic conditions, [and] more drinking and psychiatric problems" than earlier generations).

428 *Id.* at 17–18 (hypothesizing that the rise in health complaints among the baby boom generation may be attributed to heightened awareness of ancillary medical conditions because of more frequent visits to the doctor than previous generations, an increase in medical advertising, and changes in societal views of health care).

429 CUTLER, *supra* note 328, at 14.

430 *See supra* Part V.D (discussing mitigation proposals).

work longer.[431] Over the last sixty years, the nature of most jobs has changed significantly from "blue collar and agricultural employment to professional and white collar employment."[432] The degree to which there is a trend toward less physically demanding jobs is important because workers in such jobs tend to retire early[433] and therefore would sustain a benefit cut if the retirement age were increased.[434]

The results from the different studies vary as to what percentage of the population remains in physically demanding jobs. Results might depend on how the term "physically demanding" is defined.[435] Despite varying definitions, the trend towards less physically demanding jobs is clear. One study suggested that between 1982 and 2002 physically demanding labor went from 47% to 19% for men and 29% to 17% for women.[436] However, in a more nuanced study, Johnson, Mermin, and Resseger reported that jobs requiring some degree of physical activity fell from 57% in 1971 to 46% in 2006.[437] Yet, the study did conclude that a relatively small number of workers—only 7%—held "jobs that imposed high general physical demands."[438] Additionally, the authors project that the percentage of physically demanding jobs will continue to decline to about 5% of the population by 2041.[439]

However, the authors found that 25% of workers had jobs that involved "difficult working conditions," such as exposure to harsh weather, high noise, or contaminants.[440] Not surprisingly, the study determined that African Americans and Hispanics were more likely to work in physically demanding jobs, and one third of Hispanics were employed in occupations that had difficult working conditions.[441]

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431 Moore, *supra* note 18, at 582.

432 *Id.* at 581.

433 RICHARD W. JOHNSON ET AL., EMPLOYMENT AT OLDER AGES AND THE CHANGING NATURE OF WORK 3 (2007), *available at* http://www.urban.org/UploadedPDF/1001154_older_ages.pdf.

434 RHO, *supra* note 152, at 2.

435 *Id.* at 3.

436 TURNER, *supra* note 229, at 4 fig.4.

437 JOHNSON ET AL., *supra* note 433, at vii.

438 *Id.* at vi.

439 *Id.* at 11 (projecting a decrease of an additional two percentage points from the current 7% proportion of physically demanding jobs).

440 *Id.* at vi.

441 *Id.* at 9.

While Johnson, Mermin, and Resseger confirmed the well-established trend that jobs are becoming less physically demanding, they also noted the increase in jobs that are "cognitively challenging and more stressful."[442] From 1971 to 2006, jobs that required "high cognitive ability and strong interpersonal skills grew from about one-quarter to more than one-third."[443] Although cognitive skills involving "on-the-spot reasoning ability—independent of past experience—decline with age," this decline is offset by the experience, communications skills, and acquired knowledge that older workers have.[444] While older workers can perform in cognitively challenging jobs, such jobs may require continued on-the-job training, and employers tend to invest less effort in giving older workers training than they do for younger employees.[445]

Of greater concern is that stressful working conditions have doubled from 1971 to 2006.[446] The authors noted that "about 44 percent of jobs involved some stress . . . and about 9 percent of workers were in high stress occupations."[447] While the decline in physically demanding jobs bodes well for the ability of American workers to retire later in life, the rise in stress levels raises concerns that higher stress could lead to earlier retirement by those who are able to afford to retire.[448] Moreover, higher stress might lead to physical health problems,[449] which, if true, suggests that workers in such jobs may find it increasingly difficult to continue to work at older ages because of physical limitations.

While there has been a decrease in physically demanding jobs, the shift away from manufacturing to a professional services economy has occurred not only because of technological advances but also because of increased trade and outsourcing to other countries where unskilled labor is cheaper.[450] These trends have affected the demand

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442 *Id.* at vii.

443 *Id.*

444 *Id.*

445 *Id.* at 15.

446 *Id.* at 11.

447 *Id.* at vi.

448 *Id.* at 15.

449 The link between physical health and stress is still a subject of debate among researchers. *See* David Watson & James W. Pennebaker, *Health Complaints, Stress, and Distress: Exploring the Central Role of Negative Affectivity*, 96 PSYCHOL. REV. 234 (1989).

450 TILL VON WACHTER, THE EFFECT OF LABOR MARKET TRENDS ON THE INCENTIVES AND INCIDENCE FOR CLAIMING SOCIAL SECURITY BENEFITS EARLY 6 (2009).

for unskilled labor.[451] Even if older Americans have the capacity to work, one important question is whether they have the ability to find employment.

C. Ability to Find Employment

While the unemployment rate among older Americans is lower than that of the general population, seniors find it significantly more difficult to find work when they are displaced. Older workers have a lower unemployment rate than the general population.[452] The rate for workers aged fifty-one to seventy-two fluctuates between "46 and 87 percent of the general unemployment rate."[453] While the unemployment rate for the elderly increases as people age, it is still generally below that of the larger population. In 2004, workers who were approaching early retirement (ages fifty-seven to sixty-one) had a 2.6% unemployment rate, while workers aged sixty-two to sixty-seven had a 2.8% unemployment rate, and workers aged sixty-eight to seventy-two had a 3.2% rate.[454] These were all below the general unemployment rate of 5.5%,[455] though the increase is still "nontrivial."[456] A partial explanation for the traditionally lower unemployment rate might be that older workers who also have seniority on the job may have some protection from large-scale layoffs by "implicit or explicit seniority rules."[457]

However, one important exception to the generally lower unemployment rate for older workers is the early baby boomer cohort of workers aged fifty-one to fifty-six in 2004, which faced higher unemployment than "earlier cohorts at the same age." [458] This group experienced an unemployment rate far nearer to the general population of 4.8% during 2004, prompting researchers to suggest "that job search by older workers is an issue of growing salience."[459] Other indicators suggest that patterns may be changing. As a result of

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451 *Id.*

452 The general population would be counted as persons sixteen years or older who have a job or are actively looking for work. *See* Li, *supra* note 196, at 65.

453 *Id.* at 84.

454 *Id.* at 109 tbl.3.1.

455 *Id.*

456 *Id.* at 84.

457 VON WACHTER, *supra* note 450, at 6.

458 Li, *supra* note 196, at 84–85.

459 *Id.* at 85.

the subprime financial crisis, unemployment among older workers increased dramatically between December 2007 and August 2010—rising 128.1% among workers fifty-five and older compared with an increase of 107.3% among workers aged twenty-five to fifty-four.[460]

Some analysts contend that demographic trends may result in an increased demand for older workers, thus making it easier for older workers to find employment. Given the aging population, the demand for labor—assuming it stays constant—will have to be satisfied by older workers.[461]

While the unemployment rate for older workers is lower than that of the population at large, displaced older workers have a more difficult time finding new employment.[462] The probability of finding replacement work declines significantly at age sixty and progressively grows worse.[463] While there is a 55% chance of finding new work for displaced workers at ages fifty-five to fifty-nine, the rate drops to 43% for workers aged sixty to sixty-four.[464] Those over seventy have only a 26% chance of finding new work.[465] In sharp contrast, younger workers (ages twenty to sixty-five) have a success rate that ranges from 89.6% to 96.8%.[466]

A variety of factors affect the success rate, including whether the worker is seeking full- or part-time employment, similarity with previous employment, job search techniques, and wage rate sought.

Full-time v. Part-time Employment: Those searching for full-time work were more successful (59%) than those who wanted part-time work (39%), which has led researchers to suggest that a mismatch exists in the labor market between the reduced hours older workers desire and employers' needs.[467] On the other hand, as job seekers near and then become eligible for Social Security, the success rate for finding part-time work eclipses the success rate for full-time employment. For those aged sixty-five to sixty-nine, the success rate

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460 Susan Bisom-Rapp et al., *Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States*, 15 EMP. RTS. & EMP. POL'Y J. (forthcoming 2011), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1699447.

461 CUTLER, *supra* note 328, at 2.

462 Johnson & Mermin, *supra* note 279, at 3.

463 Li, *supra* note 196, at 88.

464 *Id.*

465 *Id.*

466 *Id.* at 89.

467 *Id.* at 87.

for seeking part-time work was 72.5%, whereas the full-time success rate was only 7.8%.[468]

Similarity with previous employment: Naturally, those workers seeking a job that is similar to previous employment are more competitive because of their experience and therefore have a higher rate of success (53.1%) than those seeking different work (47.4%).[469] For oldest workers (those seventy and above) the difference is more pronounced—44.2% (seeking same job type) versus 25.6% (seeking different job type).[470]

Job search techniques: The declining rate of employment success as workers age may simply be due to the effort that workers put into their job search. Fewer job search strategies are used as workers age, and older workers are less likely to put their own resources into finding work than mid-career workers.[471] Additionally, older job seekers may not have social networks as robust as those of younger job seekers, thus leading to lost opportunities.[472]

High wages: One common explanation for the low hiring rate is that older workers demand a higher wage than younger workers.[473] Older workers generally demand a higher salary to work if they ascribe a high value to leisure, have other income, or possess a great deal of work experience in the field.[474] However, some studies show that the median wage that older job seekers would accept is lower than the median wage of previously accepted employment, thereby suggesting that employers may be rejecting older workers for other reasons.[475]

The factors that make for success in a job search at an older age do not appear to be much different than those at any other age. It should come as no surprise that the people within the older workforce who find employment are healthier, are younger, are better educated, score higher on cognition tests, have longer work histories, have shorter absences since the last job, and are more likely to have worked as a

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468 *Id.* at 111 tbl.3.3.

469 *Id.* at 110 tbl.3.2.

470 *Id.* at 111 tbl.3.3.

471 *See id.*

472 *Id.* at 99.

473 *See id.* at 92–94.

474 *Id.* at 94.

475 *Id.*

manager in a profession or the services industry.[476] Whites are more successful than other races.[477]

Increasingly, displaced workers who do find work have returned to the workforce with lower salaries than their previous job. The Bureau of Labor Statistics reported in a January 2010 survey that only 45% of workers displaced from their long-term jobs were earning as much or more than they did in their previous jobs, which is down from 55% in 2008.[478]

D. Age Discrimination in the Workplace

The Age Discrimination in Employment Act (ADEA)[479] prohibits job discrimination on the basis of age for most workers age forty or over in companies that employ twenty or more people.[480] Even with legal protections, there is a widely held belief that age discrimination exists.[481]

Studies, however, differ on the extent of age discrimination in the workplace. Some conclude that older workers are more choosey about their employment.[482] In sharp contrast, Lahey found that younger women had over a 40% better chance at getting an interview than older women who had equivalent skills.[483] Employers may have preconceived notions that older workers lack energy, have higher salary expectations, will cost more in health care, and may bring a law suit based on discrimination if they are fired—among others.[484] Age discrimination claims are on the rise. Since 1998, the number of age discrimination claims received by the EEOC has increased 61%.[485]

Notwithstanding the protections afforded by the ADEA, "[r]ecent US Supreme Court decisions have weakened the ADEA's protections, making it more difficult to prove age discrimination than other forms

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476 *Id.* at 96–97.

477 *Id.* at 96.

478 Press Release, Bureau of Labor Statistics, Worker Displacement: 2007–2009 (Aug. 26, 2010), *available at* http://www.bls.gov/news.release/disp.nr0.htm.

479 Age Discrimination in Employment Act, 29 U.S.C. §§ 623, 631 (2006).

480 *Id.*

481 LAHEY, *supra* note 156, at 2.

482 *Id.*

483 Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. HUM. RESOURCES 30, 31 (2008).

484 LAHEY, *supra* note 156, at 4 tbl.1.

485 Bisom-Rapp et al., *supra* note 460, at 50.

of discrimination."[486] In *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court interpreted the ADEA to require that employees bringing an age discrimination lawsuit "establish that age was the 'but-for' cause of the employer's adverse action."[487] The ruling established that the ADEA requires a higher evidentiary standard than Title VII federal antidiscrimination laws, which provide relief if "[the plaintiff's membership in a protected class] played a motivating part in an employment decision."[488] Commentators have noted that the Court's ruling in *Gross* "has made it more difficult for plaintiffs to prove age discrimination under the ADEA."[489] After the Supreme Court's ruling, bills were introduced in both the House and Senate to amend the ADEA[490] to lessen the evidentiary standard and bring it in line with the evidentiary standards found in Title VII claims.[491]

Other recent U.S. Supreme Court rulings have also raised the bar for plaintiffs seeking to prove age discrimination. In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, the Court required that plaintiffs show not only that age was a factor in the alleged discrimination but also that there was discriminatory animus by the employer[492]—a more difficult burden that "may doom many ADEA claims."[493] In *Smith v. City of Jackson*,[494] the Court made it easier for companies to defend against disparate impact ADEA claims by adopting "the reasonable factor other than age defense."[495]

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486 *Id.* at 48.

487 Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009).

488 *Id.* at 2349 (alteration in original) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)).

489 Michael Foreman, Gross v. FBL Financial Services—*Oh So Gross!*, 40 U. MEM. L. REV. 681, 688 (2010).

490 H.R. 3721, 111th Cong. (2009); S. 1756, 111th Cong. (2009).

491 The Protecting Older Workers Against Discrimination Act would amend the ADEA so that

> a plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that: (1) an impermissible factor or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice; or (2) the practice complained of would not have occurred in the absence of an impermissible factor.

S. 1756: CRS Summary, LIBR. CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01756:@@@D&summ2=m& (last visited Feb. 13, 2011).

492 Ky. Ret. Sys. v. Equal Emp't Opportunity Comm'n, 554 U.S. 135, 149–50 (2008).

493 Bisom-Rapp et al., *supra* note 460, at 49.

494 Smith v. City of Jackson, 544 U.S. 228 (2005).

495 Bisom-Rapp et al., *supra* note 460, at 49.

E. Conclusions

The decision on whether to retire or stay in the labor force is likely the result of many factors, including some that are not affected by the economic incentives built into the Social Security Act.[496] It may be that people start claiming benefits early because they expect the system to collapse in the near future. Many polls have shown that the public does not have confidence in the Social Security financing system. An AARP poll showed that only 35% of the respondents expressed any degree of confidence in the future of the Social Security system.[497] A Gallup poll reported that 60% of non-retirees who responded believed they will get no Social Security benefits when they retire, and 56% of retirees believed that their benefits will be cut.[498]

It is not surprising that the public has doubts. The political discourse on Social Security since the late 1970s has focused on the threat to Social Security given the baby boom generation, declining birth rates, and longer life expectancies. A natural response to the fear over Social Security financing would be a "run on the bank" mentality—to start claiming benefits early in order to get what one can out of the system while there is still money in the trust fund to pay benefits.

A few trends are clear from the employment statistics. Older workers reentering the workforce generally have lower salaries than they had at their previous employer. Additionally, successful job seekers "are less likely to have sources of subsidized health insurance other than from an employer,"[499] which suggests an urgent motivation to find employment. Li speculates that unsuccessful job searchers who have health insurance not based on employment might end their job searches early "because the value of a new job is lower for them."[500] To the extent that the FRA is increased, the government should also seek to increase resources for older Americans in finding employment. This might include creating incentives for businesses to take on part-time workers or providing job-seeking resources.

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496 *See* MacInnis, *supra* note 126, at 18–19.

497 AARP, SOCIAL SECURITY 75TH ANNIVERSARY SURVEY REPORT: PUBLIC OPINION TRENDS 18 (2010).

498 Frank Newport, *Six in 10 Workers Hold No Hope of Receiving Social Security*, GALLUP (July 20, 2010), http://www.gallup.com/poll/141449/six-workers-hold-no-hope-receiving-social-security.aspx.

499 Li, *supra* note 196, at 97.

500 *Id.* at 98.

VIII
POLICY RECOMMENDATIONS

Increasing the retirement age is a reasonable response to Social Security's deficit given demographic, economic, and societal trends. Americans are healthier and living longer, and the shift from a manufacturing to a service economy allows even low-skilled workers options to extend their work lives. While American society can absorb an increase in the full retirement age, that doesn't mean that it is the best choice to fix Social Security's financing problems or ensure an adequate retirement. There is much to be gained from having workers stay in the labor force longer—including increased retirement savings and overall increases in productivity. However, increasing the FRA alone—without an increase in the EEA—actually creates a wider pool of people accepting reduced benefits because people tend to retire at the earliest age possible. The current maximum age of sixty-seven aligns with the norm being established in most other OECD countries and also stands as a midpoint in old age where the decline in health starts to accelerate. Studies show that work capacity begins a sharp decline between ages of sixty-five and seventy-five.[501] Rather than increase the FRA, a better way to keep people in the workforce longer would be to raise the EEA and then create incentives to encourage working later in life by making adjustments to the RET and DRC.

As for Social Security's solvency problem, there are other solutions that could be put in place, such as raising the maximum limit of the payroll tax, diversifying the trust fund, and changing cost-of-living adjustments. The rest of this Part discusses various policy alternatives that would achieve three goals: increase personal savings to reduce longevity risk, provide incentives to retire later in life, and address Social Security's solvency problems.

A. Raise the Early Eligibility Age

One problem created by the 1983 Amendments was that the Early Eligibility Age was not scheduled to increase in sync with and at the same rate as increases in the FRA. Consequently, cohorts subject to an increased FRA are also in line for reduced benefits at the earliest

501 At age fifty-five, work capacity is 75% and decreases to only 69% by age sixty-five. However, for the ten-year difference between ages sixty-five and seventy-five, work capacity falls more rapidly so that it is 60% by age seventy-five. *See supra* note 421 and accompanying text.

acceptance age of sixty-two. This creates the problem of ever greater reductions in benefits for early claimers. Given recent studies in behavioral economics, it stands to reason that, if people are given the choice to retire at sixty-two, they will do so even if it is not rational.

Behavioral economics tells us that people do not always act in ways that maximize their economic self-interest.[502] One set of behavioral patterns—termed hyperbolic discounting—occurs when people intend to sacrifice an immediate reward for a longer-term gain but do not follow through with the sacrifice when actually faced with the choice.[503] In the decision of when to elect benefits, many workers may be doing so because of the immediacy of the reward, even though it is not in their best long-term interest to do so.

Behavioral economics also shows that "visceral factors can lead individuals to choose the option that offers instant gratification" when the option is in close proximity.[504] At age sixty-two, the decision of whether to retire is a complex one involving the state of finances, health, employment, and other factors. Given that most workers at age sixty-two have been working since their early twenties, it is likely a decision fueled by emotional content. The appearance of an instant benefit—especially to lower income workers—may be too difficult to resist.

Raising the EEA as a paternalistic response to dysfunctional economic behavior will force workers to stay in the labor force longer than anticipated. Increasing the EEA is a reform that will likely have a greater effect in terms of labor force participation than raising the FRA. While raising the FRA will likely cause some increase in labor force participation rates, the effect is uncertain given the different factors involved in the retirement decision.[505] Raising the EEA will likely be more effective at keeping older workers in the labor force because it gives no choice as to when a worker starts receiving benefits. The upside is significant in that workers reduce their longevity risk (the risk of outliving one's savings and benefits) because their Social Security benefits will increase, and they will have additional years in the workforce for an opportunity to save and reduce the span upon which they will draw upon their resources.

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502 Knoll, *supra* note 311, at 1.

503 *Id.* at 9.

504 *Id.* at 10.

505 *See supra* Part VI.A (discussing the effect of raising the FRA on labor force participation rates).

For the same reasons that the FRA could be extended (increased longevity, improved health, etc.), so too can the EEA be raised. Furthermore, an EEA increase would apply to workers at an age where they have a higher capacity to work than the age being considered for increases to the FRA. More workers will have a greater capacity to work at sixty-three or sixty-four (assuming an increase of two years in the EEA) than they do at ages ranging between sixty-seven and seventy, when capacity to work begins a more rapid decline.

Increasing the EEA will be more difficult politically than increasing the FRA. The EEA of sixty-two has been in place for both men and women since the 1960s.[506] Many Americans have focused on age sixty-two as the first opportunity to receive benefits and possibly retire. Moreover, increasing the EEA doesn't have the same amount of political clout as increasing the FRA because doing so will not help reduce the Social Security deficit.[507] However, an increase in the EEA could result in an increase in general income tax revenues of as much as $170 billion and reduce the Social Security deficit by 2% if everyone able to work delays retirement by one year.[508] While such revenue would go into the general budget rather than the Social Security budget, the combined additional revenue represents a 28% reduction of the Social Security shortfall.[509]

Opponents principally argue that some workers will slip into poverty—a likely possibility.[510] Unfortunately, when dealing with large populations and crafting general rules that apply to all, there are some subpopulations that may suffer. These harms can be mitigated by expanding disability under SSDI and using means-based programs, such as SSI, to compensate for lost wages. To the extent that means-based programs do not suffice, many innovative ideas that leverage the Social Security system have been suggested.

One idea is an elastic EEA that would allow early eligibility for groups with short life expectancies.[511] Under this model, lifetime earnings would be used to identify workers with low life expectancies. Researchers found a strong correlation between

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506 Moore, *supra* note 18, at 551.

507 *See supra* notes 235–38 and accompanying text.

508 *See supra* note 240 and accompanying text.

509 BUTRICA, SMITH & STEUERLE, *supra* note 230, at 17.

510 *See supra* notes 232–34.

511 ZHIVAN ET AL., *supra* note 232, at 1.

lifetime earnings and the factors that generally indicate a low life expectancy, such as "lack of financial assets, fair or poor health, low educational attainment, [and] low subjective life expectancy."[512] Using lifetime earnings as a measure, the EEA can be automatically adjusted so that the EEA would remain at sixty-two for those with average indexed earnings (AIE) of 50% or less of the national average.[513] For workers who have an AIE that is equal to or greater than the national average, the EEA would be sixty-four. Anyone with an AIE between 50% and 100% of the national average would have an EEA that is scaled between sixty-two and sixty-four based on the percentage of their AIE relative to the national average.[514] Workers would be notified of their EEA at age fifty-five, once they have a history of earnings long enough to establish their projected AIE.[515] One weakness in this approach is that the AIE calculation does not take into account other sources of earnings or wealth, such as income earned abroad by foreign workers or workers employed by state and local governments that are not subject to Social Security[516] and some earnings made by self-employed workers which are currently tax-exempt.[517] Consequently, someone with a low AIE who is otherwise wealthy might be able to start early claiming at sixty-two despite the policy objective to exclude those individuals.

Another possibility is establishing a low level adjudication process that allows an exception for poor health or financial exigency so that certain low income workers can begin to receive the same level of benefits that they would have received had the EEA not been increased. The Fiscal Commission proposed such a hardship exception to its increases in the EEA and FRA and suggested that the SSA develop eligibility criteria to administer the exception.[518]

The system needs to be somewhat efficient in order to avoid unnecessary costs. For example, if a worker pleads health problems and financial exigency, he may—upon providing proof—elect to receive the same level of benefit that he would have received if the

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512 *Id.* at 4.

513 *Id.* at 5.

514 *Id.*

515 *Id.*

516 *Id.* at 4.

517 Richard Winchester, *The Gap in the Employment Tax Gap*, 20 STAN. L. & POL'Y REV. 127, 127–28 (2009) (proposing to close some of the exemptions from the employment tax).

518 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 50–51.

EEA had not been increased. While this requires an adjudication of each individual's situation, the level of proof could be established by requiring that applicants make a pleading under the penalty of perjury. The process could be streamlined so that, upon a showing of low lifetime earnings and the inclusion of an applicant in some at-risk groups, the lower EEA would be granted. Investigators could search IRS and other records to identify applicants who perjure themselves. That said, due process requires that administrative adjudication have an appeal process; consequently, there are likely to be additional costs to process appeals for those denied a lower EEA.

Although raising the EEA does not help solve the financing problem, it prevents workers from making poor economic decisions by claiming too early. Congress should also create incentives to encourage workers to retire later and, to the extent that an individual claims early, to stay in the workforce.

B. Creating Incentives to Retire Later

Even though behavioral economics teaches us that individuals do not always act in their own economic self-interest, policy makers can influence individual decision making through a process called choice architecture.[519] As choice architects, policy makers design and engineer the decision environment in order to achieve a more positive outcome.[520] Policy makers are in a unique position to recreate a Social Security system that encourages employment at later stages by eliminating both the real and perceived disincentives to work later in life.

The current system has disincentives to stay in the labor force. According to one study, the structure of Social Security, federal income taxes, and the laws surrounding employee benefits create an implicit tax that increases as people age—rising for men from 14% for a fifty-five-year-old to about 50% at age seventy.[521] Removing the disincentives and creating new incentives to work longer generates income for individuals, reduces the years they are drawing

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519 Knoll, *supra* note 311, at 14.

520 *Id.*

521 Barbara A. Butrica et al., *The Implicit Tax on Work at Older Ages*, 59 NAT'L TAX J. 211, 229 tbl.7 (2006). One example of the implicit tax would be the half of the payroll tax that employers pay for any given employee. The authors contend that employers pay lower salaries as a result of this cost of doing business; thus they conclude that "workers ultimately pay the entire payroll tax themselves." *Id.* at 213–14.

on personal savings during retirement, and improves the overall economy by raising output.[522]

1. *Eliminate the Retirement Earnings Test*

The retirement earnings test (RET) is widely considered (whether accurate or not) a disincentive to stay in the labor force for workers who claim benefits early. Workers reduce their hours or quit their jobs when the RET applies, and then they increase their employment when they reach their FRA and the test is no longer applicable. As a group, it makes more economic sense for workers to retain their jobs if claiming early because they will retain their seniority and continue to have an income that may provide additional savings. Seniors who quit or lose their jobs generally have a more difficult time finding new work and, when they do, have lower salaries. In 2000, Congress removed the RET for those who had reached their FRA. It should consider removing the RET entirely in order to create incentives for workers to stay in the labor force.

2. *Increase Benefits for Retiring After the FRA*

Currently, the marginal returns for some men to extend their employment are quite low.[523] Part of the reason for this is that benefits are based on a worker's AIME, which is an indexed average of the highest thirty-five years of earnings.[524] An additional year of work does not increase the core PIA if the extra year does not exceed the lowest indexed earnings in a worker's best thirty-five years.[525] Thus, increasing the AIME to include a worker's forty highest years of earnings would improve the marginal returns for workers, and thus, act as an incentive to retire later.[526]

Another proposal would be to increase the DRC. Studies have also shown that prior increases in the DRC were insufficient to encourage the goal of creating incentives for later retirement, and calls have been made to craft other policies to achieve that goal.[527] Increasing the DRC would provide more economic incentive for such workers to continue working and claim later. Men with low earnings and women

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522 *Id.* at 229.

523 REZNIK, WEAVER & BIGGS, *supra* note 129, at 1.

524 *See supra* notes 104–06 and accompanying text (discussing the AIME).

525 Butrica et al., *supra* note 521, at 213.

526 REZNIK, WEAVER & BIGGS, *supra* note 129, at 15.

527 Benítez-Silva & Yin, *supra* note 131, at 81.

who are not receiving spousal benefits have higher marginal returns under the current system,[528] so any additional increase in the DRC would just increase the incentive already in place to stay employed and not to claim benefits.

3. *Reduce Payroll Taxes for Older Workers*

Another effective method to increase labor force participation among older workers would be to reduce or eliminate the payroll tax on older workers. Older workers are highly sensitive to incentives to work and would likely respond to a decrease in taxes by staying in the workforce. In a widely cited study, Schmidt and Sevak found that a "10% [increase] in the after-tax return to work leads to increases in labor force participation of 7.5% among men and 11.4% among women."[529] The marginal returns for adding another year of work would also improve, not because of a benefit boost but because the cost to the employee of working is reduced through lower taxes.[530]

While this approach results in less tax revenue for the government, it can build savings for older workers and delay their use of other resources. A variety of approaches have been suggested as ways to reduce tax on older workers, including eliminating the payroll tax or adjusting the income tax rate for older worker through tax rebates.[531] While eliminating the payroll tax on older workers, such as those older than their FRA, would reduce revenue brought into the Social Security system, it would also increase employment among the elderly, thus increasing income tax revenue; therefore, the "reform would not necessarily reduce total tax revenue."[532]

4. *Other Incentives to Delay Retirement and Increase Savings*

Advancing the policy goal of encouraging a delayed retirement and increased savings could be pursued through government programs and agencies other than the Social Security Administration.

For example, increasing the contribution amount for workers in 401(k) and IRA plans and encouraging auto-enrollment in employer-

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528 REZNIK, WEAVER & BIGGS, *supra* note 129, at 1.

529 Lucie Schmidt & Purvi Sevak, *Taxes, Wages, and the Labor Supply of Older Americans*, 31 RES. ON AGING 207, 209 (2009).

530 REZNIK, WEAVER & BIGGS, *supra* note 129, at 15.

531 Eric French & John Jones, *Public Pensions and Labor Supply Over the Life Cycle* 22–23 (Fed. Reserve Bank of Chi., Working Paper No. 2010-09, 2010).

532 Butrica et al., *supra* note 521, at 230.

based plans can improve savings rates dramatically for both low- and high-income workers.[533] While 401(k) plans are run by corporations, the government creates the rules surrounding them and has the opportunity to influence how those plans are run so as to optimize savings. For workers who do not have 401(k) plans or who lack steady employment, automatic IRA plans that would essentially allow workers to build savings through automatic payroll deductions have been proposed.[534]

Additionally, some ERISA rules discourage phased retirement by requiring that workers with defined-benefit pensions retire or lose a portion of their wealth after a certain age.[535]

C. Alternatives to Address Social Security Solvency

In order to address Social Security's solvency issues, Congress should consider three other alternatives that would provide more financial stability to Social Security financing: (1) diversifying the trust fund, (2) revising the way in which cost-of-living adjustments are calculated, and (3) increasing the maximum limit on the payroll tax.

First, diversifying the trust fund would involve moving the $2.5 trillion currently held in government bonds into a portfolio that contained stocks, bonds, and other assets in order to gain a higher rate of return on the investment. One study estimates that diversifying the trust fund to include investments in a broad-based index (such as the Wilshire 5000) could eliminate as much as one-third of the deficit.[536] Over the long term, this proposal could help address the funding issues and do so in a way that minimizes tax hikes and benefit cuts. While there has been strong opposition to government investment of the Social Security Trust Fund,[537] that opposition is largely based on fears that politicians will interfere in corporate governance.[538]

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533 Jack VanDerhei & Lori Lucas, *The Impact of Auto-Enrollment and Automatic Contribution Escalation on Retirement Income Adequacy*, EMP. BENEFIT RESEARCH INST. ISSUE BRIEF, Nov. 2010, at 8.

534 *See* Knoll, *supra* note 311, at 9, 15.

535 Butrica et al., *supra* note 521, at 230.

536 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 50–51.

537 PRESIDENT'S COMM'N TO STRENGTHEN SOC. SEC., *supra* note 178, at 13.

538 *See Investing in the Private Market: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 106th Cong. 41–43 (1999) (statement of Michael Tanner, Director, Health and Welfare Studies, Cato Institute), *available at* http://frwebgate .access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:57507.pdf.

Despite problems that developed with government interference under the TARP program,[539] legal structures and norms could be formulated to keep politicians out of the investment decision.[540]

Second, changing the automatic cost-of-living adjustments (COLAs) for Social Security benefits could reduce the deficit by 26%.[541] A retiree's Social Security benefits are automatically increased by increases in the Bureau of Labor Statistics Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). The Bureau of Labor and Statistics developed a different measure of inflation (the chained CPI) that it says is more accurate in approximating increases in the cost of goods and services.[542] The chained CPI is anticipated "to increase about 0.3 percent slower each year than the CPI-W," thereby decreasing anticipated benefit payments and increasing trust fund solvency.[543] The proposal has support from both Democrats and Republicans and was one of the reforms endorsed by the Fiscal Commission.[544] Interestingly, adopting a different measure of COLA is a reform that spreads the benefit cut widely across all generations, unlike retirement age increases that target particular cohorts.[545]

Third, increasing the taxable maximum to cover 90% of earnings is a reform that has considerable support,[546] including that of the Fiscal Commission, which proposed it as one of a set of reforms.[547] Currently, the employment tax that serves as the primary funding mechanism for Social Security applies only to the first $106,800 of income. The CBO estimates that raising the cap to 90% of payroll would increase it to $156,000.[548] This proposal would improve the shortfall by 0.75% of payroll and reduce the long-term deficit by

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539 *See generally* Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127 (2010).

540 *See id*; *see also* Benjamin A. Templin, *The Public Trust in Private Hands: Social Security and the Politics of Government Investment*, 96 KY. L.J. 369, 400–01 (2008).

541 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 54.

542 U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 17, at 51–52.

543 *Id.* at 52.

544 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 52.

545 *See* Wade D. Pfau, *Comparing the Impacts of Social Security Benefit Reductions on the Income Distribution of the Elderly*, 59 NAT'L TAX J. 195, 198 (2006).

546 *See Social Security at 75 Years Hearings*, *supra* note 86 (testimony of Nancy J. Altman, Co-Director, Social Security Works).

547 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 51.

548 CONG. BUDGET OFFICE, *supra* note 72, at 18.

37.5%.[549] The Fiscal Commission proposes a gradual phase-in period and estimates the savings to be 35%.[550]

Increasing the taxable cap is a suitable compromise solution because the higher tax will be partially offset by higher benefits. This proposal has support from influential groups. The AFL-CIO's Deputy Policy Director Kelly Ross mentioned it as one solution in his comments in House hearings in July 2010.[551] A National Academy of Social Insurance survey showed that 83% of the respondents favored raising the tax cap, whereas only 58% favored an across-the-board tax rate increase.[552] Other polls support these results. A Gallup poll showed that 63% of those surveyed thought an increase in the retirement age was a bad idea, while 67% in the same sample thought increasing taxes to cover all of the higher income workers' wages was a good idea.[553] An AARP survey found that 85% of those surveyed opposed cutting Social Security benefits as a way to cure the federal deficit.[554] The survey also shows that 57% of those under fifty years of age support reform that would boost tax revenues now in order to ensure that they receive the same level of benefits when they retire as are available today.[555] The polls and surveys serve as evidence of one well-accepted characteristic of Social Security—i.e., the entitlement has created a large constituency that will seek to protect its interest.[556] Americans view Social Security as an "earned right" rather than charity.[557] While the electorate has often been

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549 *See Actuarial Publications: Summary of Provisions That Would Change the Social Security Program*, *supra* note 76 (discussing Proposal E2.3). Proposal E2.3 would decrease the long-range actuarial balance from -2% to -1.25%, which is a 37.5% improvement. *See id.*

550 FISCAL COMM'N, THE MOMENT OF TRUTH, *supra* note 2, at 54.

551 *See The Continued Importance of Social Security: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 111th Cong. (2010) (statement of Kelly Ross, Deputy Policy Director, AFL-CIO).

552 VIRGINIA P. RENO & JONI LAVERY, NAT'L ACAD. OF SOC. INS., ECONOMIC CRISIS FUELS SUPPORT FOR SOCIAL SECURITY: AMERICANS' VIEWS ON SOCIAL SECURITY 13 tbl.8 (2009).

553 Jeffrey M. Jones, *Americans Look to Wealthy to Help Save Social Security*, GALLUP (July 29, 2010), http://www.gallup.com/poll/141611/americans-look-wealthy-help-save-social-security.aspx.

554 AARP, *supra* note 497, at 19.

555 *Id.* at 29.

556 DANIEL BÉLAND, SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE 29–31 (2005).

557 *Id.* at 32–33.

characterized as apathetic, beneficiaries to Social Security act decisively when the system is threatened.[558]

CONCLUSION

The solvency of the Social Security system is one of most pressing issues facing policy makers, and reforms should be made sooner than later. Increasing the full retirement age improves the solvency of the system, and most workers can stay in the labor force longer given improved health and longevity and a reduction in physically demanding jobs. However, increasing the full retirement age does not necessarily mean that workers will retire later. The behavioral economics literature confirms what we know intuitively—that people are not always rational economic actors. Although demographic, economic, and societal trends allow workers to stay in the labor force longer, many retire at their first opportunity of sixty-two, even if it is not in their long-term economic interest to do so. Any change to the retirement age should start with an increase in the early eligibility age from sixty-two to sixty-four—a reform that will increase workers' benefits and lessen the risk of poverty in retirement. While increasing the early retirement age from sixty-two to sixty-four would positively affect retirement income, policy makers need not increase the full retirement age beyond sixty-seven in order to address Social Security solvency. A number of alternative proposals—such as changing COLA calculations, increasing the taxable maximum to 90% of earnings, and diversifying trust fund investments—would also improve Social Security's financing. Even so, policy makers should do everything they can to encourage older workers to stay in the labor force. By removing disincentives to work and improving existing incentives to retire later, Congress has the ability to form a cohesive retirement policy that rewards Americans for working late into life.

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[558] *See* Calmes, *supra* note 15.