

2014

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### Recommended Citation

Osgood, Russell K., "Retirement Policies and Related Social Changes in the Lifecycle" (2014). *Connecticut Insurance Law Journal*. 130.

<https://opencommons.uconn.edu/cilj/130>

# RETIREMENT POLICIES AND RELATED SOCIAL CHANGES IN THE LIFECYCLE

RUSSELL K. OSGOOD\*

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*This Essay argues that retirement policies, including retirement income and healthcare sufficiency, should be crafted in light of demographic and lifestyle changes rather than as a means to solve a larger fiscal problem. The author studies work force demographics and life expectancy in the decades following WWII as compared to today and discusses how other nations have attempted to solve the same problems currently facing the United States. As a means of addressing the increasing fiscal demands of paying for retirement, the article proposes an “omnibus” plan that extends the retirement age, introduces “means testing” for certain benefits as well as cutbacks and proposes changes to the taxable wage base.*

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## I. INTRODUCTION

This Essay<sup>1</sup> is an effort to establish a framework for action in dealing with the issues in a great debate that is not happening, but should be, about retirement, retirement policy and retirement income, and health care sufficiency. Lots of ideas have been floated and much ink and paper, and many cyber impulses, expended, discussing various aspects of this set of issues but those ideas have typically been generated by reference to a single policy perspective, including most frequently national fiscal necessity, health care adequacy, or social security solvency. This is

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<sup>1</sup> The word “Essay” is used intentionally to connote a looser style of argumentation and also fewer footnotes than conventional law review articles. Almost every sentence in this Essay could be footnoted to the mountain of technical material and the reams of commentary on this set of complex subjects.

essentially how the retirement proposals by the well-known Bowles-Simpson Commission<sup>2</sup> were generated as part of a larger proposal aimed at solving problems of national fiscal policy. That set of proposals has languished for lots of reasons and this Essay will argue that the set of related retirement issues cannot be “solved” by reference to a set of proposals focused only on fiscal needs. It is said that these retirement issues cannot be solved at all because they are too “political.” The matters are obviously political (and politicians have difficulty solving big problems), but these matters also reflect deep changes in the underlying social order and in longevity that make changes in the relevant policies exceptionally difficult to resolve when looked at in a short-term political framework.

This Essay will review the following: 1) the shape of the various component retirement and health policies (and demographic facts) in the late 1950s and early 1960s as a reference point, 2) the policies in place right now (with imminent changes), and 3) a brief summary of related policies in Germany, Britain, Canada, and Singapore. The Essay will then make an omnibus proposal *not aimed primarily at solving the fiscal problem*, but developed by reference largely to the changes in longevity and labor force participation. This omnibus proposal would, however, if implemented, contribute to an amelioration of the fiscal problem.

#### A. A NOTE ON STATISTICS AND PROJECTIONS

The arena of retirement and healthcare policies has a huge statistical component, but I will start with several cautionary notes about statistics in this area. *First*, statistical projections that go very far into the future, say twenty years or more, are extraordinarily unreliable. Mortality statistics are an exception, but projections of costs, etc. turn out frequently to be overstated. When Medicare Part D was added during the presidency of George W. Bush, virtually all statistical projections were wrong on the high side.<sup>3</sup> This was the case because no one was sure how adding drug

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<sup>2</sup> NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM, REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM: THE MOMENT OF TRUTH, (Dec. 2010) [hereinafter BOWLES-SIMPSON].

<sup>3</sup> See Edwin Park, *Refuting, Once Again, the Medicare Part D Myth*, OFF THE CHARTS BLOG: POLICY INSIGHT BEYOND THE NUMBERS, CENTER ON BUDGET AND POLICY PRIORITIES (March 11, 2013, 11:04 AM), <http://www.offthechartsblog.org/refuting-once-again-the-medicare-part-d-myth-2/>.

benefits would affect hospitalization and other costs. In retrospect it seems to have reduced them (this is logical). *Second*, human, social and economic behavior is dynamic and hard to predict. For instance, many people believe that there will be (or is) a significant increase in delayed retirements due to the rise of retirement living costs (and longevity) and the failure of private savings and employer provided retirement income to increase commensurately (or at all). Current data fails to show this because the current data can, due to exogenous factors, mask what is going on. For instance, just as many people may wish to work longer, but we have had a major employment contraction with many attendant “early” retirements. These people are not retiring early because they wish to but because it was forced on them individually or in large groups. *Third*, health care cost projections continue to be based on what has been a norm created during a period of sustained healthcare inflation (1965 to the present). This inflation was fueled by massive resource infusions by employer plans and government transfer payments. No one is predicting an end to this inflation in part because the Affordable Care Act (“ACA”) is slowly coming into effect and it will increase the demand for healthcare services. But the rate of inflation has to change. There literally will not be resources available to provide for health care at the quantities projected if the inflation continues at a very elevated level. How it will come to an end is not yet understood, but it is beyond doubt going to end.

## I. A LOOK BACK

One of the problems in thinking about how to resolve the many pending “crises” in the areas of retirement and related retirement healthcare has been a failure to study methodically what has changed or led to our present situation. Typically, it is assumed that the problems have sprung from: 1) increases in longevity and/or 2) government intervention in the health care market. But the story is more complicated and multifaceted than these two phenomena, and in the next few paragraphs I will sketch our situation as of 1960, and then in the following section describe our situation today.

A. OASDI<sup>4</sup>

The Social Security system is comprised of various benefits and it is widely assumed that these have not changed much and that the threat of insufficiency of funds today is a function of an aging workforce, lower birthrate, and increased longevity. This is not true. The primary insurance benefit (of OASDI) has changed in a number of ways since 1960. First, the minimum benefits were much lower then. Second, there were no automatic, only episodic, COLA (“Cost of Living Adjustment”) adjustments to benefits until 1972. Third, there was no Social Security Disability Insurance scheme until 1956 and the number of participants had not ballooned as it did in the 1970s and 1990s.<sup>5</sup> Fourth, since the wage base was lower the amount of higher end and maximum benefits were relatively smaller. Fifth, a significant number of workers, including governmental, charitable, farm and ecclesiastical organization workers, were not included in the system. The system was funded, as it is today, by a dual employer/employee tax on “wages and salaries” (without any offset for the various income tax deductions) that was intelligently premised on the notion that all people should at all times and all income levels put aside a portion of wages (matched by the employer) for support during old age.

## B. HEALTHCARE “SYSTEM”

In 1960 there was no Medicare and no ACA. A significant number of workers had employer- or union-provided health insurance but many did not. A few people (usually wealthy) bought individual policies. Healthcare inflation had begun to increase as medicine modernized and began to add procedures and medications and machines that prolonged life or tested for sickness. Healthcare insurance was a state matter.

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<sup>4</sup> This discussion of Social Security was informed by a recent, comprehensible and careful description of the system’s current provisions and its origins. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMP. LAB. L. & POL’Y J. 5 (2011).

<sup>5</sup> See *Disability Policy & History: Statement Before the H. Subcomm. on Soc. Security of the Comm. on Ways and Means* (July 13, 2000) (statement of Edward D. Berkowitz).

### C. LONGEVITY

Longevity for males in 1960 was 66.6 years and for females was 73.1 years.<sup>6</sup> It was higher in developed European countries, but it had been creeping up in all developed nations during the post-World War II epoch, particularly for women.

### D. PRIVATE PENSIONS

Private employer and union plans covered approximately forty-one percent of the full time workforce in 1960.<sup>7</sup> This group was largely male and had shorter life expectancies. The pensions were generally defined benefit plans paying annuity type benefits that were set at retirement and generally did not increase automatically with inflation. Defined contribution plans had become popular in the private (non-union) sector, but not in the case of public plans. The rate of coverage of employees had increased from 1945 until 1960 significantly. Private pension plans sometimes had disability insurance features that covered a disabled worker until he or she attained age sixty-five.

### E. LABOR MARKET PARTICIPATION AND THE STRUCTURE OF EMPLOYMENT

In 1960 83.3% of males aged sixteen to sixty-five participated in the labor force with females at 37.7%.<sup>8</sup> Labor market participation immediately after age sixty-five by males was 35%.<sup>9</sup> Employment was concentrated in full-time forty hour a week jobs reflecting the norms of the Federal Fair Labor Standards Act, (supervisors, overtime, etc. etc.) devised to regulate industrial and other large employment employers. To be sure, there were large numbers of small employers, and many rural employers, including

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<sup>6</sup> *Health Data Interactive: Life Expectancy at Birth, 65 and 85 Years of Age, US, Selected Years 1900-2010*, NAT'L CTR. FOR HEALTH STATISTICS (Jun. 25, 2013), <http://205.207.175.93/HDI/TableViewer/tableView.aspx?ReportId=169>.

<sup>7</sup> S.A. SASS, *THE PROMISE OF PRIVATE PENSIONS* 139 (1997).

<sup>8</sup> *Current Population Survey Database*, BUREAU OF LABOR STATISTICS (2013) available at <http://www.bls.gov/opub/ted/2007/jan/wk2/art03.txt>.

<sup>9</sup> Robert S. Szafran, *Age-Adjusted Labor Force Participation Rates, 1960-2045*, 123 MONTHLY LAB. REV. 25, 30 (2002).

farms, that existed outside the industrial model, but they were not a focus of federal regulation.

#### F. MANDATORY RETIREMENT

For employees or most employers there was a mandatory retirement age, generally age sixty-five. There was no Age Discrimination in Employment Act (“ADEA”) and, as mentioned above, not a large number of disabled workers. Some employers, including police, fire, and the military provided for retirements typically before age sixty-five. Colleges and universities typically had a mandatory retirement age for faculty, but occasionally it was somewhat higher than sixty-five.

As we shall see shortly, the world shown by these facts is different, in significant ways, from the world our retirement programs now confronts. Most of the changes have added costs to these programs, so part of what this excursus into the past shows is that there are multiple contributing factors to our now heavy costs of retirement. This suggests that no single change will alter the cost “crisis.”

### II. THE CURRENT SITUATION

#### A. OASDI

Today the primary insurance benefit is significantly higher than projected in 1960. This is attributable to indexed increases, increases in minimum benefits, and increases in wages and salaries and the social security wage base. The Social Security Trust Fund reserves, which are entirely composed of IOUs from the United States Treasury because all past and current FICA payments have been or will be expended by the Trustees, are being depleted, and the most recent data suggests that only about seventy-five percent of projected benefits are funded (counting future FICA taxes) and that the Social Security Trust Fund reserves will be exhausted in 2035.<sup>10</sup> Early retirement (with reduced benefits) continues to

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<sup>10</sup> SOCIAL SECURITY AND MEDICARE BOARDS OF TRUSTEES, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2013 ANNUAL REPORTS 2 (2013) [hereinafter 2013 SUMMARY TRUSTEES REPORTS]. The exhaustion of the reserves does not mean there will be nothing to pay benefits for there will be a continuing accrual of future employment taxes and these taxes are

be available at age sixty-two, and normal retirement (depending on one's birth date) is at sixty-six or sixty-seven. Participants may elect to defer the regular commencement of benefits at this age, and if they do, their later benefits are increased by a set percentage. The Social Security Disability Insurance Trust Fund is projected to be exhausted in 2016, and there has been a large increase<sup>11</sup> both in those claiming and securing disability benefits, due in part to the employment contraction of the recent recession.<sup>12</sup> There has been active discussion of this "crisis" and no action on a solution. There seems to be consensus on a modest recalibration of the COLA (using a "chained" CPI versus the current CPI<sup>13</sup>) measuring point for the primary insurance amount but, even that has not yet been approved by Congress and the President.

#### B. HEALTHCARE SYSTEM

Medicare participants are eligible to enter at age sixty-five, whether retired or not. (Disabled Social Security annuitants may qualify early in

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projected to cover seventy-five percent of the projected future benefits if no changes are made.

<sup>11</sup> From 1998 to 2012 the number of disabled individuals receiving benefits increased from 4,698,319 to 8,853,614. *Selected Data from Social Security's Disability Program*, SOC. SEC. ADMIN. (Dec. 2013), <http://www.ssa.gov/OACT/STATS/dibStat.html>.

<sup>12</sup> 2013 SUMMARY TRUSTEES REPORTS, *supra* note 10. The Bowles-Simpson Commission made a suggestion that people "unable to work" but not disabled be permitted to receive an actuarially reduced payment of their primary insurance benefit at age sixty-two (augmented to 100% at their regular retirement date). One would be more sanguine about this proposal except for the history of difficulty in policing the definition of "disabled" under the current system. "Unable to work" is apparently a lower standard. BOWLES-SIMPSON *supra* note 2, at 51. It is worth noting that the Social Security Administration has been concerned, from the beginning of this benefit, about the administrability of the concept of disability. See Berkowitz, *supra* note 5. The parallel Railroad Retirement System has had similar, or even more difficulty, in assessing correctly disability status. See William K. Rashbaum, *600 Long Island Railroad Retirees Lose Disability Pay in U.S. Inquiry*, N.Y. TIMES, July 1, 2013, at A18.

<sup>13</sup> BOWLES-SIMPSON, *supra* note 2, at 51-2. Yale Sterling Professor of Economics, Robert J. Shiller, has recently proposed that social security benefits be indexed to GDP changes to align retirees' interests with society's as a whole. Robert J. Shiller, *Want to Fix Social Security? Use the Right Wrench*, N.Y. TIMES, June 8, 2013, at 4.

certain circumstances for Medicare.<sup>14</sup>) The costs of participation include: 1) substantial premium payments for Part B (physician and related services) and 2) in connection with the newer Part D certain payments. Individuals commonly obtain wrap-around policies that in turn do not cover all of these costs.<sup>15</sup> The Medicare Trust Fund's (which technically only relates to Part A (hospitalization) of Medicare) reserves are projected to be exhausted sooner than the Social Security Trust Fund. The wage base for this system is unlimited, unlike the one for OASDI, but the foreseeable tax revenues leave this system even more underfunded.<sup>16</sup> Some Medicare eligible individuals are, due to their low income, also eligible for Medicaid.<sup>17</sup>

Many employees are (before Medicare eligibility) covered by employer or union provided health insurance and a smaller number also have post-retirement, employer-provided wrap-around (Medicare) coverage. The passage of ACA in 2010 portends significant changes in (and an augmentation of) this, but at this time all of this seems dicey at best.<sup>18</sup> The core feature of the augmentation, a series of state exchanges, seems in doubt. The related expansion of Medicaid<sup>19</sup> is on track in many states but has been rejected in other states. The theory of a fully implemented ACA was that affordable near universal coverage would be obtained by collecting premiums from many young and relatively healthy people, but this theory has yet to be tested in the United States except in Massachusetts, Vermont, and Hawaii. There are predictions that many employers will drop their employer plans as ACA Exchange policies

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<sup>14</sup> *Disability Planner: Medicare Coverage if You're Disabled*, SOC. SEC. ADMIN. (2013), <http://www.ssa.gov/dibplan/dapproval4.htm>.

<sup>15</sup> The relatively high costs and confusing structure of Medicare is well described in the companion piece to this article by Richard Kaplan. YOYO of course means, "you're on your own," an appropriate acronym for the current financial aspects of Medicare. Richard Kaplan, *Desperate Retirees: The Perplexing Challenge of Covering Retirement Health Care Costs in a YOYO World*, 20 CONN. INS. L.J. 433 (2014).

<sup>16</sup> 2013 SUMMARY TRUSTEES REPORTS, *supra* note 10, at 3.

<sup>17</sup> *Dual-Eligible Beneficiaries of Medicare and Medicaid: Characteristics, Health Care Spending and Existing Policies*, CONG. BUDGET OFF. (June 6, 2013), <http://www.cbo.gov/publication/44308>.

<sup>18</sup> Susan E. Cancelosi, *What to do, What to do: Employer Health Benefit Plans During and After 2012's Uncertainty*, 51 U. LOUISVILLE L. REV. 569 (2013).

<sup>19</sup> Medicaid is a joint federal-state system that provides healthcare for individuals and families below a certain level of income. It has been steadily expanded but the states vary significantly in what is covered.

become available, and it is even clearer that many employers are already dropping employer provided wrap-around post-retirement plans (even though Medicare coverage and costs are not directly changed by the ACA).<sup>20</sup> Finally, the CLASS (“Community Living Assistance Services and Support Act”) (or long term care) feature of ACA has been declared dead by the Secretary of Health and Human Services.<sup>21</sup>

One of the major changes in the healthcare environment since 1960 is the widespread social perception that health care is a “right,” or an “entitlement,” and “someone” else should pay for it. This perception extends to the feeling that insurers and employers, or Medicare, is, or are, greedy if they deny coverage for a therapy or an additional test or other medical procedures. In the campaign around ACA the supporters never confronted this but in fact traded on it and the opponents only obliquely hinted that not all health care can, or will, be available under any system.

Finally, healthcare inflation, while bending slightly down, remains high from almost any reference point. New technology and insistent demands for, and provision of, experimental and other high-cost, or arguably duplicative procedures, continue to drive up cost.

### C. LONGEVITY

In 2010, male life expectancy was seventy-six years and female was 80.9 years.<sup>22</sup> Many serious illnesses that were quickly fatal in 1960 are now managed over long periods of time, including cancer, heart disease, and dementia. At the same time there is no reliable data that shows individuals are not “wearing out,” or physically declining, at a rate consistent with the recent past. Finally, the CLASS ACT (a long term care program that proved fiscally unsound) of ACA, and its recent abandonment, reflects concern about what is thought to be a tsunami of baby boomers needing to be nursed for long periods of declining health in long term care facilities. This last prediction is one of the statistical projections that is hard to feel certain about.

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<sup>20</sup> See generally Cancelosi, *supra* note 18.

<sup>21</sup> The Bowles-Simpson Commission had previously recommended its abandonment. BOWLES-SIMPSON, *supra* note 2, at 37.

<sup>22</sup> *Health Data Interactive*, *supra* note 6.

## D. PRIVATE PENSIONS

In 2012 fifty-four percent of the civilian workforce participated in a public (non-Social Security), private, or union pension or other deferred compensation plan or plans.<sup>23</sup> See Table I inset. Compared to 1960 there has been a large scale change<sup>24</sup> from guaranteed, defined benefit plans to §401(k) defined contribution plans which are likely to produce lower levels of lifetime contributions for retirement income purposes and ultimately lower benefits.<sup>25</sup> See Figure 1 inset. Amounts accumulated in defined contribution plans can be rolled over into Individual Retirement Accounts (“IRAs”) which permit withdrawals for non-retirement purposes before retirement.<sup>26</sup> Many §401(k) plans and IRAs have employee direction of investments which adds risk in many cases and also has produced high maintenance and investment advisor fees (which have produced litigation and some corrective rule-making).<sup>27</sup>

About midway in the period from 1960 to the present the United States considered, but did not adopt, a minimum universal (employer paid for) pension (“MUPs”)<sup>28</sup> designed to produce a higher level of private pension

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<sup>23</sup> *Retirement Benefits: Access, participation, and take-up rate, civilian workers, National Compensation Survey*, U.S. BUREAU OF LABOR STATISTICS (Mar. 2012), [http://bls.gov/ncs/ebs/benefits/2012/ownership/civ\\_all.pdf](http://bls.gov/ncs/ebs/benefits/2012/ownership/civ_all.pdf) (last visited June 25, 2013).

<sup>24</sup> This change has many causes but one of the leading ones has been the inflexible funding obligations and the massive funding deficiencies in many defined benefit plans. *See, e.g.*, Mary Williams Walsh, *Ratings Service Finds Pension Shortfall*, N.Y. TIMES, June 27, 2013, at B1 (Moody’s recomputes state and local pension liabilities showing larger deficiencies in a number of states).

<sup>25</sup> There is no good data for 1960 because the Labor Department was not yet charged with regulating deferred compensation plans but data from the passage of ERISA in 1974 to the present shows the dramatic move to §401(k) plans. *See, e.g.*, Bureau of Labor Statistics, *Defined Contribution Plans: Method of Contribution*, BUREAU OF LABOR STATISTICS, <http://bls.gov/ncs/eba/detailedprovisions/2010/ownership/private/table20a.txt> (viewed on June 25, 2013). Currently eighty-six percent of those who participate in a defined contribution plan participate in a §401(k) (perhaps alongside another defined contribution plan in some cases).

<sup>26</sup> 26 U.S.C.A. §§72 (t)(6), (7), (8) and 408 (d).

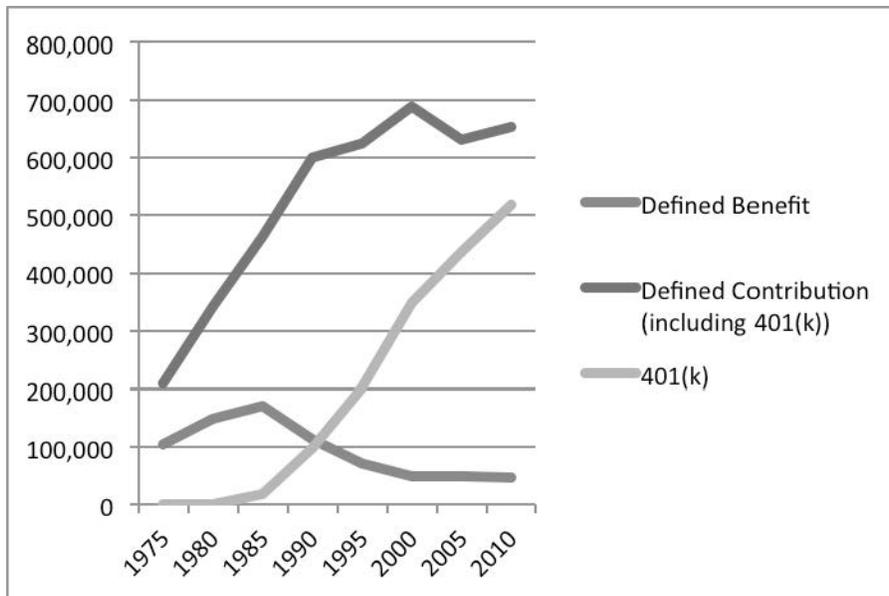
<sup>27</sup> *See* Tara Siegel Bernard, *Limiting the 401(k) Finder’s Fee*, N.Y. TIMES, June 21, 2013, at B1.

<sup>28</sup> *See* P. WIEDENBECK & R. OSGOOD, *CASES AND MATERIALS ON EMPLOYEE BENEFITS* 84 (2d ed. 2013). MUPs were recommended by the President’s Commission on Pension Policy in 1981.

plan benefits to a larger number of workers, particularly the low paid. While a few other developed countries have done this, there was no political support for this expensive idea that would have loaded another expense on employment.

The confluence of the decline of regular pension plans and the rise of the highly discretionary §401(k) plans will likely cause private pensions to recede as a percentage contributor to retirement income. This can be attributed to a number of factors, including the ferocious legal complexity of this area of the law and the need on the part of employer to reduce employment related costs as the social insurance costs of social security and health care have risen dramatically. Private plans are voluntary and inflexible and in the environment of oscillating economic growth they are disfavored.

FIGURE 1:<sup>29</sup>



Y axis = number of plans

<sup>29</sup> U.S. DEP'T OF LABOR, *Private Pension Plan Bulletin Historical Tables and Graphs 25* (Nov. 2012), available at [http://www.dol.gov/ebsa/pdf/historical\\_tables.pdf](http://www.dol.gov/ebsa/pdf/historical_tables.pdf).

**Table 1. Retirement Benefits: Access, participation, and take-up rates, civilian workers, National Compensation Survey, March 2012<sup>30</sup>**

(All workers = 100 percent)

Characteristics	All retirement benefits <sup>3</sup>			Defined benefit			Defined contribution		
	Access	Participation	Take-up rate	Access	Participation	Take-up rate	Access	Participation	Take-up rate
All workers .....	68	54	79	29	26	91	55	37	68
<b>Worker characteristics</b>									
Management, professional, and related .....	83	74	89	43	40	92	63	48	76
Management, business, and financial .....	84	76	91	39	36	92	74	61	82
Professional and related .....	82	72	88	45	41	92	59	43	73
Teachers .....	88	83	94	74	70	94	35	19	55
Primary, secondary, and special education school teachers .....	97	93	96	91	88	97	27	11	41
Registered nurses .....	82	69	84	39	35	91	71	50	71
Service .....	47	29	63	17	16	94	35	16	45
Protective service .....	76	60	78	52	49	95	41	17	41
Sales and office .....	71	54	76	23	19	84	62	43	70
Sales and related .....	67	42	63	12	8	68	62	38	61
Office and administrative support .....	73	61	83	29	26	88	62	46	75
Natural resources, construction, and maintenance .....	68	55	81	30	29	96	56	40	72
Construction, extraction, farming, fishing, and forestry .....	65	52	80	31	30	97	50	35	70
Installation, maintenance, and repair .....	71	58	81	29	27	95	61	44	73
Production, transportation, and material moving ... ..	67	52	77	26	24	92	55	37	66
Production .....	69	54	78	22	21	93	64	45	70
Transportation and material moving .....	65	49	75	29	27	92	47	29	61
Full time .....	78	65	83	34	32	92	63	45	72
Part time .....	38	21	54	12	9	79	30	13	44
Union .....	95	88	93	81	77	95	45	29	85
Nonunion .....	64	48	75	20	17	88	57	39	68
<b>Average wage within the following categories:<sup>4</sup></b>									
Lowest 25 percent .....	41	21	51	9	7	77	35	16	44
Lowest 10 percent .....	30	10	33	5	3	61	26	7	28
Second 25 percent .....	70	52	75	24	21	90	58	38	65
Third 25 percent .....	79	67	85	35	32	92	62	46	75
Highest 25 percent .....	88	80	91	50	47	93	68	53	79
Highest 10 percent .....	90	83	92	51	48	93	71	56	79
<b>Establishment characteristics</b>									
Goods-producing industries .....	75	61	82	27	26	93	68	51	75
Service-providing industries .....	67	53	79	29	26	91	53	35	67
Education and health services .....	77	66	85	43	40	92	51	33	65
Educational services .....	86	80	93	72	67	93	35	20	57
Elementary and secondary schools .....	91	86	95	85	82	96	24	9	38
Junior colleges, colleges, and universities .....	87	78	90	53	44	83	62	45	72
Healthcare and social assistance .....	70	55	78	23	21	90	62	43	69
Hospitals .....	90	77	86	48	44	90	75	54	72
Public administration .....	90	86	95	85	80	95	33	17	50

See footnotes at end of table.

## E. LABOR MARKET PARTICIPATION AND THE STRUCTURE OF EMPLOYMENT

Women have tremendously increased their participation in the labor force (37.7% to 58.6%)<sup>31</sup> while male participation remains at historic

<sup>30</sup> *Retirement Benefits*, *supra* note 23.

levels. Participation by the elderly (sixty-five or older) is rising significantly (currently 18.5%) after a drop to an all-time low in the mid-1980s (11%) but due to the employment contraction of the recent recession it is hard to be sure how much of the current rise is permanent,<sup>32</sup> (see Figure 2 inset).<sup>33</sup> Labor force participation by younger people has dropped recently to 54.9% in 2012 due to high levels of post-high school educational enrollment and also the depth of the recession of 2007-09.<sup>34</sup>

An equally significant set of changes seems to be occurring in the structure of employment. The industrial (and FLSA) model of full work weeks, a single employer, supervisors, and overtime is changing. As in the 18<sup>th</sup> century,<sup>35</sup> it now looks like more people are working at home, holding multiple jobs simultaneously, not working forty hours a week for any single employer, and changing employers more frequently. See Figure 3 inset on the rise of regular part-time employment. Some of these changes may reflect profit-maximizing employers shifting to short-term contract labor (to avoid regulatory and health care costs), but they also reflect the effect of new technologies on the place and nature of employment. These trends seem likely to continue and perhaps even to accelerate.

#### F. MANDATORY RETIREMENT

In 1986 Congress passed and President Reagan signed an amendment to the Age Discrimination in Employment Act (“ADEA”) banning mandatory retirement for virtually all employees.<sup>36</sup> This change, when added to the increased costs of retirement and changes in labor force participation by women and heavy immigration, have added significantly to

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<sup>31</sup> See Howard N. Fullerton, Jr., *Labor Force Participation: 75 years of change, 1950-98 and 1998-2025*, MONTHLY LAB. REV. 3, 4 (Dec. 1999).

<sup>32</sup> *Id.* at 4.

<sup>33</sup> See *id.*

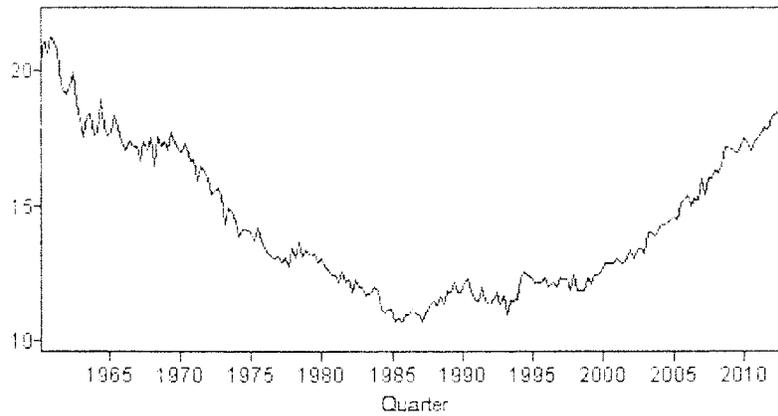
<sup>34</sup> Bureau of Labor Statistics, *Labor Force Projections to 2022: The Labor Force Participation Rate Continues to Fall*, MONTHLY LAB. REV. 1, 12, 18 (Dec. 2013).

<sup>35</sup> See generally ROY PORTER, *ENGLISH SOCIETY IN THE 18<sup>TH</sup> CENTURY* 185-213 (Rev. ed. 1991); T.C.W. BLANNING, *THE EIGHTEENTH CENTURY: EUROPE 1688-1815*, 91-130 (2000) (Europe). As to our current situation, see Editorial, *Part-Time America*, WALL STREET J., July 7, 2013, at A12.

<sup>36</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986).

the labor force<sup>37</sup> and created a significant downdraft on wages and salaries.<sup>38</sup>

**FIGURE 2: Labor Force Participation Rate – 65 years and over<sup>39</sup>**

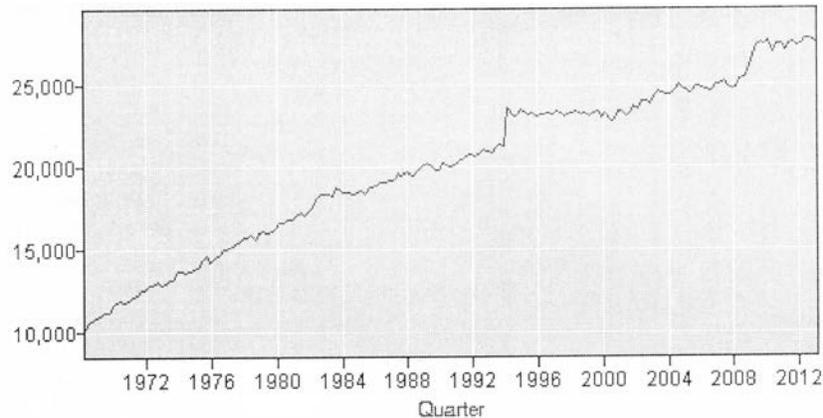


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<sup>37</sup> Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV. 15, 20, 25-27 (May 2002).

<sup>38</sup> Lawrence Mishel & Heidi Shierholz, *A Decade of Flat Wages: The Key Barrier to Shared Prosperity and a Rising Middle Class*, ECON. POL'Y INST. BRIEFING PAPER 365, Aug. 21, 2013, at 3, available at <http://s1.epi.org/files/2013/BP365.pdf>.

<sup>39</sup> Fullerton, *supra* note 31, at 3-4.

**FIGURE 3: Employed part time<sup>40</sup>**

### III. COMPARATIVE RETIREMENT AND HEALTH SYSTEMS

Table II<sup>41</sup> inset in the text, compares the health and retirement policies of the United States, the United Kingdom, Canada, Germany, and

<sup>40</sup> BUREAU OF LABOR STATISTICS, ISSUES IN LABOR STATISTICS: SUMMARY 08-08 (2008), available at <http://www.bls.gov/opub/ils/pdf/opbils71.pdf>.

<sup>41</sup> This chart is constructed from information gleaned from a number of law review articles about the foreign nations' systems. See Steven Ney, *Pension Reform in Germany* (ICCR Vienna/PEN-REF Project, Feb. 2001); Lillian Liu, *Retirement Income Security in the United Kingdom*, 62 SOC. SEC. BULL., no.1, at 24, 26, 27, 29 (1999); Donald W. Light, *Universal Health Care: Lessons From the British Experience*, 93 AM. J. PUB. HEALTH, no.1, at 25, 29 (2003) (United Kingdom's universal health care program); United Kingdom, *Retirement Age*, GOV.UK (last updated Nov. 8, 2013), <https://www.gov.uk/retirement-age>; Michael Wiseman & Martynas Yčas, *The Canadian Safety Net for the Elderly*, 68 SOC. SEC. BULL, no. 2, at 55, 56, 64 (2008); DAVID MCCARTHY ET AL., ASSET RICH AND CASH POOR: RETIREMENT PROVISION AND HOUSING POLICY IN SINGAPORE 3, 4, 5, 9, 28 (2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN018299.pdf>. It is worth noting that the rates and the base of taxation for social insurance benefits are and have been quite variable among these and other countries. (United States: employee (7.3%), employer (7.3%); Germany: employee (17.3%), employer (17.3%); Canada: employee (6.2%), employer (10.5%)). *International Comparisons of Charitable Giving November 2006*, CAF BRIEFING PAPER (CAF), 9 (2006). <http://www.cafonline.org/>

Singapore. Canada, Germany, and the United Kingdom, like the United States, have an aging workforce and face significant fiscal challenges in paying for the obligations of their health and retirement benefits. At the same time each of the foreign nations is funding supplemental retirement income (in various ways) at higher levels than the United States. They have not experienced such high health care inflation and all cap or ration health coverage in ways that has led to significant use by citizens who are using private alternative systems while employed or after retirement. Germany alone retains a mandatory retirement age of sixty-seven. Germany's primary social security retirement benefits are more variable than the United States, and depending on income and other factors, but all of these nations use general revenues to support the basic social security system at least in part. In sum, these systems will likely produce, if solvent, a higher level of retirement income and lower health care costs for retirees.

The comparative chart shows, however, that there is no quick, unitary or easy solution to the United States' multiple "crises" for it demonstrates the significant parallels in the approaches of the five nations. To the extent that there are parallels, the chart also fails to demonstrate the major challenges that they face in common which is that as life expectancy increases, the likelihood that a national economy will generate enough "surplus" labor income to fund thirty years of retirement (and all health costs for a lifetime) after only forty-plus years of covered employment is low. More workers will need to work beyond age sixty-five to ensure the solvency of these promises. Finally, the increase in longevity when coupled with the fracturing of employment into smaller and less stable components requires a re-conceptualization of how to amass sufficient retirement resources for the population.

<b>TABLE II: Pension, Retirement Age &amp; Health Coverage Comparison</b>					
	<b>United States</b>	<b>United Kingdom</b>	<b>Canada</b>	<b>Germany</b>	<b>Singapore</b>
<b><u>Basic S/S Retirement System</u></b>	Yes  Employer/Employee Contribution	National Insurance Fund  (Based on years of contribution) Employer/Employee/ State Funded	Old Age Support (OAS)  Employer/Employee/ State Funded, Flat Rate	GRV Employer/Employee/ State Funded	Central Pension Fund (CPF)  Multiple Distinct Accounts  Employer/Employee Funded
<b><u>Mandatory Supplemental Retirement System</u></b>	No	Second State Pension (SSP or S2P)  Earnings-related Redistributive Mandatory	CPP/QPP  Earnings-related Employer/Employee Contributions	Not Mandatory  Supplemental Employer-run, Defined-benefit	Not Mandatory
<b><u>Voluntary Supplemental Retirement Option (Employer)</u></b>	Yes  Moving to 401(k) Employer/Employee	Yes  Tax Incentives	Yes  Tax Incentives	Yes  Employer-funded More Emphasis on this as GRV weakens	Yes  Voluntary SRS Tax Incentives
<b><u>Mandatory Retirement Age</u></b>	No	No after 2011	No  65 Can Be NRA under OAS and CPP/QPP	Yes, age 67 (Rest of EU is 65)	No  Minimum Age: 62
<b><u>Health Coverage</u></b>	Before Age 65: Private Employer Ins. & ACA—2014 Age 65+: Medicare	State Provided	State Mandated	State Insurance Mandate	Yes  Under CPF

#### IV. AN OMNIBUS PROPOSAL

All recent efforts to reform or alter the various retirement and healthcare provisions relating to older Americans have failed. The last

successful set of changes occurred during Ronald Reagan's presidency when in 1983, on a bipartisan basis, Congress and the President agreed to move the OASDI full retirement eligibility age from sixty-five to sixty-six and finally to sixty-seven.<sup>42</sup> No change was made in the early retirement age (sixty-two) or in the year of Medicare eligibility. During George W. Bush's presidency he proposed making a portion of a person's OASDI contributions be eligible to be invested in actual external (to the Government) investment vehicles.<sup>43</sup> Politicians derided and rejected this idea, but a number of our developed peers, including the United Kingdom and Singapore, have adopted a feature like this or are actively considering it.

In the following paragraphs, labeled as in the discussion above, I will make a set of linked proposals that are designed to deal with an aging and expanded workforce, fiscal deterioration of both OASDI and Medicare, the absence of a norm of retirement, changes in the structure of work, and health care developments. The overall theory of the proposals is that individuals and the governments are not able to amass enough resources to pay for elongated retirements and people should work beyond the conventional retirement age of sixty-five to contribute to the labor force and for continuing professional stimulation.

#### A. OASDI

The year for retirement eligibility with full benefits should be moved gradually to age seventy. Bowles-Simpson also proposed an increase in the regular and early retirement ages for the primary benefit eligibility, but this was couched in terms of making that system, and the entire federal government, more solvent.<sup>44</sup> This was not an adequate reason for most

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<sup>42</sup> Janice M. Gregory et al., *Strengthening Social Security for the Long Run*, NAT'L ACAD. OF SOC. INS.: SOC. SEC. BRIEF, no. 35, Nov. 2010, at 3,4.

<sup>43</sup> Elizabeth D. Tedrow, *Social Security Privatization In Other Countries – What Lessons Can Be Learned For the United States?*, 14 ELDER L.J. 35, 36, 39 (2006); see also Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 148-50 (privatization entails investing funds in non-governmental entities).

<sup>44</sup> BOWLES-SIMPSON, *supra* note 2, at 50. A commission chaired by then Sen. Kerrey of Nebraska recommended in 1995 delaying further the full retirement eligibility age but not the early retirement age. J. ROBERT KERREY & JOHN C. DANFORTH, *Reform Proposal of Commissioners*, in BIPARTISAN COMMISSION ON

people. Why? A primary cause of the parlousness of the Social Security, Disability and Medicare Trust Funds has been Congress's penchant for liberalizing benefits without paying for them. The payroll taxes and the wage base have increased but in each case not enough to finance the addition of COLAs, larger minimum benefits, and the disability income feature and program. It is true that the aging of the workforce and the drop in the birthrate<sup>45</sup> have also contributed to this situation, but the trust funds (except the Disability Insurance Trust Fund) would have years of solvency ahead of them without the congressional giveaways.

The only convincing reason to delay for three years (to age seventy) the year for full retirement eligibility is that the population is living longer and is healthier. These changes mean that if the average person goes to work at, say, age twenty and retires at sixty-four, he or she has forty-five years to accumulate resources (in government solution and in various qualified and non-qualified savings vehicles) for a likely retirement period of twenty five years (or more if the couple is married). The elongated period of retirement requires more working and productive years to save adequately and also to contribute to the mandatory government plans (OASDI and Medicare).

Four additional changes should also be considered. *First*, the early retirement age of sixty-two should be raised (probably to age sixty-five) because the pre-retirement age should parallel the full retirement age and also the discounted (from age seventy to age sixty-two) primary retirement benefit would be too small. *Second*, for retirees in the top income<sup>46</sup> quartiles (say \$250,000 or more) the portion of the primary retirement benefit attributable to employer contributions and the income on them (logically fifty percent) should be means tested. Some resist this on the ground that it is a breach of the OASDI "social contract" but Congress' many liberalizations of that system eliminated any implied promise of noninterference with the equilibrium (which never existed) of sufficiency. If the breach argument was convincing, then the change could be

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ENTITLEMENT AND TAX REFORM: FINAL REPORT TO THE PRESIDENT 7, 16 (Dec. 1994).

<sup>45</sup> Mark Mather, *World Population Data Sheet 2012: Fact Sheet: The Decline in U.S. Fertility*, POPULATION REFERENCE BUREAU (July 2012), <http://www.prb.org/Publications/Datasheets/2012/world-population-data-sheet/fact-sheet-us-population.aspx>.

<sup>46</sup> The figure used for these purposes should not be federal taxable income but a more robust computation of income including exempt municipal bond interest.

prospective in effect, but intellectually it is not convincing because the employer contributions are mandated and could be applied logically to anyone's primary retirement benefit. *Third*, the previously eliminated earnings test set at a high level for workers who work beyond the age of primary retirement benefit eligibility (to be age seventy) and are receiving benefits should be reinstated.<sup>47</sup> *Fourth*, the cutback of benefits (currently 5/9% for each month before full retirement eligibility that one retires early) applicable to those who commence benefits between ages sixty-five and seventy should be modestly reduced.<sup>48</sup> Delayed retirement increases the monthly retirement pension, when taken, by eight percent for a year's delay or 2/3% per month of delay (for those with birthdays in or after 1943) up to retirement at age seventy. The eight percent figure should be reduced modestly as part of the system-wide belt-tightening proposed here.<sup>49</sup> This reflects the fact that the labor market is less stable than before and older workers will likely find it harder to find new employment during this period. Such a modification of the cutback should also take some pressure off of the disability income fund. This reduction in the cutback is obviously something that will "add" cost but the fact that it is part of a further pushing back of the age of full retirement eligibility indicates that it

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<sup>47</sup> This test was eliminated in 2000 for individuals who have attained their normal retirement age. Senior Citizens' Freedom to Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198 (2000); see Office of the Chief Actuary, Soc. Sec. Admin., *Automatic Determinations: Exempt Amounts, 1975-1999*, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/cola/rteahistory.html> (last modified Oct. 16, 2008).

<sup>48</sup> The current actuarial reduction (5/9% per month) is said to be actuarially "fair" and my proposal would depart from that standard (at some cost to the trust fund) by reducing it to say 5/12% per month. This is justifiable taking into account the various equities of this delay in benefit commencement and the variability of the health of people over age sixty-five.

<sup>49</sup> See SOC. SEC. ADMIN., *Retirement Planner: Delayed Retirement Credits* <http://www.ssa.gov/retire2/delayret.htm> (last visited Jan. 25, 2014) ("social security benefits are increased by a certain percentage (depending on date of birth) if you delay your retirement beyond full retirement age"); SOC. SEC. ADMIN., *Summary of P.L. 98-21, (H.R. 1900) Social Security Administration Amendments of 1983 – Signed on April 20, 1983*, LEGISLATIVE HISTORY, IN-DEPTH RESEARCH, <http://www.ssa.gov/history/1983amend.html> (last visited Jan. 25, 2014) (Act increases delayed retirement credit).

is really a softening of that decision.<sup>50</sup> *Fifth*, there are a plethora of proposals to increase the taxable wage base to include up to ninety percent of all wages and salaries or even investment or capital gains income.<sup>51</sup> The historic reason for limited social security taxation of wages or salaries is that the primary insurance benefit is intended as a jointly funded employee pension. However, since some people, in effect, earn investment income as their self-employment income, it seems appropriate to include an amount of investment income above say \$30,000 and below the current social security wage base as analogous to salary or wage income.

There will be some who will condemn any further delaying of primary retirement eligibility. In an editorial<sup>52</sup> entitled “What’s Next for Social Security?” published on June 9, 2013 the *New York Times* lambasted the “cuts” already taking place in Social Security. It specifically referred to the delay from age sixty-five to sixty-seven as a “cut”. The *Times* opined that Social Security “benefit cuts...cannot go much further.” Putting aside the *Times*’ current tendency for rhetorical excess, the editorial is an example of how difficult it is to discuss social security when *ad hominen* statements that ignore the many changes that have liberalized benefits decry other changes that slow or defer benefits. The full truth as to whether any “cuts” are taking place would have to take into account that if the social security regime of the fairly recent past was in effect, many of the people (who are now working beyond age sixty-five) would have lost (due to the very low earnings test) their entire benefit without having the option of deferring commencement and increasing it. A further system-wide

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<sup>50</sup> This would also be consistent with the Bowles-Simpson proposal to allow greater benefits to those who are unable to work after age sixty-five but not disabled within the meaning of the law. BOWLES-SIMPSON, *supra* note 2, at 50-51.

<sup>51</sup> In 2005 (due to growth in income equality) only eighty-five percent of wages and salaries, were taxable for FICA purposes. Proposals to tax one hundred percent of wages and salaries would, if implemented, significantly delay the exhaustion of the Social Security trust fund (for up to forty more years if benefits are not similarly increased) but they have not been legislatively feasible due to a disagreement over whether the benefits of the high-income earners should be increased in a parallel fashion. An increase of both taxable wages and benefits would retain the historic character of the system but be less fiscally positive. See JANEMARIE MULVEY, CONG. RESEARCH SERV., RL32896, SOCIAL SECURITY: RAISING OR ELIMINATING THE TAXABLE EARNINGS BASE, at 1-3 (Sept. 24, 2010).

<sup>52</sup> Editorial, *What’s Next for Social Security?*, N.Y. TIMES, June 9, 2013, available at [http://www.nytimes.com/2013/06/10/opinion/whats-next-for-social-security.html?\\_r=0](http://www.nytimes.com/2013/06/10/opinion/whats-next-for-social-security.html?_r=0).

deferral of benefits is obviously a serious move that should not be undertaken lightly, but the increase in longevity coupled with past benefit liberalizations since 1960 justifies a revision of the current rules contrary to the Times editorial.

It is possible that one might see the proposal to establish a mandatory retirement age of seventy as in tension with the overall conclusion that people can, and should, for societal and for individual reasons, work beyond age sixty-five. This perception misses the fact that the change in the social security eligibility age for primary retirement benefits from sixty-five to seventy will constitute a powerful incentive to work until age seventy for most people in the workforce. That incentive is appropriately limited to working until age seventy. After age seventy individual health considerations and society's interest in accommodating young labor force entrants suggests the advisability of a mandatory retirement option for employers. As mentioned above, no employer would be required to adopt such a mandatory retirement rule but many would, particularly if the demographic trend of people seeking to work beyond age sixty-five continues or increases.

Under current labor title pension and federal income tax law, a qualified plan may, in some cases, set a normal retirement date under the age of sixty-five.<sup>53</sup> Such a plan provision does not mean that a participant must retire at age sixty-five but it does trigger (usually) possible benefit distribution eligibility, vests any unvested benefits, and a few other things.

It is possible that this private pension age sixty-five option should be rethought in light of the other proposals made here, if adopted. At the same time it is not necessary to change this now and in view of the increase in instability of employment particularly for older workers, it should not be changed simultaneously but it should be looked at again after a period of time has passed for the other changes to settle in.

## B. HEALTHCARE SYSTEM

In line with the proposal on moving full primary retirement benefit eligibility to age seventy, it would seem logical to gradually, and over time, move full Medicare eligibility to age seventy also. Those between ages sixty-five and seventy would be covered, if they come into effect fully, by the provisions of ACA including in some cases continuing employer-provided healthcare. This ACA coverage begins to address the large issues

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<sup>53</sup> See, e.g., 26 U.S.C. § 411(a)(8) (2006).

coming to the fore as a result of the change in the structure of employment and also the difficulties of those losing coverage employed later in life due to industrial dislocations and/or a significant recession. The changes in eligibility will bring extra revenues to the Trust funds but likely increase ACA costs (when they are honestly calculated). It would almost certainly increase the cost of Medicaid. It is not clear, given the prior commitment to ACA, as febrile as it is, that this change will affect healthcare inflation. It might, in fact, increase it a bit by taking five years out of the Medicare (low fee) system and putting it in the higher fee insurance and less high fee (Medicaid) system.

This change in the Medicare eligibility age will help retirees in that it delays for five years entry into the confusing, multiple fee, and compartmentalized Medicare system, a system that provides low payments to providers, few incentives to economize, and absurdly pays the most to the highest cost providers without regard to outcomes. But all of these problems with Medicare would better be handled by moving it either to be a unified state-controlled system *or* to a system in which providers and insurers have to compete to win contracts to provide services to beneficiaries. The beneficiaries currently have no motive to diminish expenses and the government has devised a Rube Goldberg system comprised of components only fit to be understood as a rolling steel ball sculpture in an airport waiting room.

### C. PRIVATE PENSIONS

It is not clear that this omnibus proposal will lead to any increase in the costs (or change the viability) of private or other governmental pension or §401(k) plans. At the same time Congress should reconsider the ease of making early withdrawals from all such plans for any but the most worthy purposes.<sup>54</sup> Why should the assets of a §401(k) account, if rolled over into an IRA, be withdrawable to buy a new or larger home or to send a child to college when, in general, people are not saving adequately for retirement? Other related changes could be made to refocus qualified plan treatment on

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<sup>54</sup> Dan Halperin, among others, has endorsed limitations on the allowable reasons for distributions. *See infra* note 54-58 and accompanying text. *See, e.g.*, Richard L. Kaplan, *Retirement Funding and the Curious Evolution of Individual Retirement Accounts*, 7 ELDER L.J. 283, 283, 293-303 (1999).

retirement needs. Why should Roth IRA's even exist?<sup>55</sup> Why should roll-over distributions from IRAs to charities permanently escape income tax?<sup>56</sup>

Daniel Halperin has made a series of thoughtful proposals (divided into "ideal" and "possible" categories) to improve the retirement income of lower paid<sup>57</sup> people participating in qualified plans.<sup>58</sup> He proposes changes in the coverage and substantiality of benefits of the low paid, including full and immediate eligibility and vesting.<sup>59</sup> He also suggests that employees should be protected against market declines in their accounts in defined contribution plans.<sup>60</sup> He admits that all or most of his "ideal" proposals would discourage adoption or even trigger terminations of such qualified plans.<sup>61</sup> In sum, his proposals resemble the MUPs<sup>62</sup> proposal which never was adopted or even widely supported.

Halperin's proposals are particularly unlikely to be adopted when the social security system itself is underfunded in the longer term. The most sensible set of changes to the qualified plan rules would be those which facilitate less complex alternatives like the SEP-IRA option or a Simplified Retirement Plan ("SIMPLE" Plan) which allows employers to adopt a plan composed of linked IRAs for each employee and then perhaps to add a governmental match contribution for certain low paid workers.<sup>63</sup>

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<sup>55</sup> See *id.* at 303-04 (a Roth IRA does not require lifetime distributions, which "undercuts the very notion that it is a retirement funding vehicle at all.").

<sup>56</sup> 26 U.S.C. § 408(d)(8)(E) denies a charitable deduction of any such amount if excluded from the income of the participant. See generally 26 U.S.C. § 408(d)(8) for this extraordinary loophole from the tax base.

<sup>57</sup> It is important to note that these changes could potentially advantage very wealthy people who have never earned wages or salaries and hence have low or even the minimum social security primary insurance benefit.

<sup>58</sup> Daniel Halperin, *Employer-Based Retirement Income – The Ideal, the Possible and the Reality*, 11 ELDER L. J. 37 (2003).

<sup>59</sup> See also Russell K. Osgood, *Qualified Pension and Profit-Sharing Plan Vesting: Revolution Not Reform*, 59 B.U. L. Rev. 452 (1978) (calling for full and immediate vesting for all private pension plan participants).

<sup>60</sup> Halperin, *supra* note 58, at 45.

<sup>61</sup> *Id.* at 67.

<sup>62</sup> MUPs ("Minimum Universal [Private] Pension") were proposed by the President Commission on Pension Policy in 1981 as a way to increase for all people retirement income by mandating universal private pension coverage. See WIEDENBECK & OSGOOD, *supra* note 28, at 84.

<sup>63</sup> In 1983 Congress added SEPs ("Simplified Employee Pensions" which are company-wide employee linked IRAs) in I.R.C. § 408(k) (2006). SEPs have not been widely adopted perhaps because of Congress' nearly simultaneous creation

This alternative would also create a vehicle (each IRA) that would be fully portable and that would permit contribution during periods of unstable, part-time employment or for several part-time employers, a trend that is occurring.

#### D. MANDATORY RETIREMENT AGE

To help employers deal with increased costs of some of this proposal, Congress should amend ADEA to permit an employer (including the government) to impose a mandatory retirement age of seventy. Many employers, particularly colleges and universities, struggle with the propensity of some faculty and other highly paid workers to stay on beyond seventy. Many of these people are capable of performing their jobs but some are not, and a majority has experienced some diminution of productivity.

Allowing a mandatory retirement age of seventy helps address the problem of the lack of skilled jobs for new entrants to the labor force. It also would remove, for electing employers, the cost and anguish of dealing with the weakening but not yet fully debilitated employee. Finally, allowing an employer to do this would not coerce them to do it (consistent with pre-ADEA law and practice).

The only significant objection to allowing a mandatory retirement age is that most people already retire at or before age seventy<sup>64</sup> and it is not clear whether this change will save employers much or do much for labor market flexibility. But, going back to the unreliability of statistical projections, we are only at the beginning of the changes (in employee behavior at age sixty-five) that might come as economic needs grow and the propensity to retire after sixty-five changes dramatically.

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and favoring (in many ways) of the even more flexible § 401(k) alternative. I.R.C. § 401(k). Most recently the Simplified Retirement Plan (SIMPLE plan) was added in 1996 and can be in the form of a SEP or a § 401(k) plan. *See* WIEDENBECK & OSGOOD, *supra* note 28, at 382–91.

<sup>64</sup> It is hard to establish this, but it can be shown by looking at the Bureau of Labor Statistics Data on Labor Force Participation at age 70 and beyond; for instance, labor force participation, while growing for those aged 70 to 74 is about 19%. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2013), *available at* <http://www.bls.gov/cps/cpsaat03.htm>.

Some will object to the notion that there is no human right to work beyond age seventy but the European Court of Justice has held that the Union's Human Rights Convention and related directives of the European Council validly permit mandatory retirement at age sixty-five and the Germans still permit it, but at age sixty-seven.<sup>65</sup> Reinstatement of the possibility of a mandatory retirement age would not prohibit anyone from working beyond age seventy but it would permit electing employers to end employment in those enterprises or entities at age seventy. If an employer thinks that is not justifiable then it does not have to elect to impose a mandatory retirement age. It would be important in crafting the repeal of the current ADEA rule to ensure that employers could be given flexibility to phase down on a non-discriminatory basis an employee's employment starting at age seventy (or perhaps a little sooner) as long as employment continues for a reasonably short period of time after age seventy, say, no more than a five-year phase down. This would also fit with the changes occurring in the structure of employment and not require employers to forfeit suddenly all of the accrued experience of employees attaining age seventy.

Finally, this change in mandatory retirement contributes to the creation of a coherent and sensible set of policies for employees, employers, and the government. Age seventy would be the target for retirement for all purposes. One possible addition to this proposal might be to impose an additional employer payroll tax of say one percent on the wages of any employee who works beyond age seventy. This tax would be collected and split between the Medicare and Social Security trust funds. Why impose it on the wages of those who work over age seventy? Because this reinforces the goal of retirement at seventy. Alternatively or perhaps additionally, employers who impose a mandatory retirement age of age seventy could be required to contribute an additional amount to a mandated private pension fund for all of its qualifying employees (a form of MUPs) for the privilege of mandatory retirement.

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<sup>65</sup> See Case C-388/07, *The Queen v. Sec'y of State*, 2009 E.C.R. I-01569, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0388:EN:HTML>; Case C-411/05, *Palacios de la Villa v. Cortifiel Servicios SA*, 2007 E.C.R. I-8531, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0411:EN:HTML>.

## E. LABOR MARKET AND STRUCTURE OF EMPLOYMENT

I have argued that the changes we are seeing in the structure of employment may well accelerate and certainly will continue. This should be watched closely for it would seem that the employment tax model, relying on taxes on wages and salaries for both Medicare and OASDI, may need to be reconsidered in light of these changes. Wages and salaries, the current wage base, presuppose conventional, industrial model employment, not piece work or independent employment based in the home. They were conceived in a world in which an employee had only one employer. The entire structure of the employment tax trust funds are derivative of the federal Fair Labor Standards Act (“FLSA”) which again is premised on an employee having only one employer. In a world in which people might work for a number of employers on a part-time basis, the FLSA rules about over-time, supervision, etc., are outmoded and may, in fact, encourage unrelated employers to use even more part-time workers.<sup>66</sup>

There has been a fair amount of anguish, by commentators<sup>67</sup> and the Labor Department<sup>68</sup>, about the move to episodic, multiple part-time employment. It certainly has a negative financial impact for many workers, but the old norm of sustained very long-term employment by a single large employer did not frequently produce long-term satisfaction on the part of workers. Very long-term employment can produce stagnation on the part

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<sup>66</sup> In recent years the Labor Department has fought valiantly to police the line between true “independent” contractors and part-time employees called independent contractors. See Susan N. Houseman, *A Report on Temporary Help, On-Call, Direct-Hire, Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States*, U.S. DEP’T OF LABOR (Aug. 1999), [http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/exec\\_s.htm](http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/exec_s.htm).

<sup>67</sup> See generally Julia J. Bartkowiak, *Trends Toward Part-Time Employment: Ethical Issues*, 12 J. BUS. ETHICS 811 (1993). ACA creates another Incentive to limit workers to “part-time” status (30 hours of work a week or less). This was one of the reasons that the Obama Administration recently deferred the implementation of the employer mandate for a full year. Avik Roy, *White House to Delay Obamacare’s Employer Mandate until 2015; Far-Reaching Implications for the Private Health Insurance Market*, FORBES (July 2, 2013, 6:21 PM), <http://www.forbes.com/sites/theapothecary/2013/07/02/white-house-to-delay-obamacare’s-employer-mandate-until-2015-far-reaching-implications-for-the-private-health-insurance-market/>.

<sup>68</sup> See *supra* note 62 and accompanying text.

of the employer and its cadre of employees. Of course, this was not always the case but economic changes beginning in the 1980s are not reversible and those changes require enterprises to be more nimble in hiring employees (and in making major capital investments) and require employees to be more aggressive in seeking out multiple, sometimes simultaneous work opportunities.

## V. SUMMATION AND FEASIBILITY

I have argued in this Essay that the problems with our retirement and health policies for the aging are so deep and the politics so heavy, that the only solution that might succeed is an omnibus solution devised in light of the long-term trends in employment, longevity, and the nature of employment or work. The proposals that I have made require contributions by employees in the form of more work and possibly diminished benefits *and* by employers of potentially additional years of healthcare premiums and retirement plan contributions all aimed at creating a retirement norm of age seventy. This is a reasonable proposal and one that will help both the OASDI and the Medicare trust funds.

A great uncertainty in the foregoing is the future of ACA. It certainly rests on a foundation of sand that the ocean of events is eroding. On the other hand, the changes in the structure of employment suggest that healthcare coverage needs to be decoupled from the model of the large employer providing employees (and their families) healthcare coverage. ACA is a move in that direction, but it may not survive after coming out of the regulatory incubator it was placed in when it was crafted legislatively. If it does not survive, however, the combination of the social sense of healthcare entitlement along with the changes in the structure of employment will dictate some way to provide additional, affordable health care coverage that eliminates exclusions based on age, pre-existing conditions, or employment status.

In sum, I propose that in light of major demographic changes, including increased labor force participation, increased longevity, and the absence of adequate retirement saving, we should gradually move primary social security retirement to age seventy, increase the age of Medicare entry also to age seventy, permit optional (with the employer) mandatory retirement at age seventy, and make a number of smaller changes designed to soften the effects of these changes. Workers now seem to wish (or feel the need) to work beyond age sixty-five and this additional period of work will improve the financial viability of the two trust funds. In the longer run additional retirement savings are needed either in the form of additional

non-social security employer retirement plan contributions *or* amounts in other tax-favored retirement vehicles external to the employment relationship. Finally, these changes do not address in a systematic way the developments in the structure and nature of employment. Perhaps the current range of tax favored structures, modified by moving to more portable and employee focused retirement savings accounts rather than qualified plans, can accommodate this change but that is not at all sure.