“Let Them Eat Cake”: Examining United States Retirement Savings Policy through the Lens of International Human Rights Principles

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ABSTRACT

This Article uses an international human rights framework to analyze and critique the effectiveness of the United States’ retirement system and its underlying policies. The Article challenges the ongoing pension reform debate to include considerations outside traditional economic theory, such as income inequality, the dignity of the elderly, and the irreducible mutuality of people. While a human rights analysis will not yield a precise policy prescription for the retirement savings crisis, it will serve as an additional framework within which the government’s economic and social policies regarding the treatment of the elderly can be evaluated, expanding the focus and range of responses. The Article provides an overview of human rights law and the concept of the welfare state as they apply to the elderly, as well as an analysis and critique of the current private retirement system through the lens of human rights law. The final portion of the Article sets forth four proposals for pension reform that reflect fundamental human rights considerations aimed at increasing retirement security across the income spectrum. These proposals are as follows: (1) minimum benefits under Social Security should be restructured to prevent individuals with significant work histories from living in or falling into poverty; (2) Social Security benefits should be adjusted using a price index that more accurately reflects the spending patterns of older persons in order to prevent a decline in purchasing power due to inflation; (3) the current wage cap on Social Security taxes should be eliminated to stymie the funding shortfall of the program and to generate new revenue to help pay for the increase in minimum benefits; and (4) to augment the private retirement system, a Universal Retirement Sav-

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ings Program with Minimum Guaranteed Benefits should be mandated to provide adequate retirement savings and protection against the risk of loss for all workers.

INTRODUCTION

The American tax system contains numerous provisions designed to encourage activities consistent with certain public policy concerns and to relieve various forms of personal hardship. Much of the debate surrounding tax policy relates to questions about the types of activities that governments should or should not support, the manner in which governmental support should be structured, the extent to which such support should be provided, and the effectiveness of tax-preferred programs. This Article considers these questions as they relate to the private retirement system, one of the nation’s largest tax expenditures, and also compares and contrasts the effectiveness of this program with Social Security, the nation’s public retirement system.

Historically, the private retirement system has been successful in providing retirement security to a cross section of American workers, many of whom could not have saved for retirement on their own. However, a confluence of economic, social, and demographic changes over the last three decades has impacted the private retirement system, rendering it unable to

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1. A course that I taught called Tax Policy and Human Rights, which analyzed the relationship between numerous tax expenditures and human rights, inspired the topic of this Article. The consideration of human rights for elders provided a uniquely interesting perspective because the classification of older people encompasses numerous categories for which human rights are promoted. Thus, in many ways, exploring the relationship between retirement policy and human rights for elders can be a touchstone issue for considering tax policy and human rights in general.


5. See Langbein et al., supra note 4.

6. In 1978, Congress passed the Revenue Act of 1978, which contained a provision that expressly allowed employees to avoid being taxed on the portion of income they elected to receive as deferred compensation rather than as direct pay. Since that time, the offering of such plans by employers has continuously increased. See Langbein et al., supra note 4, at 3–6 for an overview of the emergence of the private retirement system caused by increased life expectancy, demographic revolution, a settled retirement age, and the cultural shift toward the novel idea of retirement in general.
provide retirement security for millions of American workers, especially those who are low- and middle-income. This development has exacerbated existing social and economic inequalities in American society by widening the retirement income gap between higher and lower income workers. In addition, Social Security is experiencing a funding shortfall that threatens the program’s success in reducing elderly poverty. The combination has created a retirement savings crisis that poses a threat not only to the dignity of individual workers in their old age, but also to the financial security of families and communities. This crisis cannot be resolved simply by instructing individuals who have limited resources to save for retirement any more so than a famine can be eliminated by ordering individuals who have no bread to eat cake. The reality is that some workers have competing consumption needs that prevent them from being able to save in the private retirement system. Thus, as a matter of individual and social well-being,


10. See generally Ariel Min, Asking for help at 80 — America’s new faces of hunger, PBS: News Hour (May 22, 2015) (profiling how Naples’ local Jewish Family and Community Services’ senior center provides necessary additional help with buying and delivering food due to a lack of retirement funds), http://www.pbs.org/newshour/updates/senior-hunger-photo-essay/ [https://perma.cc/7WRC-9X9L].

11. Although often ascribed to Marie Antoinette, the famous phrase was never uttered by the infamous queen. Rather, in an effort to express his displeasure at his own lack of bread, Jean Jacques Rousseau attributed the phrase to a “thoughtless saying of a great princess.” Jean Jacques Rousseau, Confessions (1781–1788), reprinted in Familiar Quotations; see also Karen N. Barker, "Let Them Eat Cake": The Mythical Marie Antoinette and the French Revolution, 55 The Historian 709, 709 (1993).

significant pension reform is needed to ensure that all workers have sufficient resources in their old age for an adequate standard of living.

The Universal Declaration of Human Rights is the most significant source of human rights law. It provides that every living person has a right to an adequate standard of living. Other sources of human rights law require governments to generate the “maximum available resources” for the progressive realization of civil, political, economic, social, and cultural rights. Furthermore, the United Nations Principles for Older Persons specifically provides that “older people should have access to adequate food, clothing, shelter, and health care.” Thus, the retirement savings crisis has both economic and moral implications. It raises questions not only about the effectiveness of domestic retirement savings policy, but also about the willingness of the United States to promote and protect internationally recognized human rights for its elderly population.

This Article uses an international human rights framework to analyze and critique the effectiveness of the United States retirement system and its underlying policies. This Article contends that framing retirement policy in

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13. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948) (Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.) (hereinafter UDHR); Amy J. McMaster, Human rights at the Crossroads: When East Meets West, 29 Vt. L. Rev. 109, 119 (2004) (Perhaps the most important source of international human rights is the UDHR).

14. The term “maximum available resources” has been defined as the combination of five factors: (1) government expenditure; (2) government revenue; (3) development assistance (both official development assistance and private resource flows); (4) debt and deficit financing; and (5) monetary policy and financial regulation.” See Radhika Balakrishnan et al., Maximum Available Resources & Human Rights, Center for Women’s Global Leadership 5 (2011), http://www.cgwl.rutgers.edu/docman/economic-and-social-rights-publications/362-maximumavailableresources-pd/file [https://perma.cc/2UFG-7F78].


the context of international human rights challenges the ongoing pension reform debate to include considerations outside traditional economic theory regarding resource allocation. Furthermore, this Article argues that adopting a non-traditional approach to retirement savings policy that explicitly considers issues of economic inequality, the dignity of the elderly, and the irreducible mutuality of people could lead to a more equitable and effective distribution of retirement benefits in the United States. Finally, this Article also contends that human rights considerations could help policymakers to realize that reliance on a self-help approach to retirement savings by the United States, one of the richest countries in the world, without allowances for workers who have insufficient income to save, is incongruous. This Article does not claim that a human rights analysis will yield a precise policy prescription for the retirement savings crisis. Rather, this Article claims that a human rights analysis provides an additional framework within which the government’s economic and social policies regarding retirement should be evaluated and may also help to identify a more expansive range of responses to the ongoing pension reform debate.

Specifically, Part I provides an overview of the recent history of human rights law and the recognition of human rights for the elderly. Part II describes the concept of the social welfare state and the United States’ chief social welfare program, Social Security. Part III examines the interplay of the United States’ current private retirement savings system and tax expenditures. Part IV analyzes and critiques the current private retirement system through the lens of international human rights law and addresses the need for pension reform. Part V presents four proposals that reflect fundamental human rights considerations in providing greater retirement security across the income spectrum.

I. OVERVIEW OF INTERNATIONAL HUMAN RIGHTS LAW

A. The Origins and Scope of Human Rights Law

The genesis of human rights principles can be traced back to ancient religious writings—including the Torah, the Bible, and the Quran—all of which provide instruction on how individuals in society should treat one another. Contemporary human rights, however, adopts a more comprehensive approach and asserts the belief that everyone is entitled to certain rights simply by virtue of being human. This view emerged after World

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War II, when war crimes and atrocities led the international community to establish the United Nations as a means of ensuring that individuals never again be unjustly denied “life, liberty, freedom, food, or shelter.”

Since its founding in 1945, the United Nations has focused on promoting and protecting human rights. In 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR), which asserts that governments have an affirmative obligation to ensure and protect civil and political rights as well as social and economic ones. The UDHR, which functions as an international bill of rights, reflects the first authoritative step by the international community to collectively recognize and affirm universal principles of human rights. Thus, the purpose of human rights law is not to establish human rights, but rather to guarantee them.

There has always been a theoretical connection between political and economic rights in human rights law. In practice, however, the connection has not always been clear. Some UN members initially advocated for a division among classes of human rights, believing that combining them would undermine individual rights. As a result, the United Nations Commission on Human Rights, which was replaced by the UN Human Rights Coun-

20. See id. at 6 (paraphrasing President Franklin D. Roosevelt's 1941 State of the Union Address).
24. U.N. Charter, art. 13, ¶ 1 (noting the role of the General Assembly in “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights”); UDHR, supra note 13; see also, Julia Tavares de Alencar, Human Rights for Elders, in The Universal Declaration of Human Rights: Forty Years and Beyond 226 (Yael Danieli et al. eds., 1999). But see Moran, supra note 22, at 12 (noting that the Universal Declaration of Human Rights “clearly was not universal” because only forty-eight nation-states approved it while eight others abstained).
25. Moran, supra note 22, at 9–10 (stating that these guarantees protect individuals and groups against both national and international actions that interfere with fundamental freedoms, justice, and human dignity); see, e.g., Human Rights Educators' Network of Amnesty International USA, What Are Human Rights?, in AMERICA NEEDS HUMAN RIGHTS 164, 168 (Anuradha Mittal & Peter Rosset eds., 1999) (observing that principles of the UDHR have been incorporated in the constitutions of more than 185 nations).
cil,28 drafted and adopted two separate treaties as a means of enforcing the UDHR.29 These treaties were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).30 The prevailing view today, however, is that economic, social, and cultural rights are inextricably linked with civil and political ones.31 This perspective reflects the understanding that the exercise of civil and political rights hinges on the economic needs of individuals being met.32 In other words, it is difficult to believe the protection of civil and political rights can be fully meaningful if an individual lacks basic necessities such as food, shelter, or healthcare.33

Not only has the structure of human rights law changed over time, but so too has the role of government.34 Since the adoption of the UDHR, human rights law has evolved from focusing on standard setting and promotion to focusing on protection and prevention.35 Accordingly, there is


30. Id.; ICESCR, supra note 15.


34. See Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L.J. 507, 511 (1991) (noting that governments are now viewed as having responsibility of providing protections as well as some modicum of services, including income, housing, and health care). But see Tara J. Melish, Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty, 13 Yale Hum. Rts. & Dev. L. J. 1, 69 (2010) (“The federal government has increasingly devolved primary responsibility for both individual rights protection and social service provision back to state, local, and private capacities, deemed better suited and more responsive to the task.”). Melish goes on to argue that the federal government should expand the welfare state further. Id.

now a recognized duty for governments to respect and protect human rights as well as to promote and fulfill them.36

B. The Development of Human Rights Policies for Specific Groups

Although human rights extend to all people, the recognition of special rights has developed for certain groups because of the unique and persisting challenges of their circumstances.37 The elderly population is such a group.38 Throughout the world, older individuals continue to disproportionately face discrimination in employment and access to credit, abuse in the home, and violence in public arenas.39 These occurrences, which often go unreported, cause tremendous human suffering.40 As a result, a body of human rights law has emerged that explicitly focuses on the rights of the aged.41

The recognition of elder rights is a particularly important and timely issue in the United States as one of the largest demographic groups in its history,42 the Baby Boomers,43 reaches retirement age.44 Because of this de-


38. Part I. C., infra.


40. See World Health Organization, Elder Abuse Fact Sheet, http://www.who.int/mediacentre/factsheets/fs357/en/ [https://perma.cc/N6UQ-8TYG] (noting that “only 1 in 24 cases of elder abuse is reported”); see also Centers for Disease Control and Prevention, Understanding Elder Abuse Fact Sheet, https://www.cdc.gov/features/elderabuse/index.html [https://perma.cc/A8QS-KQAV] (noting that one out of every ten elder persons is abused, but that number is likely underestimated because of the lack of elder abuse reporting); see also Murphy, supra note 16, at 8–9 (explaining that elderly women, minorities, and LGBT person “undergo disproportionate challenges to enjoying their fundamental rights.”). For example, Murphy notes that elderly abuse in the home is rarely reported after the age of forty-nine due to the reliance by the abused elderly on her abuser. Id. at 10.


velopment, the laws, policies, and duties relating to the treatment of older individuals in American society should be reviewed more critically than ever before to ensure that they remain equitable and effective.

C. The Recognition of Human Rights Law for Elders

Although the United Nations Organizational Charter makes no reference to age, the UDHR states that every person has a right to an adequate standard of living “in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond . . . control.” Thus, this language, which sets a common standard of achievement for all people and nations, explicitly includes the elderly among populations that warrant special attention regarding their basic human rights.

In 1978 the United Nations formally recognized the issue of human rights for the elderly, when it funded the World Assembly on the Elderly. Subsequently, at its inaugural event in 1982, the Assembly adopted an International Plan of Action on Aging that asked member countries to review their laws and policies relating to the protection of rights for the elderly. Almost a decade later, in 1991, the United Nations Principles for Older Persons was adopted.

The Principles for Older Persons explicitly assert the rights of the elderly and encourage governments to incorporate in their social programs principles that promote independence, full participation, health care, self-fulfill-

44. J.Vera Cohn & Paul Taylor, Baby Boomers Approach 65 — Glumly, PENG RES. CTR. (Dec. 20, 2010), http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/ [https://perma.cc/Y3X8-6RXK] (“By 2030 all Baby Boomers will have turned 65, when 18% of the nation’s population will be at least that age.”).
45. UDHR, supra note 13, at art. 25 cl. 1 (emphasis added).
46. Id.; see also Alvarez, supra note 24, at 227.
48. Elaine S. Kunze, Social Security Systems Around the World: Do Cultural Priorities Affect Their Development?, 18 ELDER L.J. 99, 102 (2010) (noting that the Assembly called upon governments to “implement the plan in the ways they best see fit . . . [based on principles such as . . . the value of the contributions of the elderly to society, and the responsibility that government has to the elderly, the [Ageing] Plan set[ ] out recommendations for action.”).
49. U.N. Principles for Older Persons, supra note 16. Additionally, on December 21, 2010, by resolution 65/182, the General Assembly established “The Open Ended Working Group on Aging.” This Group considers possible gaps in the human rights of older persons, and seeks ways of addressing them. Since its establishment, the “Working Group” has held eight sessions; however, it has not released any major documents. See General Assembly Res. 65/182 U.N. Doc. A/66/173, ¶ 80 (Dec. 2010).
ment and the ability to live with dignity and security.50 This document states that the elderly should be afforded “adequate food, clothing, shelter, and health care” as well as “appropriate support services.”51 The Principles for Older Persons additionally require governments to create environments that value and appreciate the contributions of the elderly.52 All of these efforts are necessary in order to combat prevailing attitudes that too often marginalize the contributions of older persons, viewing them as burdens on society rather than valuable resources.53 These attitudes not only are incompatible with human rights principles, but also detract from a communal sense of responsibility for the well-being of the elderly.

The reality is that seniors as a group make significant contributions to society. For example, older individuals shop abundantly, pay taxes, and frequently use services that employ other people. Seniors also tend to give more generously than do other age groups to charities and provide substantial volunteer services to numerous organizations and non-profits.54 Consequently, protecting the economic and social rights of elders impacts all of society, as families, businesses, and the broader community lose valuable resources when workers have insufficient means in their old age to meet their financial needs.55 It is therefore important to encourage workers who can save for retirement to do so. For individuals who cannot afford to save on their own, additional assistance is necessary. As a matter of pension policy,

50. See generally U.N. Principles for Older Persons, supra note 16.
51. Id. The year 1999 was proclaimed the International Year of Older Persons, marking the tenth anniversary of the adoption the International Plan of Action on Aging by an international conference. See, e.g., Alvarez, supra note 24, at 227.
52. Alvarez, supra note 24, at 227.
53. Verena Menec, Why Seniors Matter – And How They Contribute to Our Everyday Lives, in CANADIAN HEALTH POLICY IN THE NEWS: WHY EVIDENCE MATTERS 54, 55 (Norah McRoberts et al. eds., 1st ed. 2012) (ebook) (“Stories abound in the media about how seniors are going to bankrupt the healthcare system or how the Canadian pension system will collapse under the burden of a growing senior population.”) (ebook); see also Sebastian J. Sanchez Rivera, Worldwide Ageing: Findings, Norms, and Aspirations, 79 Rev. Jur. U.P.R. 237, 260 (2010) (“[D]espite older persons past efforts and contributions to our societies, today many still are subject to exploitation and silently excluded from participating in productive roles in their societies.”); see generally The Americas and The Human Rights of Older Persons: Historical Overview and New Developments, 45 IUS GENTIUM 215, 220 (2015) (“[R]ecognizing the need to address matters of . . . ageing from a human rights perspective that recognizes the valuable . . . contributions of older persons to the common good, to cultural identity . . . to human, social, and economic development, and to the eradication of poverty.”) (quoting Draft Inter-American Convention on the Human Rights of Older Persons, Preamble).
54. See Menec, supra note 53, at 54-55; see, e.g., Vinay Bhagar, Pam Loeb & Mark Revner, The Next Generation of American Giving: The Charitable Habits of Generations Y, X, Baby Boomers, and Matures (March 2010), http://www.convio.com/files/next-gen-whitepaper.pdf [https://perma.cc/U3L3-EHNA] (noting that the elderly make up almost half of all charitable giving); see also Press Release, Corporation for National & Community Service, Senior Volunteering at a 10-Year High (May 6, 2013), https://www.prnewswire.com/news-releases/senior-volunteering-at-a-10-year-high-206296111.html [https://perma.cc/38CL-W9NW] (“The Corporation for National and Community Service found that the percentage of volunteers who are seniors has steadily increased over the last decade (up six points – from 25.1% in 2002 to 31.2% in 2011). Nearly three-quarters (72.4%) are volunteering informally by doing favors for and helping out their neighbors, seven points higher than the national average.”).
55. Families stand to lose because seniors provide services of intangible value, such as babysitting, raising children, providing emotional support, and educational tutoring. See Menec, supra note 53.
it is also important to protect money saved for retirement against risks, such as unexpected longevity, market volatility, and inflation, which all have the potential to erode value.56

II. HUMAN RIGHTS AND THE SOCIAL WELFARE STATE

A. The Concept of the Welfare State

Similar to human rights law, the welfare state concept rests upon principles of human dignity, community values, and the government’s responsibility to aid those who are unable to “avail themselves of the minimal provisions for a good life.”57 The welfare state recognizes the government as playing a key role in the protection and promotion of the economic and social well-being of its citizens.58 This role is necessary due to mistakes, losses, miscalculations, and catastrophes with which individuals often are incapable of coping alone.

The United States’ modern welfare state was influenced by President Franklin D. Roosevelt’s New Deal programs and his 1941 State of the Union address, in which he identified the four fundamental freedoms that he believed “everyone in the world ought to enjoy.”59 Those freedoms include freedom from want and freedom from fear.60 Some modern analysts contend that in discharging responsibility for individuals who cannot provide for themselves, the welfare state should incorporate theories of equal opportunity and equitable distribution of wealth.61 Accordingly, the welfare state currently has two separate and distinct functions.62 First, it redistributes income in order to reduce poverty and ine-

56. See discussion infra Parts VII. B–C.
59. President Franklin D. Roosevelt, Annual Address to Congress on the State of the Union: Four Freedoms Speech 20–21 (Jan. 6, 1941), (transcript available at http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/ [https://perma.cc/T9VM-XA7J]).
60. In addition to the freedoms from want and fear, President Roosevelt stated that the freedom of speech and expression and the freedom of worship were fundamental rights afforded to all. See Roosevelt, supra at 59.
61. See Bruce M. Price, Halting, Altering and Agreeing, 38 S.U. L. REV. 233, 258 (2011) (“Prior to the development of the welfare state, society did not have a rational expectation of the legal regulatory system preventing the free market operation by providing various safety nets against calamities which befall people, or to affect redistributions in the interests of fairness and social well-being’’); see also Jacob S. Hacker, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK (2006) (advocating for a welfare state with more redistribution and stronger economic protections for workers).
62. Prasad, supra note 58.
quality—ideally from rich to poor, healthy to unhealthy, and able to disabled.\textsuperscript{63} Second, it pools risks on a society-wide scale.\textsuperscript{64} As explained by social scientists, risk pooling improves society’s ability to operate more effectively by allowing it to disregard “the dictates of nature, fate or circumstance.”\textsuperscript{65} The Social Security program, described below, exemplifies how tax policy can achieve this function by pooling the resources of all workers to protect individuals against the risk of income loss resulting from old age, disability, unemployment, and widowhood.\textsuperscript{66}

B. Overview of the Social Security Program

The United States has a history of protecting and promoting human rights through social benefits.\textsuperscript{67} Since the passage of the New Deal in the 1930s, policymakers have promoted a human rights agenda, legislating numerous social programs that endorse the belief that government has an obligation to protect civil, cultural, economic, social and political rights.\textsuperscript{68} The most notable of these programs was the Social Security Act of 1935, which is the foundation of the United States welfare state.\textsuperscript{69} This Act holds that the government has a responsibility to protect the well-being of its citizens,

\textsuperscript{63} Id. Income redistribution can also occur from poor to rich. See Alice Gresham Bullock, The Tax Code, the Tax Gap, and Income Inequality: The Middle Class Squeeze, 53 How. L.J. 249, 256–266 (2010) (discussing income redistribution from the bottom up through certain tax code provisions).

\textsuperscript{64} Prasad, supra note 58, at 258.

\textsuperscript{65} See Peter Baldwin, Introduction to The Politics of Social Solidarity 2 (1990).

\textsuperscript{66} See discussion infra Part VI. Much like Rawls’s “original position” philosophy of justice, which suggests planners of society should operate as though they are behind a “veil of ignorance”—knowing nothing about individuals’ sex, race, nationality, or tastes—the proper function of the welfare state is to pool risks without regard to such information. See John Rawls, A Theory of Justice 12 (1971).

\textsuperscript{67} Richard B. Lillich, The United States Constitution and International Human Rights Law, 3 Harv. Hum. Rts. J. 53, 56 (1990) (arguing that American constitutional law, coming before the UDHR, has led to many of the international human rights that are now protected by the UDHR) (quoting Louis Henkin, “most of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world.”);

Louis Henkin, Rights: American and Human, 79 Colum. L. Rev. 405, 415 (1979); Franklin Delano Roosevelt, U.S. President, Radio Address on Unemployment and Social Welfare from Albany, New York (Oct. 13, 1932) (“[M]odern society, acting through its Government, owes the definite obligation to prevent the starvation or the dire want of any of its fellow men and women who try to maintain themselves but cannot. To these unfortunate citizens, aid must be extended by the Government — not as a matter of charity, but as a matter of social duty.”);


\textsuperscript{68} See Abramovitz, supra note 22. Though the United States was an early participant in the development of international human rights and did pass several pieces of legislation to protect its own citizens’ rights, it has failed to be a continuous force in international human rights. See Makau Mutua, Standard Setting in Human Rights: Critique and Prognosis, 29 Hum. Rts. Q. 547, 568 (2007) (detailing the United States’ reluctance to continue the development of international human rights).

\textsuperscript{69} See W. Andrew Achenbaum, From the Margins to Pacesetting: The Place of the Elderly in U.S. Legal History from a Historian’s Perspective, 7 Marq. Elder’s Advisor 93, 108 (2005) (“The 1935 Social Security Act became the centerpiece of the New Deal, and the foundation of the nation’s welfare state.”).
especially those in financial or social need, through grants, pensions, and other forms of benefits.\textsuperscript{70}

Congress established Social Security as a social welfare program\textsuperscript{71} with two primary objectives.\textsuperscript{72} The first objective was to provide a minimum standard of living to the elderly, the disabled, and their dependent survivors.\textsuperscript{73} This function reflects the humanitarian view that covered workers and their dependents should not be allowed to live in abject poverty, and that society has a responsibility to provide them with at least a subsistence standard of living.\textsuperscript{74} The program's second objective was to help moderate the decline in living standards when workers lose wages due to retirement, disability, or death.\textsuperscript{75} This focus is a direct response to the obligation under human rights law to affirm human dignity and protect basic economic and social rights when individuals are unable to provide for their own basic needs.\textsuperscript{76} By making the program mandatory, the government draws upon the earning power of the entire workforce to provide support for the retirement needs of the nation's elderly and disabled.\textsuperscript{77}

Social Security has been one of the most successful and popular social programs in U.S. history.\textsuperscript{78} The program has been particularly effective in reducing poverty among the elderly.\textsuperscript{79} Social Security retirement benefits initially were designed to be a safety net for the elderly, supplementing

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\textsuperscript{71} See Patricia P. Martin & David A. Weaver, Social Security: A Program and Policy History, 66 SOC. SEC. BULL., no. 1, 2005, at 3–6 (A social welfare program is “any of a variety of governmental programs designed to protect citizens from the economic risks and insecurities of life.”).


\textsuperscript{73} Wilbur J. Cohen, Social Security Objectives and Achievements, 18 SOC. SEC. BULL. 2, 2–3 (1955).

\textsuperscript{74} G.A. Res. 55/2, para. 11, United Nations Millennium Declaration (Sept. 6, 2000) (“We will spare no effort to free our fellow men, women and children from the abject and dehumanizing condition of extreme poverty, to which more than a billion of them are currently subjected.”).

\textsuperscript{75} Cohen, supra note 73.

\textsuperscript{76} See UDHR, supra note 13, at art. 22 (“Everyone, as a member of society, has the right to social security and the realization . . . of the economic, social, cultural rights”), see also What is the Human Right to Social Security?, NAT'L ECON. & SOC. RTS. INITIATIVE, https://www.nesri.org/programs/what-is-the-human-right-to-social-security [https://perma.cc/35AK-PBZT] (noting that Social Security and Human Rights both include similar principles: comprehensiveness, flexibility, and non-discrimination).

\textsuperscript{77} Langbein et al., supra note 4, at 21.


private savings, employer provided retirement benefits, and contributions from family members. As of 2015, however, 62 percent of retired households rely on Social Security benefits for more than half of their total income, with 34 percent of retired households having no other significant source of income. Accordingly, Social Security has become the foundation for retirement security in the United States.

C. Social Welfare and Human Rights Principles Promoted through the Social Security Program

Universal coverage makes the structure of the Social Security program more compatible with human rights principles than the structure of the private retirement system. In the United States, the private retirement system covers only 50 percent of workers, in contrast, as many as 97 percent of individuals aged 60 to 89 receive, or expect to receive, Social Security benefits. The objectives, structure, and distribution of the Social Security program are also more compatible with human rights principles than are those of the private retirement system.

The distribution of benefits in the Social Security program is progressive and therefore compatible with human rights principles. Benefits are based on a formula that provides higher replacement rates for low-wage workers.

[https://perma.cc/XTX4-S6AU] (noting that the Social Security program significantly reduced poverty among the elderly in the United States).

80. See Martin & Weaver, supra note 72, at 1–3.
82. See Rhee & Bovill, infra note 17, at 1–2 (“[Social Security] serves as the primary foundation of retirement income security for most Americans and provides a critical bulwark against old-age poverty.”).
83. See Human Rights Council, Preamble, supra note 28 (recognizing that universality is an important consideration in human rights issues).
86. See, infra, notes 203–06 and accompanying text.
For example, individuals who retire today at age 65 with earnings of 45 percent of the average wage will receive Social Security retirement benefits that equal approximately 52 percent of their pre-retirement earnings.\textsuperscript{89} In contrast, individuals who earn the maximum taxable wage of $128,400 will receive benefits that replace only 25 percent of their pre-retirement earnings.\textsuperscript{90}

Additionally, because Social Security benefits automatically receive cost of living adjustments, they keep pace with inflation.\textsuperscript{91} This form of protection ensures that workers do not fall into poverty as they age.\textsuperscript{92} As will be discussed in Parts IV and V, the private retirement system disproportionately benefits high-income workers and many plans fail to provide protection against benefit losses through inflation or other events.\textsuperscript{93} Therefore, as a matter of both retirement policy and human rights, it is important to analyze and critique the effectiveness of the private retirement system in an effort to provide greater retirement security.

III. THE PRIVATE RETIREMENT SYSTEM AND TAX EXPENDITURES IN THE UNITED STATES

A. Overview of the Private Retirement System

The private retirement system is voluntary, employment-based, and tax-preferred.\textsuperscript{94} Each of these characteristics plays an important role in the structure, function, and effectiveness of the program. The fact that the private system is voluntary makes it necessary for the government to provide incentives to encourage employers to establish and maintain qualified retirement plans.\textsuperscript{95} This creates tension between having stricter rules about participation and coverage rates on the one hand, and not deterring employers from offering and maintaining qualified retirement plans on the other.\textsuperscript{96}

Because the system is employment-based, the receipt of benefits from the private retirement system is uncertain. As a result, plan coverage often by-

\textsuperscript{89} See Actuarial Note Number 2017.9, supra note 88, at 5–6 tbl.B (showing career average earnings for various levels of income along side the career average earnings percentage an employee would expect to get back as a minimum replacement rate).

\textsuperscript{90} Id.

\textsuperscript{91} Social Security Administration, History of Automatic Cost-Of-Living Adjustments (COLA), https://www.ssa.gov/news/cola/ (https://perma.cc/3AJR-593Q) (stating that the cost of living adjustment is to ensure that Social Security benefits are not “eroded by inflation”).

\textsuperscript{92} Id.


\textsuperscript{94} Langbein et al., supra note 4, at 3–4.

\textsuperscript{95} Id. at 289 (noting that the term “qualified plan” isn’t explicitly mentioned in the Internal Revenue Code, but that it simply means a retirement plan that meets the requirements of either I.R.C. §§ 401(a) or 402(a)(2)).

\textsuperscript{96} Id.
passes a significant percentage of the labor force. The type of job that an individual selects can determine whether a private retirement plan is offered or not because there are notable differences in coverage rates from one industry to another.97 As many as 77.6 percent of workers in the public sector are covered by employer-sponsored plans, compared to only 35 percent of workers in the service industry. The aggregate coverage rate in the agricultural, mining, and construction industries is even lower, at 28.7 percent.98 Additionally, workers in the private retirement system who lose their jobs prior to becoming vested also lose their retirement benefits.99 Because low-income workers are more likely than higher-income workers to be employed in industries that do not offer retirement plans—and also have higher attrition rates—these variances and trends in employment practices significantly widen the retirement savings gap relative to income.100

The tax preferences for the private retirement system are necessary to incentivize employers to establish and maintain retirement programs; however, they raise serious concerns about the fairness of such programs. These tax incentives consist of deductions and deferrals.101 Contributions to qualified plans by employers are not taxed as income when they are made; they are taxed later when the employee retires and begins to take distributions. Moreover, the earnings on the contributions accumulate tax-free and are not taxed until distribution.102 The fact that deductions and tax deferral are more valuable to workers who have higher marginal tax rates contributes to lower coverage and participation rates among low- and middle-income workers in the private retirement system.103 This disparate impact is particularly apparent in the new 401(k) plan dominated landscape, where partici-

97. Id. at 23.
98. EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABASE ON EMPLOYEE BENEFITS ch.6, fig.6.3 (2014), http://www.ebri.org/pdf/publications/books/database/DB_Chapter62006.pdf [https://perma.cc/HZ36-CQND].
100. Low-income workers are also more likely to leave employment prior to becoming vested, which further impacts their retirement security. See Colin Gordon, The Perils of Private Welfare: Job-Based Benefits and American Inequality, in GROWING APART: A POLITICAL HISTORY OF AMERICAN INEQUALITY, Inequality.org (2014), http://scalar.usc.edu/works/growing-apart-a-political-history-of-american-inequality/job-insecurity-employment-based-benefits/path--differences-that-matter [https://perma.cc/HJT5-WB5T].
103. See discussion infra Part III.B.
pants choose both whether and to what extent they contribute to their employer sponsored plans.

B. Coverage and Participation in the Private Retirement System

When ERISA was established in 1974, approximately 50 percent of the private, nonagricultural workforce was covered by a private retirement plan. The coverage rate in the private retirement system has remained relatively constant since then, notwithstanding ongoing efforts to increase it. The overall percentage of workers whose employers offered a private retirement plan was 54 percent in 2012, and it reached an all-time high of 55 percent in 2013.

There are numerous reasons for workers not to be associated with an employer-sponsored plan. A worker may not work for an employer who offers a plan. Even when an employer does offer a plan, the employee may not fall within the category of employees the employer-plan is established to benefit. It is common practice for employers to differentiate plan offerings based upon categories, such as geographic location or whether employees are paid by the hour or by salary. There also is a strong correlation between earnings and coverage in the private retirement system. As many as 72 percent of workers who earn less than $15,000 do not have access to an employer sponsored plan; in contrast, only 22 percent of workers with compensation of $50,000 or more do not have such access. Thus, employees who are low-wage workers are unlikely to be covered by an employer-sponsored plan, and do not receive the benefits that such plans provide.

104. The Employee Retirement Income Security Act of 1974 (ERISA) is a federal tax and labor statute that sets minimum standards for pension and other benefit plans established by employers in the private sector. ERISA was enacted in an effort to protect interests of employers’ benefit plan participants and their beneficiaries. 29 U.S.C. § 1001 et seq. (1978); see generally DEPARTMENT OF LABOR, HISTORY OF EBSA AND ERISA, https://www.dol.gov/agencies/ebsa/about-ebsa/about-ius/history-of-ebsa-and-erisa [https://perma.cc/7WQ4-BLZG].

105. See Jefferson, Increasing Coverage, supra note 99.

106. See Brady & Bogdan, supra note 84.


108. Studies based on long-term analysis indicate that coverage rates have not been getting better over time, with access to employer-sponsored retirement plans actually decreasing since the 1980s. See Rhee & Boivie, supra note 17, at 3–5.


110. Langbein et al., supra note 4 at 27.

111. EBRI Databook, supra note 98, at fig.6.
A worker may also not be associated with a plan offered by the employer because the worker may not "participate" in the plan. The term "participate" refers to whether the worker actually benefits from the plan in a given year. Thus, a worker can be covered by a plan but not participate in it. This often occurs when a worker, although a member of the covered class of employees, has not satisfied the minimum age and service requirements imposed by the plan.

In 1974, rather than mandating universal coverage, the framers of ERISA chose to address the coverage problem by using non-discrimination rules that limit the employer's ability to exclude certain workers from their plans. The non-discrimination rules operate by comparing the coverage rates of highly compensated employees to those of non-highly compensated ones. Enforcement of the rules hinges on a quantifiable level of permitted disparity between the participation rates for the two groups.

C. Plan Types—Defined Benefit and Defined Contribution

In traditional defined benefit plans, assets are pooled in an aggregate trust, and the employer promises a fixed amount to plan participants, usually based on final pay and years of service. In such plans, participation is typically non-elective. The employer is required to fund the plan sufficiently to pay for the promised benefit and is liable for the payment of the benefit, regardless of the actual investment performance of the plan assets. Thus, the employer bears the funding responsibility as well as the investment risk in defined benefit plans.

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113. Id.


115. The Senate warned that universal coverage could lead employers to reduce benefits or stop offering new plans. See S. REP. No. 93–383, at 18–19 (1973).


120. Langer, supra note 4, at 40.

121. To protect defined benefit plan participants in the event that the employer becomes insolvent, the Pension Benefit Guaranty Corporation ("PBGC") insures a limited accrued benefit. See generally 29 U.S.C. §§ 1301–1311 (2012).
In contrast, in defined contribution plans, each participant is assigned an individual account, and the participant is not guaranteed a specific amount at retirement. The benefit payable at retirement is determined by the balance of the account, which reflects both employer and employee contributions, as well as the investment returns. Therefore, because there is no promised benefit in defined contribution plans, the participant, rather than the employer, bears the risk of poor investment performance.

Section 401(k) plans are a special type of defined contribution plan. In these plans, participants are required to elect to have portions of their compensation contributed to the retirement plan; thus, the term “participation” has a different meaning. Workers are considered to participate if they are eligible to make elective contributions, whether or not they choose to do so.

D. Coverage and Participation Rates

Federal pension policy has long aimed to expand pension coverage for non-highly compensated workers. The House Ways and Means Committee Report that accompanies the Revenue Act of 1942 refers to the function of the non-discrimination standards as preventing “the [pension] trust device from being used for the benefit of shareholders, officials, or highly paid employees.” In the Committee on Finance Report accompanying the Comprehensive Private Pension Security Act of 1973, one of the listed goals of the legislation was to “increase the number of individuals participating in retirement plans.”

The prevalence of 401(k) plans has exacerbated the disparity in participation rates between low- and high-income workers because in such plans contributions are elective. Although employers are permitted to make non-elective contributions to plan participants in 401(k) plans, most contri-
butions are made on behalf of those employees who elect to participate.\textsuperscript{130} Many low- and middle-income workers who have access to employer-sponsored plans do not choose to participate.\textsuperscript{131} As many as 54 percent of workers with earnings between $20,000 and $40,000 do not contribute to the 401(k) plans that their employers sponsor.\textsuperscript{132}

The most obvious reason for the disparity in participation rates is that low- and middle-income workers cannot afford to contribute.\textsuperscript{133} Another reason is that some low-income workers are covered by means-tested welfare programs. These programs can discourage participation by effectively imposing an implicit tax on all forms of savings.\textsuperscript{134} Lower participation rates among low- and middle-income workers also relate to the structure of the tax incentives, which favors high-income workers.\textsuperscript{135}

Not only are participation rates lower among non-highly compensated workers in 401(k) plans, but their contribution levels are lower as well.\textsuperscript{136} Total assets in defined contribution plans exceeded $7.0 trillion in 2016; however, relatively few of these assets were attributable to low- and middle-income households.\textsuperscript{137} Households in the top 20 percent of income owned


\textsuperscript{132} Aon Hewitt, supra note 131, at 12 (noting that not only is this percentage number high, it has been rising since 2012). Additionally, workers may be covered by a retirement plan, but may choose not to participate due to income constraints or other reasons.

\textsuperscript{133} See Jefferson, Increasing Coverage, supra note 99, at 475–78 (noting that workers may be have access to a retirement plan, but may choose not to participate due to income constraints or other reasons).


\textsuperscript{135} See id.; see also discussion supra Part IIIA and infra Part IV.A.


almost 68 percent of all retirement account assets, as compared to only 7.4 percent for households in the bottom 50 percent of income.  

Notwithstanding these disparities, section 401(k) plans are the fastest growing type of retirement plan in the private sector. The placement of investment risk on the employee is one of the primary reasons 401(k) plans are popular with employers. Another reason for their popularity is that there are fewer administrative costs and regulatory burdens placed on them than on traditional defined benefit plans. Thus, the prevalence of 401(k) plans in the private sector is a function of convenience and cost rather than retirement security. This raises questions about both the effectiveness of the private retirement system and the justification for its cost.

IV. THE USE OF TAX EXPENDITURES FOR THE PRIVATE RETIREMENT SYSTEM

In the Budget and Impoundment Control Act of 1974 ("Budget Act"), the term "tax expenditure" is defined as "revenue losses attributable to provisions of the federal tax law" that allow preferential tax treatment. Therefore, the determination of whether a provision is considered a "tax expenditure" depends on whether it is consistent with generally accepted measurements of net income. Tax expenditures are measured in terms of

138. See Miller et al., supra note 107, at 3-4.

139. Avoiding fiduciary liability is another reason that 401(k) plans are popular, as evidenced by the existence of 404(c) plans, which shift the risk of investment returns to the plan's participants. See Langbein et al., supra note 4, at 47.


141. See Scott Tong, Father of Modern 401(k) Says It Fails Many Americans, Marketplace Consumed (June 13, 2013), http://www.marketplace.org/topics/sustainability/consumed/father-modern-401k-says-it-fails-many-americans [https://perma.cc/W3AH-ALP6] (noting that Ted Benna, the father of the 401(k), stated that the reason for the creation of the 401(k) came when employers asked "how can I get the biggest tax break and give the least to my employees, legally?") This explains why 401(k) plans initially were used as supplemental plan that provided additional benefits beyond traditional plans for high-ranking executives. See Elizabeth O'Brien, 10 Things 401(k) Plans Won't Tell You, MarketWatch (Feb. 23, 2013), http://www.marketwatch.com/story/10-things-401k-plans-wont-tell-you-2012-11-09 [https://perma.cc/U4TP-CA5M]; see also Shlomo Benartzi, Save More Tomorrow: Practical Behavioral Finance Solutions to Improve 401(k) Plans 2 (2012).


forgone revenue.\textsuperscript{144} The exact cost is determined by calculating the difference between the existing tax liability and what the tax liability would have been in the absence of a particular provision, assuming that all other tax expenditures remain constant.\textsuperscript{145}

There are numerous costs and complexities that occur when tax expenditures, rather than direct expenditures, are used to accomplish social spending.\textsuperscript{146} For example, tax expenditures add administrative burdens to the Internal Revenue Service,\textsuperscript{147} and they do not always receive sufficient scrutiny and oversight.\textsuperscript{148} To the extent that these and other externalities are unaccounted for, the true costs of tax expenditures are understated.\textsuperscript{149}

In theory, most tax expenditures are universal in their application and are not limited to specific sectors of the population.\textsuperscript{150} In reality, however, this is not the case. One of the biggest criticisms of the use of tax expenditures for social spending is that they disproportionately benefit high-income tax-
payers. In 2015, approximately 27.5 percent of the benefits of tax expenditure programs went to 1 percent of the wealthiest taxpayers, as compared to less than 5 percent to taxpayers in the lowest quintile of income. This result occurs primarily because incentives in the form of exclusions, deductions, and tax deferrals are more valuable to taxpayers with higher marginal tax rates, due to the progressive rate structure of the federal income tax. Additionally, the types of activities that are encouraged and the extent to which certain preferences are available often favor high-income taxpayers, who have more disposable income. For these reasons, the use of tax expenditures for social spending raises serious questions about the equity and effectiveness of the programs they support. As increasing numbers of American workers face the prospect of having insufficient resources for an “adequate standard of living” in their old age, these concerns are especially relevant to the private retirement system, which at $178 billion for fiscal year 2016, is one of the nation’s largest tax expenditures.


153. See Dorothy A. Brown, Shades of the American Dream, 87 WASH. U. L. REV. 329, 341 (2009) (noting that tax deductions are less valuable for low-income workers); see also ERIC M. ZOLT, DETERRENCE VIA TAXATION: A CRITICAL ANALYSIS OF TAx PENALTY PROVISIONS, 37 UCLa L. REV. 343, 358 n. 73 (1989) (“Professor Surrey contended that tax expenditures benefit high-income taxpayers more than low-income taxpayers because they provide greater dollar benefits as a taxpayer’s marginal tax rate rises.”); see also Griffith, supra note 144, at 353 n.63 (“Under a progressive rate structure a deduction or exclusion of a given amount has a greater dollar value to the rich than to the poor because the rich are subject to higher marginal rates.”).

154. See A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS, supra note 3, at 52 (“[T]ax expenditures formulated as deductions will generally reduce the progressivity of the tax system, by reducing average tax rates more for higher marginal rate taxpayers than for lower marginal rate taxpayers”); see also CHUCK MARR & BRIAN HIGHSMITH, REFORMING TAX EXPENDITURES CAN REDUCE DEFICITS WHILE MAKING THE TAX CODE MORE EFFICIENT AND EQUITABLE: RECENT PROPOSALS UNDERSCORE BIPARTISAN SUPPORT FOR REFORM, CTR. ON BUDGET & POL’Y PRIORITIES 5 (2011), https://www.cbp.org/sites/default/files/atoms/files/4-15-11tax.pdf [https://perma.cc/EF38-EAJD] (“The wealthiest households [get] receive the largest tax subsidies [through expenditures], while the benefits to middle-class families are considerably smaller and many of the most vulnerable families are left out entirely. This structure generally reduces both the efficiency and the fairness of these tax incentives.” Id. at 4).

V. HUMAN RIGHTS AND UNITED STATES RETIREMENT SAVINGS POLICY

A. Human Rights Analysis of the Existing Private Retirement System

Under human rights law, governments have a moral obligation to generate the maximum available resources for the “progressive realization of economic, social, and cultural rights” of their citizens. Tax policy can play a fundamental role in the redistribution of national resources to address economic inequalities; consequently, it is not uncommon for governments to use tax expenditures to further human rights objectives.

In an effort to assess the effectiveness of various tax programs and policies used throughout the world for this purpose, the U.N. Special Rapporteur on Extreme Poverty submitted a questionnaire to member states to help evaluate the impact of fiscal and tax policies on human rights. Based on the questionnaire, the Special Rapporteur created a report, the Human Rights Impact of Fiscal and Tax Policy, to identify trends in policies, highlight human rights concerns, and supply member states with recommendations.

The report included responses to the following three survey questions: (1) is your government’s tax policy compatible with the obligation to use maximum available resources to realize economic and social rights?, (2) is your government’s tax structure regressive or progressive?, and (3) are there special mechanisms in place to protect marginalized and vulnerable groups with respect to the “design, implementation, and monitoring of tax provisions and policies in accordance with principles of transparency, non-discrimination, and accountability?” Although the questions were written

156. See infra Part I.
158. MARPLES, supra note 151, at 2 (noting that a common goal of tax expenditures is “altering the distribution of fiscal benefits and burdens”); see also IMF, Fiscal Policy and Income Inequality, IMF Policy Paper, 1 (2014) (“Fiscal policy is the primary tool for governments to affect income distribution.”).
159. See RADHIKA BALAKRISHNAN ET. AL., supra note 14, at 6–9 (2011).
162. See QUESTIONNAIRE ON THE HUMAN RIGHTS IMPACT OF FISCAL AND TAX POLICY, supra note 160. “1. Is your government’s tax policy compatible with the obligation to use maximum available resources to realize economic and social rights? If not, why? Do obstacles of a national or international nature impinge on your government’s ability to mobilize the maximum available resources through taxation?”; “2. In general, would you say that the tax regime is regressive or progressive? Why?” Please provide examples (for instance: proportions of wealth, income, and consumption taxes in total revenue;
to elicit responses regarding the relationship of human rights principles to broad fiscal and tax policies, applying the questions more narrowly to the United States private retirement system is useful for evaluating the program's impact on the human rights of the elderly.

1. Maximizing Available Resources to Realize Economic and Social Rights

The United States' private retirement system does not appear to fully maximize available resources in order to realize economic and social rights for all citizens. There are two primary reasons for this. One is that the program is voluntary. Voluntariness leads to lower coverage rates for low- and middle-income taxpayers and greater benefits for taxpayers with higher marginal tax rates.163

The second reason comes from the reallocation of risk associated with the shift from using defined benefit plans to defined contribution plans as primary retirement savings vehicles.164 In defined benefit plans, the Pension Benefit Guaranty Corporation (PBGC), a federal agency, insures a limited benefit in the event that an employer becomes insolvent and is unable to pay the promised benefits.165 Therefore, in defined benefit plans, the government is secondarily liable for the payment of retirement benefits. Participants in such plans bear the risk of loss only to the extent that their vested accrued benefits exceed the insured limit, which is a situation that
rarely occurs. In 401(k) plans and other defined contribution plans, there is no federal protection against plan losses. Thus, the failure to provide some form of guaranteed benefit in 401(k) plans reallocates the risks associated with retirement savings from the government to the participant. This shift does not maximize resources for the advancement of economic and social rights, as it places greater risks on individual workers who are less likely than the government to be in a position to protect themselves.

2. Regressive or Progressive Structure

The United States’ private retirement system cannot accurately be described as progressive. All taxpayers, including the least wealthy, subsidize the preferential tax treatment of the private retirement system by paying higher taxes on the portions of their incomes that do not receive special tax treatment. However, as explained above, the private retirement system provides relatively few benefits to low- and middle-income workers. When tax subsidies are skewed in favor of high-income taxpayers, they are referred to as “upside-down-subsidies.” This is because they have the perverse economic effect of giving more to individuals with more and less

166. This is because relatively few plan participants have vested accrued benefits in excess of the insurable limit. Further protection is offered in the form of generally built-in cost-of-living-adjustments (COLAs) in defined benefit plans; whereas, defined contribution plans do not offer such protection against inflation. See Robert Kleine & Mitch Bean, A Cost Benefit Comparison of Defined Benefit and Defined Contribution Retirement Plans, COAL. FOR SECURE RETIREM. 17 (2014).

167. Marcks & Kalamarides, supra note 165, at 5 (“DC plan participants bear the risks of investment losses and outliving their assets.”).

168. For an in-depth discussion on insurance protection in defined contribution plans, see Jefferson, Rethinking Risk, supra note 102, at 640–71. Even if a worker elects to save in 401(k) plans but losses occur due to a sudden market downturn, there is no available protection. See Frans Pennings & Paul M. Secunda, Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experience, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 385 (2015) (“Although the United States has pension insurance for defined benefit plans that become financially distressed under the scheme set up by the federal PBGC, there is no protection for private-sector defined contribution plans (like 401(k) plans)” (emphasis added).

169. The United States’ government has created federal tax laws that allow favorable tax treatment for private sector employers to sponsor pension and retirement savings plans, and for employees to participate in those plans. These tax incentives are paid for in the form of tax expenditures, which cost the government and taxpayers roughly $177.9 billion as of 2016. Even though the government’s attempt was to encourage retirement savings, “[defined contribution] participants with high incomes and other assets benefited the most.” See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-18-111SP, The Nation’s Retirement System: A Comprehensive Re-evaluation Is Needed 52, 84–86 (2017).

170. See Norman Stein, Stochastics Towards A Consumption Tax and the End of Retirement Income Security, 9 FLA. TAX REV. 119, 126–27 (2008) (“[T]he [private retirement] system is both over-inclusive in that it provides benefits for those who would save for their own retirement without tax incentives, and under-inclusive because it fails to provide meaningful benefits to many low- and middle-income workers.”), see also Marples, supra note 151.

171. David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 YALE L.J. 955, 977 (2004) (explaining that because the value of deductions rises with marginal tax rates, lower-income taxpayers receive less than higher-income taxpayers, which results in the lower-income taxpayers subsidizing for the wealthiest to receive deductions).
to individuals with less. Accordingly, the private retirement system currently redistributes income from those without coverage to those with coverage, which generally results in redistribution from low-income workers to higher-income ones. Thus, it is difficult to conclude that the private retirement system’s redistributive function is progressive.

3. Transparency, Accountability, and Non-Discrimination

One of the primary criticisms of tax expenditures is that they are more esoteric and opaque than direct payments. Therefore, as a tax expenditure, the private retirement system cannot be considered transparent in either its design or its operation. This assessment also affects the degree to which the program has accountability. Unlike direct payment programs, which are visible to the public, programs supported by tax expenditures are less apparent because they are buried in the tax law. As a result, these programs are more immunized from public debate and scrutiny than are direct expenditure programs.

The private retirement system also fails at being non-discriminatory. Although employer sponsored plans are subject to non-discrimination rules, there is a level of permitted disparity that allows qualified plans to disproportionately benefit highly compensated workers. The safe harbor tests

172. See A Reconsideration of Tax Expenditure Analysis, supra note 3, at 49; see also Wendy A. Bach, Poor Support / Rich Support: (Re)viewing the American Social Welfare State, 20 Fl. Tax Rev. 495, 520 (2017) (“Because [tax expenditures] tend to benefit the wealthy far more than the poor, the overall effect of social spending on income inequality is far less significant than [other] OECD countries.”).

173. See Bach, Poor Support / Rich Support, supra note 172, at 517 (explaining that “social insurance goes to nearly all with distribution being overall progressive, distributing more to those on the lower end of the income spectrum. In contrast, tax expenditures flow primarily to those in the top quintiles of the economic distribution.”). This effect is directly at odds with human rights goals. See ICESCR, supra note 15 (stating that states need to “progressively [view] the full realization of rights recognized in the present Covenant”).

174. See Langbein et al., supra note 4, at 300; cf. Michele Gilman, A Court for The One Percent: How The Supreme Court Contributes to Economic Inequality, 2014 Utah L. Rev. 389, 450 pt. III.B. (2014) (expressing the need for a more progressive tax code to combat economic inequality).

175. See Stanley S. Surrey & Paul R. McDaniell, Tax Expenditures 70, 93 (1985) (explaining that the presence of tax expenditures makes the tax system more complex and harder to comprehend, and that if tax expenditures were converted to direct programs, it would reduce the complexity of the tax law).


177. See generally GAO-94-122, supra note 144 (“GAO recommends that the tax-writing committees . . . exercise more scrutiny over indirect ‘spending’ through tax expenditures.”).

178. See discussion supra Part IV.B.

179. The non-discrimination rules for 401(k) plans are complex and costly, as they require extensive record keeping; thus employers lobbied for the safe harbor rules that automatically satisfy the non-discrimination test. See Langbein et al., supra note 4, at 453. A qualified plan must meet not only the participation and non-discrimination standards under section 410(b)(1), but also either satisfy the designed-based safe harbor test under section 401(k)(12) or meet one of the “actual deferral percentage” (ADP) tests. 26 C.F.R § 1.401(k)-2 (2015). These tests compare contribution rates of the highly com-
for non-discrimination in 401(k) plans, which significantly lessen the employer's administrative burdens, allow even greater discrimination in favor of highly-compensated employees.\textsuperscript{180} This occurs because as long as the employer meets the safe harbor minimum contribution or match for every non-highly compensated participant, highly compensated employees are free to contribute up to the limit.\textsuperscript{181} Although the non-discrimination rules are not per se inconsistent with desirable pension policy, they do raise questions about whether the degree of permitted disparity is justifiable. In summary, based on the three survey questions discussed above, human rights principles seem to have little impact on the United States' private retirement system and its underlying structure.

B. Human Rights and Elderly Poverty in the United States

It is estimated that over 4 million seniors in the United States currently live under the poverty line,\textsuperscript{182} while millions more live just above the federal poverty level.\textsuperscript{183} These numbers represent as much as 45 percent of the senior population.\textsuperscript{184} Based on existing trends and patterns in the private retirement system, increasing numbers of American workers will be forced to live in poverty in their old age.\textsuperscript{185} Poverty has been described in human

\textsuperscript{180} For further discussion on safe harbor rules see YOUR GUIDE TO SAFE HARBOR 401(k) PLANS (2016), VANGUARD, https://institutional.vanguard.com/iam/pdf/SMSAFE.pdf [https://perma.cc/Q2T4-5NDU].

\textsuperscript{181} LANGBEIN ET AL., supra note 4, at 453.

\textsuperscript{182} The poverty line is equivalent to the poverty threshold, which is the statistical process of gathering data to determine the number of people who are in poverty. It is typically used to set financial eligibility criteria for federal programs. It is updated each year by the U.S. Census Bureau. See U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, FREQUENTLY ASKED QUESTIONS RELATED TO THE POVERTY GUIDELINES AND POVERTY, https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty [https://perma.cc/SJ9N-DYF2].


\textsuperscript{184} See JULIETTE CUBANSKI, GISELLE CASILLAS & ANTHONY DAMICO, POVERTY AMONG SENIORS: AN UPDATED ANALYSIS OF NATIONAL AND STATE LEVEL POVERTY RATES UNDER THE OFFICIAL AND SUPPLEMENTAL POVERTY MEASURES 4 (June 2015), http://files.kff.org/attachment/issue-brief-poverty-among-seniors-an-updated-analysis-of-national-and-state-level-poverty-rates-under-the-official-and-supplemental-poverty-measures [https://perma.cc/SX2P-UP77] (claiming that as of 2013, under the Supplemental Poverty Measure, those 65 and older had incomes below twice the poverty level at a rate of 45 percent, compared to only 33 percent under the official measure).

\textsuperscript{185} See generally MILLER ET AL., supra note 107 (reporting that as of 2013, "approximately one out of every five near-retirement households" had no savings or pension).
rights literature in the area of retirement savings crisis, elderly poverty, and human rights are all closely connected.

The fact that millions of Americans will have insufficient retirement savings in their old age is a problem of national importance that warrants government intervention. One commentator predicted that unless major changes in retirement savings patterns occur, the new normal for many elderly Americans will be captured by the slogan, "[t]oo frail to work, too poor to retire." 188

Disturbingly, the number of older Americans living in poverty is on the rise. 189 From 2005 to 2009, poverty rates for individuals ages 65 to 74 rose by nearly 2 percent. 190 During this same period there was an even steeper increase of 3.1 percent for individuals ages 75 to 84. 191 The number of seniors who fall into poverty in their later years is also on the rise. In 2009, as many as 6 percent of individuals above age 85 were new entrants into poverty, up from 4.6 percent in 2005. 192

As alarming at these percentages are, when health care costs are factored in, the rate of elderly poverty significantly increases. 193 This is because medical expenses for individuals between the ages of 55 and 64 are nearly twice the amount spent by individuals between the ages of 35 and 44. 194

187. Id. at ¶¶ 7–8.
189. Mary Helen McNeal, Say What? The Affordable Care Act, Medicare, And Hearing Aids, 53 HARV. J. ON LEGIS. 621, 639 (2016) (“Many experts project that poverty rates among seniors will continue to rise in the foreseeable future, with one source anticipating a 180% increase in the number of seniors living in poverty by the year 2050.”).
191. Id.
192. Id. This result is due partly to the fact that inflation erodes the value of retirement benefits over time. See GAO-18-111SP, supra note 169, at 61–62.
193. McNeal, supra note 189, at 659 (highlighting the fact that medical costs account for 15 percent of total Medicare household budgets compared to non-Medicare households); see also Christian Weller, Medicating the Elderly Into Poverty?, ECON. POLICY INST.: ECON. SNAPSHOT (July 16, 2003), http://www.cpi.org/publication/webfeatures_snapsshots_archive_07092003 [https://perma.cc/WNM2-QH62].
194. See Professor Mary Helen McNeal, Affordable and Accessible Hearing Health for Seniors, NAEJA J., Fall 2017, 97, 107 n.78 (noting that medical costs have outpaced GDP between 1.1 and 3 percent over the past 5 decades); see also Weller, supra, note 193; see also Kathryn Campbell, Granny Dealing Drugs On the Government’s Dime: Why Medicare and Medicaid Should Have Safeguards in Place to Prevent Abuse, 24 ELDER L.J. 401, 407 n.42 (2017) (noting a Fidelity report “estimat[ing] that a sixty-five-year
an analysis conducted by the Kaiser Family Foundation that adjusted for increased health care costs—by deducting out-of-pocket medical expenses from income according to the Supplemental Poverty Measure (SPM)—the elderly poverty rate in the U.S. increased from 10 percent to 15 percent. For elderly at 200 percent below the poverty threshold, the rate increased by 12 percent, from 33 percent to 45 percent.195 Advocates for the SPM argue that it is a better way of measuring poverty because it provides a more accurate accounting of income necessary for basic needs.196 Increased health care costs have also been identified as the primary reason for a significant increase in bankruptcy filings among seniors.197

Elderly poverty is not gender neutral.198 As of 2015, over 10 percent of women lived at or below the poverty line as compared to only 7 percent of men.199 Women ages 75 and older are approximately three times more likely to live in poverty than are men of the same age.200 This is true for several reasons. Women are less likely to have worked in jobs that have employer-sponsored retirement plans; women are more likely to have had lower earnings due to wage discrimination; and women also are more likely to have had absences from the labor market, due to childbirth and other

old couple retiring in that year required $245,000 to cover medical expenses through retirement, more than a fifty percent increase from the estimate in 2002.”) (emphasis added). See Alexandra Cawthorne, Elderly Poverty: The Challenge Before Us, CTR. FOR AM. PROGRESS (2008), http://cdn.americanprogress.org/wp-content/uploads/issues/2008/07/pdf/elderly_poverty.pdf [https://perma.cc/5QVB-ZAXM] (explaining that energy costs also disproportionately impact the elderly).

195. CUBANSKI, ET. AL., supra note 184, at 3–4. For another example, a study conducted by the National Academy of Science that adjusted for increased health care costs, found that the elderly poverty rate in New York City increased 14 percent, from 18 to 32 percent. See Cawthorne, supra note 194, at 1.

196. Id.


199. PROCTOR ET AL., supra note 183, at 15 fig.6. Over 1.2 million men over the age of 65 live under the poverty line, and over 2.5 million women over the age of 65 live under the poverty line. See id.

200. 1.3 million women over the age of 75 live under the poverty line, as compared to 535,000 men over the age of 75. See POVERTY STATUS IN THE PAST 12 MONTHS, supra note 183.
family health reasons. Additionally, women have longer life expectancies, which make it more likely that either inflation will erode women's retirement income or they will outlive their assets during retirement.

Race is another factor that impacts poverty rates among the elderly, with African Americans and Hispanics more likely to experience poverty in old age than whites. While 12 percent of whites over age 65 live in poverty, 22 percent of blacks and 21 percent of Hispanics over age 65 do. This can be explained by the fact that elderly people of color are less likely than whites to receive private retirement benefits and to have investment income. Therefore, elderly poverty disproportionately affects numerous groups which international human rights have traditionally supported, including women and people of color.

VI. PROPOSALS TO INCREASE RETIREMENT SECURITY WITH A HUMAN RIGHTS FOCUS

A. Need for Pension Reform

Because the impact of poverty is especially devastating in old age when it is often no longer possible to work, social and economic policies should play a central role in helping workers to save adequate amounts for a dignified life in old age. This need is particularly compelling for those who cannot afford to save on their own. Therefore, efforts should be made to reform the existing retirement system to provide greater retirement security for workers in their old age, to correct structural inequalities in the private retirement system, and to meet internationally recognized human rights


202. In 2013, the average life expectancy for a female in the United States was 81.3 years, while the average life expectancy for a male in the United States was 76.5. See Life Expectancy at Birth, OECD Data (2018), https://data.oecd.org/healthstat/life-expectancy-at-birth.htm (https://perma.cc/QCN9-6RAT).


204. See Cubanski, et. al., supra note 184, at 5–6. But see Proctor et al., note 183, at 13 tbl.3 (illustrating that the poverty rate for Asians was actually lower than for Whites at 11.4 percent for 2015).

205. Cubanski, et. al., supra note 184, at 5–6.


207. See Murphy, supra note 16, at 8 (explaining that older persons face both the “accumulated effects” of discrimination experienced throughout their lives “and the additional discrimination of old age” and that older women, older minorities and older LGBT persons face “disproportionate challenges to enjoying their fundamental rights”).

208. See also discussion infra Part IV.B.
obligations for the elderly. The failure of policymakers to work towards achieving these goals speaks volumes about the United States’ moral standing and its commitment to fundamental human rights principles.

Retirement security involves two critical components. One relates to adequacy and involves determining how much an individual needs to save, often referred to as the “replacement rate.” As a general rule, the optimal goal is to at least save the amount necessary to sustain pre-retirement living standards. The other component of retirement security is far more complicated. It relates to the methods used to achieve the targeted amount and the available mechanisms for protecting saved amounts against losses prior to retirement.

While factors like life expectancy, health, inflation, market volatility, and employer solvency clearly play a large role, there is tremendous uncertainty about the accumulation and protection of adequate retirement savings. Consequently, some level of governmental oversight and assistance is appropriate and necessary, as the government is more capable than most individuals of providing protection against these types of uncertain events. Moreover, because of economies of scale and risk pooling, it is more efficient for the government and employers to provide various forms

209. The U.S. is currently failing to do so. See Org. For Econ. Co-Operation And Dev., Poverty Rate (2017), https://data.oecd.org/inequality/poverty-rate.htm (demonstrating that the U.S. currently has the sixth highest elderly poverty rate amongst 34 OECD countries).


212. The optimum replacement rate varies from individual to individual, and depends on factors, such as health, pre-retirement income, and geography. In most cases, except for the very poor, this amount should ensure sufficient savings to provide basic necessities in old age. See generally id.

213. National Research Council, Ageing and the Macroeconomy: Long-term Implications of an Older Population 129 (2012) (suggesting guaranteed annuities, if public policy were to incentivize their being more transparent and better understood, would be an attractive mode for the elderly to employ in order to protect their retirement savings).

214. Id. at 134, 145 (2012). Concerns about employer insolvency are relevant in the Defined Contribution aspect with plans that invest in employer securities such as stock bonus plans and employee stock ownership plans (ESOPs).
of assistance in an effort to achieve greater retirement security.\textsuperscript{215} Presently, the private retirement system is not required to provide participants in 401(k) plans any assistance in accumulating or protecting their retirement savings.\textsuperscript{216}

In contrast, Social Security provides workers protection against all forms of risk associated with retirement savings. Moreover, it also has universal characteristics that achieve a more equitable distribution of benefits.\textsuperscript{217} Accordingly, key human rights principles, universality and progressivity, are fundamental to the structure of the Social Security program.\textsuperscript{218} Additionally, the Social Security program has lower fees and expenses than the private retirement system, which positively impacts the rate of investment return in the plan.\textsuperscript{219} Plan fees and expenses are important considerations for retirement security because they negatively impact the rate of investment return in a plan.\textsuperscript{220}

\textsuperscript{215} The government or employer is better at protecting themselves against risk, because they can spread the financial risks evenly among contributors to the employer-sponsored retirement account, a risk management tactic called risk pooling. See Leslie McClintock, \textit{What Is Risk Pooling in Insurance?}, ZACKS, http://finance.zacks.com/risk-pooling-insurance-1890.html [https://perma.cc/Z82D-3JM4]. Economies of scale occur in microeconomics when output can be increased with a decrease in input costs. This applies to retirement accounts because fees and premiums become smaller as the number of employees grows, allowing the company to pool the risk among the employees.

\textsuperscript{216} Michael Lind et al., \textit{Expanded Social Security: A Plan To Increase Retirement Security for All Americans}, NEW AM. FOUND. 5–8 (2013), http://www.demos.org/sites/default/files/publications/LindHiltonsmithFreedman_ExpandedSocialSecurity_04_03_13.pdf [https://perma.cc/G8HU-EAUW] (providing an overview of the various risks regarding the private retirement system that has "shifted the risks and costs onto employees and have failed to provide sufficient support for retirees.").

\textsuperscript{217} See Kathryn L. Moore, \textit{The Future of Social Security: Principles to Guide Reform}, 41 JOHN MARSHALL L. REV. 1061, 1065 n.26 (2008) ("Indeed, the coverage under the current system exceeds [President Roosevelt's original goal] because it covers the self-employed as well as the wages of the highly paid.").


\textsuperscript{219} The issue of reasonable fees and expenses related to 401(k) plans has drawn great attention by regulators, litigators, and the media in recent times. See Patrick Coughlin, \textit{Is Everyone Paying Their Fair Share Of 401(K) Fees?}, XEROX BLOGS (Sept. 3, 2015), http://hrinsights.blogs.xerox.com/2015/09/03/is-everyone-paying-their-share-of-401k-fees/#.VgskAXBSDLKA; John Wasik, \textit{Five Reasons Why Social Security Retirement Program Needs To Live Long and Prosper}, FORBES (Aug. 14, 2013), http://www.forbes.com/sites/johnwasik/2013/08/14/five-reasons-why-social-security-retirement-program-needs-to-live-long-and-prosper. In fiscal year 2012, the OASI had administrative fees of 0.5 percent. \textit{id.} During the same period, annual fees for the average stock mutual fund, often used by retirement accounts, were 0.77 percent. See Karen Hub, \textit{The Top 50 Annuities}, BARRON'S (June 23, 2014), http://www.barrons.com/articles/barrons-top-50-annuities-1403333975?esrc=y [https://perma.cc/6FJ6-7EMT] (noting that average variable annuity fees range from 1.5 percent to 3.5 percent); see also 2015 INVESTMENT COMPANY FACTBOOK, supra note 137, at 95, fig.5.3.

For these reasons, expanding and strengthening the Social Security program is the most equitable, effective, and efficient way of providing low- and middle-income workers greater financial security during old age, both from a pension policy and human rights perspective. However, to ensure adequate levels of retirement income for all workers across the income spectrum, a mandatory, universal retirement savings component that offers some protection against losses should be added to the private retirement system. The remaining portions of this Article contain proposals to accomplish both of these goals.

B. Structure of the Existing Social Security Program

Social Security benefits are funded by a mandatory, flat-rate, payroll tax on all wages.\(^\text{221}\) This tax is set by statute and is paid by employers and employees in equal amounts.\(^\text{222}\) The tax rate is currently 6.2 percent.\(^\text{223}\) The Old Age Survivors Insurance (OASI) portion of the Social Security program limits the amount of wages subject to the payroll tax to amounts less than or equal to the "contribution and benefit base," which changes periodically according to the national average wage index.\(^\text{224}\) Thus, the contributions for a worker with wages greater than or equal to the 2017 wage base of $127,200 consists of an annual payment of $7,886.40 by both the employee and the employer, totaling $15,772.80.\(^\text{225}\)

The Social Security program provides a guaranteed benefit.\(^\text{226}\) This guarantee means that workers are assured of having some means of procuring basic needs and services in old age, regardless of the investment performance of the funds or the timing of their retirement. Additionally, because the normal form of payment in the Social Security program is a life annuity, Social Security effectively provides a guaranteed rate of return throughout

\[\text{www.aon.com/attachments/thought-leadership/ben_quarterly_Q4_2010_401k.pdf} \quad \text{[https://perma.cc/XND8-WAGH]}\]


\(\text{222. I.R.C. §§ 3101, 3111.}\)


\(\text{224. Contribution and Benefit Base, supra note 223.}\)

\(\text{225. For Medicare’s Hospital Insurance (HI), the taxable maximum was the same as that of OASI from 1966–1990. However, separate HI taxable maximums of $129,000, $130,200, and $135,000 were applicable in 1991–93. After 1993, the wage limit was removed for HI. The tax rates under the HI program are 1.45 percent for employees and employers, each, and 2.9 percent for self-employed persons. Contribution and Benefit Base, supra note 223.}\)

\(\text{226. See Alison M. Shelton, Congressional Research Service, R41518, Social Security: The Minimum Benefit Provision 1 (2012) ("The goal of the Special Minimum PIA is to provide a minimum benefit for those who work in covered employment for many years but at low earnings."). Cf. Human Rights Council, supra note 28 (recognizing that universality is an important consideration in human rights issues).}\)
retirement. This feature protects workers from the risk of outliving their assets, a form of protection increasingly difficult to find in the private retirement system, which now offers fewer defined benefit plans.

Social Security old age benefits are especially important for minorities, who generally have less opportunity to save in employer provided plans. Among individuals age 65 and older, Social Security represents 90 percent or more of income for 41.1 percent of Asians, 45.2 percent of African Americans, and 52.2 percent of Hispanics, as compared to 31.7 percent of whites. Social Security benefits are also particularly important to women because, as explained above, they typically receive smaller employer provided retirement benefits, have lower wages, and spend more time out of the paid workforce. Furthermore, the fact that women live longer than men makes Social Security’s inflation protection a valuable feature for female workers.

Although Social Security is an important source of retirement income—and for many the only source—the program’s benefits are relatively modest by international standards. As of May 2017, the average Social Security retired worker’s benefit was nearly $1,368 per month, or approximately $16,400 per year. Represented as a percentage of median earnings, the replacement rate of the United States Social Security program ranks 31 among a list of 34 developed countries’ public retirement systems. Social Security benefits in the United States average only 41 percent of the earnings of a middle-income worker, as compared to about 90 percent in the

227. A general “annuity is a series of specified income payments, payable over a specified period”; whereas “[a] promise to pay benefits for the remainder of the lifetime of the covered participant is called a life annuity.” See Annuities, Benefits Guide § 4:180 (2017).


231. See Higewisch, et al., supra note 201; see also accompanying text.

232. See Top Ten Facts About Social Security, supra note 85, at 8–9. Further, women benefit from the progressive benefit calculation formula because they have lower earnings, as well as the spousal and survivor’s benefits. Id.


Netherlands, and to an overall average of 57.9 percent for all OECD countries.\textsuperscript{236}

While the Social Security program has remained fundamentally the same since its inception in 1935, it has undergone numerous non-structural changes and adjustments over time. One such change was the introduction of a minimum benefit in 1972, referred to as the “Special Minimum Primary Insurance Amount” or the “Special Minimum PIA.”\textsuperscript{237} The Special Minimum PIA is an alternative benefit that increases payments to workers who have low earnings.\textsuperscript{238} Unlike the benefit formula for the standard Social Security benefit, the benefit formula for the Special Minimum PIA is based on the number of years worked rather than on average lifetime earnings.\textsuperscript{239} In other words, the Special Minimum PIA is designed to restrict payment to workers “who work in covered employment for many years but at low earnings,”\textsuperscript{240} without providing windfalls for workers with only a few years of covered employment.\textsuperscript{241} Therefore, workers with low lifetime average earnings resulting from sporadic attachments to the workforce are ineligible; whereas, workers with extended work histories of low wages are eligible.\textsuperscript{242}

Eligibility for the current Special Minimum PIA requires workers to have over 10 years of Social Security-covered employment.\textsuperscript{243} The Special Minimum PIA is payable only when it is higher than the benefit calculated under the standard Social Security benefit formula.\textsuperscript{244} Under the present design, very few workers receive the Special Minimum PIA and even fewer are likely to receive it in the future.\textsuperscript{245} As of December 2001, approximately 134,000 workers, including dependents and survivors, were entitled to receive the Special Minimum PIA.\textsuperscript{246} Of that population, only 79,000 had a higher benefit under the Special Minimum PIA calculation than under the regular benefit calculation.\textsuperscript{247} The remaining 55,000 individuals were con-

\textsuperscript{236} See \textit{id}. Lower average benefits in the United States are also attributable to the fact that there is a higher retirement age and lower benefits for workers who retire early. \textit{id}.
\textsuperscript{238} Id. at 16.
\textsuperscript{240} See Shelton, \textit{supra} note 226, at 1.
\textsuperscript{242} Id. at 1, 5.
\textsuperscript{244} Olsen & Hoffmeyer, \textit{supra} note 241, at 1.
\textsuperscript{245} See Shelton, \textit{supra} note 226, at 12 (noting that the number of beneficiaries of the Special Minimum PIA has steadily decreased since 2000).
\textsuperscript{246} Olsen & Hoffmeyer, \textit{supra} note 241, at 8.
\textsuperscript{247} Id.
sidered “dually entitled,” meaning they were also eligible to receive other types of Social Security benefits that were higher in amount.248

Under its current design, the Special Minimum PIA has begun effectively to phase-out for workers reaching age 62 by 2017 or later.249 This is because the Special Minimum PIA is indexed to price inflation,250 whereas regular Social Security benefits are indexed to average wage increases.251 Wage increases historically have grown faster than price inflation.252 Therefore, due to the cumulative effect of indexing, by the end of 2017 most beneficiaries will have larger benefits under the regular benefit than under the Special Minimum PIA calculation.253

As discussed above, a significant percentage of the elderly population relies on Social Security as the primary source of retirement income.254 Because the Special Minimum PIA is so low, it does not prevent its recipients from living in or falling into poverty, even when individuals have significant work histories.255 The greatest amount that can currently be received as a Special Minimum PIA benefit is 90 percent of the poverty level.256 When the Special Minimum PIA was established in 1972, the maximum payment was 96 percent of the poverty level.257 This difference represents an 11 percent decline in the real value of the minimum benefit.258 Low-wage workers who retired between 1982 and 2000 with 30 years of earnings received annual benefits that ranged from 3.9 to 20.0 percent below

248. Id. at 2–3; see also Shelton, supra note 226, at 1, 4.
249. See Shelton, supra note 226, at 12.
250. Meyerson, supra note 239, at 3 (noting that the Special Minimum PIA is indexed to price inflation as compared to Social Security benefits, which are indexed to wage inflation).
251. See Olsen & Hoffmeyer, supra note 241, at 2.
253. Shelton, supra note 226, at Summary.
254. See Income of the Population 55 or Older, supra note 230, at 287 tbl.9.A1 (noting that Social Security makes up the majority of income for 61 percent of the elderly, 90 percent of income for 33 percent of the elderly, and 100 percent of income for nearly 20 percent of the elderly).
the poverty level.\textsuperscript{259} Low-wage workers with 40 years of earnings received annual benefits ranging from 3.9 percent to 15.3 percent below the poverty level.\textsuperscript{260} These results are incompatible with the objectives of both the Social Security program in general and the Special Minimum PIA in particular—namely, to provide economic security to American workers.\textsuperscript{261}

Social Security benefits in the United States should be upwardly adjusted to ensure that they provide amounts sufficient to prevent workers with significant work histories from living in poverty in old age. This Article proposes methods of expanding and restructuring Social Security to achieve this goal. The key elements of each proposal are discussed below.

\section*{C. Redesigning the Social Security Minimum Benefit}

To ensure that the Special Minimum PIA remains effective, the benefit should be redesigned. There are two variables involved in this process. One deals with the benefit level; the other focuses on the coverage requirement.\textsuperscript{262}

The level of benefit should be increased to 125 percent of the poverty level. Thereafter, the benefit should be indexed for inflation using the price index for older persons discussed below, which more accurately reflects the consumption patterns of the elderly population.\textsuperscript{263} Under the proposed approach, the Special Minimum PIA benefit for 2017 for individuals with 30 years of covered earnings would increase to 1.25 times $12,060, the poverty threshold, or $15,075 per year, and thereafter would be indexed for inflation.\textsuperscript{264} Presently, the 2017 maximum Special Minimum PIA for a worker with 30 years of covered earnings is $10,176.\textsuperscript{265}

Consistent with the existing structure of the Special Minimum PIA, the new minimum benefit should continue to target workers who have significant work histories. Thus, in order to prevent windfalls for workers with sporadic work histories, the coverage requirement should be retained for the

\textsuperscript{259} \textit{Id.} at 11.

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} The purpose of the Social Security Act was to “provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons.” See \textit{H.R. Rep. No. 74-615, at 1 (1935), https://www.ssa.gov/history/pdf/Downeyst%20PDFs/Social%20Security%20Act%20of%201935%20Vol%201.pdf [https://perma.cc/V4AQ-TYJH].}

\textsuperscript{262} \textit{See Shelton, supra note 226, at 15–16.}

\textsuperscript{263} \textit{See discussion infra Part V.B.} Alternatively, as a means of maintaining a constant ratio to average living standards, as recommended by some proposals, the Minimum Benefit should be linked to wage inflation rather than to price inflation. \textit{See generally Shelton, supra note 226, at 16; see generally President’s Commission to Strengthen Social Security, Strengthening Social Security and Creating Personal Wealth for All Americans (2001), http://govinfo.library.uchicago.edu/cssr/reports/Final_report.pdf [https://perma.cc/9VF4-YAV4].}

\textsuperscript{264} Annual Update of the HHS Poverty Guidelines, \textit{supra note 182, at 8832.} The multiplication was done by author.

\textsuperscript{265} \textit{Special Minimum Benefits} (2018), \textit{supra note 256.}
increased minimum benefit.266 The minimum benefit would be expressed as 125 percent of the poverty threshold for workers with 30 years of covered earnings.267 Workers with fewer than 30 years but more than 10 would receive a prorated benefit.268

Redesigning the Special Minimum PIA to provide higher benefits in this manner would ensure that no elderly person with a long-term attachment to the workforce lived in poverty.269 Furthermore, raising the Social Security minimum benefit in this manner is equitable and appropriate because it targets populations that disproportionately comprise the elderly poor.270 This result can be seen in the case of many older, single women who under the current structure do not qualify for the Social Security survivors' benefit for widows because they either never married or divorced before becoming entitled to such benefits.271 This population should be taken into consideration in reform efforts because, as discussed above, women are disproportionately represented among the elderly population living in poverty.272

Additionally, individuals with histories of low earnings are more likely to suffer from poor health, leading to premature deaths.273 Therefore, higher minimum benefits for low-earning workers allows this population to receive a greater portion of the benefits to which they are entitled in their lifetimes. In other words, increasing the Special Minimum PIA would partially offset the reduction in benefits that low-income workers receive under the current structure, due to shorter life spans. Moreover, because poor workers are less likely to have other sources of income during retirement, increased minimum benefits would help to address rising economic inequalities among the elderly population.274 Equally important, however, is ensuring that all workers have adequate resources to live above the poverty level in their old age. This recognizes the contributions and value of the elderly to society, protects their right to live in dignity, and affirms the

266. Shelton, supra note 226, at 16–18.
267. Id. at 19–20.
268. Id.
269. Id. at 14 ("[R]estructuring the Social Security minimum could be more effective in alleviating poverty” and “a way to reward long-term, low-wage work”).
270. Id. at 14 (explaining that research shows restricting the Minimum Benefit is an effective way of reducing poverty).
271. Id. at 15 (2012) (noting that a person does not qualify for spousal benefits if they have never been married or if they divorced before they were married for 10 years).
272. See supra notes 99–104 and accompanying text. See also Shelton, supra note 226, at 14; supra note 200 and accompanying text.
273. Steven H. Woolf et al., How are Income and Wealth Linked to Health and Longevity?, Urban Inst. 1 (Apr. 2015) ("Studies show that Americans at all income levels are less healthy than those with incomes higher than their own.").
274. There are also racial dimensions in these considerations because African-Americans have shorter life expectancies than do whites. See Teresa Ghilarducci, Senior Class: America's Unequal Retirement, 26 Am. Prospect no.1, at 46, 49 (2015).
government’s obligation to support and protect human rights in the United States.275

D. Proposal to Restructure the Inflation Index

Social Security retirement benefits are paid as life annuities that guarantee monthly payments for the life of the worker.276 These benefits are automatically adjusted in order to prevent a decline in purchasing power due to inflation.277 Currently, this adjustment is based on changes in the Consumer Price Index (CPI), the benchmark measure of inflation produced by the Bureau of Labor Statistics.278 Some policymakers and other commentators maintain that the CPI does not accurately estimate the change in the cost of living for seniors because it fails to take into account the different spending patterns of the elderly.279 Accordingly, these critics argue that Social Security benefits should be adjusted using a price index that more accurately reflects the spending patterns of older Americans, which would produce higher benefits.280

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277. See Cost of Living Adjustment, supra note 88.


The Bureau of Labor Statistics began calculating an age-based index in the early 1980s. This special index, called the Experimental Price Index for the Elderly (CPI-E), is based on the spending patterns of Americans age 62 and over. The study associated with the CPI-E showed that older Americans experience a higher overall inflation rate compared to the official CPI population. This result is primarily due to increased health care expenses. During the experimental period, medical care prices rose more than twice as much as the average rate for all other items considered. Experts have determined that if the CPI-E had been adopted in 1984, retirement benefits in 2001 would have been almost 4 percent higher, or approximately $408 more per year, per worker.

The CPI-E, or another similar index, should be used to adjust all Social Security old age benefits in order to more effectively counteract the impact of inflation. Without such a correction, the purchasing power of the retirement benefits will erode over time and those who rely on Social Security as their principle lifeline will inevitably slip into poverty.

Although numerous legislative bills have been introduced calling for the use of the CPI-E, the experimental index has never been used to adjust Social Security benefits. Critics of the use of the CPI-E have expressed concern that it is not reliable enough to use for adjusting Social Security benefits and could produce undesirable outcomes. Therefore, to ensure

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281. Hobijn & Lagakos, supra note 278, at 1.
282. Id.
283. Stewart, supra note 280, (“From December 1982 to December 2007, the experimental CPI-E rose 126.5 percent, compared with increases . . . just 110.0 percent for the [current] CPI.”).
285. Stewart, supra note 280, at 20 (“[O]lder Americans devote a substantially larger share of their total budgets to medical care.”). Also reflected are higher home heating costs and food consumption at home, amongst other increased costs seniors experience. See SOCIAL SECURITY ADMINISTRATION, CONSUMER PRICE INDEX FOR THE ELDERLY 313, 314, https://www.ssa.gov/history/pdf/80chap15.pdf [https://perma.cc/QLS4-TCM].
286. Hobijn & Lagakos, supra note 278, at 2 (“[W]e estimate that . . . the average benefit in 2001 would have been 3.84 percent higher.”).
288. NOAH MEYERSON, CONGRESSIONAL BUDGET OFFICE, USING A DIFFERENT MEASURE OF INFLATION FOR INDEXING FEDERAL PROGRAMS AND THE TAX CODE 7 (2013) (stating that the CPI-E over-
that its use does not adversely impact workers, annual adjustments could be
determined by using the greater of the regular CPI or the CPI-E for a given
year.

E. Proposal to Restructure Tax by Removing the Wage Cap

The Social Security program is presently experiencing a significant fund-
ing shortfall, primarily because of changing demographics. The number
of workers age 65 and over compared to the number of workers between
the ages of 20 and 64 has dramatically changed since the inception of the
Social Security program. This relationship, referred to as the “worker to
beneficiary ratio,” was 16.5 to 1 during the 1950s; today it is only 2.8 to 1.
Although the ratio was expected to change gradually as death rates
decreased, a sudden spike occurred after 2010 when the Baby Boomer
population began to reach retirement age. At that point, there was a rapid
decline in the number of current workers paying employment taxes relative
to the number of retirees in payment status. This trend can be expected to
continue over the next 20 years as the Baby Boomer population continues
to move from working age to retirement age. Moreover, the combination of

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289. See discussion infra, at notes 6–12 and accompanying text. The windfall in benefits the first
generation of Social Security recipients received contributes to the shortfall the U.S. currently is experi-
encing. See, e.g., SPECIAL COMM. ON AGING U.S. SENATE, SOCIAL SECURITY MODERNIZATION: OPTIONS
TO ADDRESS SOLVENCY AND BENEFIT ADEQUACY, S. REP. 111–187, 30 (2010) (“In initial years of
Social Security, retirees received benefits that far exceeded the value of [their] contributions . . . [which]
created a deficit . . . or “legacy cost” . . . estimated [at] roughly $13 trillion.”) (alteration to original).

[https://perma.cc/7DSQ-JGYK] (noting that the CPI-E “was intended to provide a more accurate mea-
sure of inflation for seniors, [but] has several methodological flaws that overstate inflation, including
underestimating the rate of improvement in healthcare.”).

291. See also C. Eugene Steuerle & John M. Bakija, Retooling Social Security for the 21st Century, 60 SOC. SEC.
BULL., No. 2 40–42 (1997); Alicia H. Munnell, The Problem with Social Security Lies in Its History, WASH.
problem-with-social-security-lies-in-its-history/?utm_term=.5a455c73d0a4 [https://perma.cc/WUS9-A3KU];
see also Tami Luhby, Social Security: Many Pay More in Taxes Than They’ll Get Back, CNN

(2017) (“Social Security’s projected long-range funding shortfall is attributed primarily to demographic
factors”); see also Jacob S. Hacker, Restoring Retirement Security: The Market Crisis, the “Great Risk Shift,”
and the Challenge for Our Nation, 19 ELDER L.J. 1, 6–10 (2011) (arguing that while the erosion of
retirement savings security rests on policy changes, it is “rooted in deep demographic and economic
trends.” Id. at 4).

293. The relationship is also referred to as the “aged dependency.” Social Security Testimony Before
Congress: Stephen C. Goss, Chief Actuary, Soc. Sec. Admin., Testimony Before the Subcomm. on Social Sec.,
Pensions, and Family Pol’y of the S. Comm. on Fin. 113th Cong. (May 21, 2014), http://www.ssa.gov/legisla-
tion/testimony_052114.html [https://perma.cc/THH3-NJDX].

AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 13, tbl.IV.B3 (Jul.

295. Goss, supra note 291.
longer life expectancies and lower birth rates will likely exacerbate the funding deficit in upcoming years.294

The funding shortfall is unsustainable. Official projections show that if payments and benefits are held constant, in approximately 25 years the system will no longer be able to pay expected benefits in full.295 In response to the funding deficiency, the Social Security program has undergone numerous reforms, including adjustments to the basic benefit formula, increased eligibility ages, and higher payroll taxes.296 Notwithstanding these adjustments, a significant shortfall still exists, and questions about the program’s long-term viability persist.297

In order to strengthen the financial position of the Social Security program and infuse additional funding into the system to help pay for the proposed benefit increases discussed above, the payroll cap on wages subject to the Social Security payroll tax should be eliminated. The cap is indexed for inflation, and typically increases every year.298 Presently, the payroll tax covers approximately 87.3 percent of total earnings.299 Eliminating the cap would subject 100 percent of earnings to the payroll tax. Estimates show that the new revenue generated by removing the cap would be sufficient to eliminate as much as 89 percent of the funding deficiency.300 A part of the new revenue also could be used to fund some portion of the proposed benefit increases.301

Furthermore, eliminating the wage cap would result in a more progressive payroll tax structure than the existing one.302 Currently, a worker with

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294. Id.
296. See Martin & Weaver, supra note 72, at 8–10.
300. See Wayne Liu, Congressional Research Service, RL32896, Social Security: Raising or Eliminating the Taxable Earning Base 14 tbl.3 (2017) ("If all earnings [above the wage cap] were subject to the payroll tax . . . the Social Security Trust Funds would remain solvent for the next 60 years.") (alteration to original).
301. Determining the exact portion to be allocated to fund the increases is beyond the scope of this paper.
302. While the benefits of the Social Security program are thought to be progressive, as discussed above, the tax structure is regressive because lower average rates apply as wages increase. See supra notes 169-174 and accompanying text. It has been argued that the regressive effect of the tax is offset by the progressive effect of the benefit. See, e.g., Scott Greenberg, Options for Broadening the U.S. Tax Base, Tax Found. (Nov. 24, 2015), https://taxfoundation.org/options-broadening-us-tax-base [https://perma.cc/L3NV-Y7US] ("The cap on the Social Security payroll tax treats one class of income (earnings over [$127,200]) more favorably than other income, thus deviating from an ideal consumption base. So,
earnings in excess of the wage cap pays a lower average tax rate than a worker with lower wages. For example, in 2017, an individual with wages of $127,200 would pay an average payroll tax rate of 6.2 percent; an individual with wages of $254,400 would pay an average rate of 3.1 percent.\textsuperscript{303} Although removing the cap would significantly increase revenue, the change would affect a relatively low number of workers. Only 6 percent of U.S. workers earn wages in excess of the current cap.\textsuperscript{304} Removing the cap would mean that all workers would pay the same rate of taxes on total wages. In exchange for the additional payment, there could be a proportionate increase in the benefits of high-wage workers.\textsuperscript{305}

The above-described proposals to expand and restructure Social Security are offered in order to ensure that low-wage workers are not forced to live in poverty in their old age. These adjustments alone, however, are not sufficient to provide adequate income replacement for most workers. In order to ensure retirement security for workers across the income spectrum, a mandatory, universal program that provides some level of protection against plan losses should be established in conjunction with these proposals.

F. Proposal of a Universal Retirement Savings Program with Minimum Guaranteed Benefits

Traditional defined benefit plan coverage has declined in recent years and 401(k) plans now dominate new plan offerings.\textsuperscript{306} As discussed above, the use of 401(k) plans as primary retirement savings has not increased the


\textsuperscript{304} SOCIAL SECURITY ADMINISTRATION, OFFICE OF RETIREMENT POLICY, POPULATION PROFILES (Mar. 2015), https://www.ssa.gov/retirementpolicy/fact-sheets/tax-max-earners.pdf [https://perma.cc/Y4V1-5UEN].

\textsuperscript{305} See Romig, supra note 302, at 1 (stating that the increase depends on how policymakers choose to treat the newly taxed earnings).

\textsuperscript{306} TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, Ref. No. 2010-00-097, STATISTICAL TRENDS IN RETIREMENT PLANS, at 7 (2010), http://www.treasury.gov/tgta/auditreports/2010reports/2010010097fr.pdf [https://perma.cc/9XAS-HR7F] (stating that from 1977–2007, active participants in defined benefit plans dropped from 28.1 million to 19.4 million, and active participants in defined contribution plans rose from 14.6 million to 66.9 million). But see ALICIA H. MUNNELL, JEAN-PIERRE AUBRY & CAROLINE V. CRAWFORD, HOW HAS SHIFT TO DEFINED CONTRIBUTION PLANS AFFECTED SAVINGS? CTR. FOR RETIREMENT RES., No.15–16 (Sept. 2015) (arguing that the change from defined benefit plans to defined contribution plans has not affected the retirement security or accumulation of retirement benefits of the population).
overall coverage rate in the private retirement system, while it has allocated all of the funding burdens and risks to the worker.\textsuperscript{307} Furthermore, the optional contribution feature of these plans has proven problematic for low- and middle-income workers, whose retirement savings are grossly inadequate.\textsuperscript{308} Thus, it is critically important to explore ways of ensuring that all workers, especially those who are low and middle-income, have sources of retirement income other than Social Security on which to rely in old age, when they are no longer able to work.\textsuperscript{309} In order to accomplish this goal, the remainder of this Article proposes a new level of retirement savings that combines a mandatory, universal retirement system with a defined contribution insurance program that provides minimum guaranteed retirement benefits.

The proposed Universal Retirement Savings Program with Minimum Guaranteed Benefits is an individual account program that mandates coverage and participation for all workers to the extent of wages, up to a given limit.\textsuperscript{310} The limit would be based on an existing threshold, such as the definition of a “highly compensated employee,” as defined in section 414(h), which currently is set at $120,000.\textsuperscript{311} The proposed accounts would be jointly funded by the employer and the employee, each of whom would provide a contribution of 3 percent of wages up to a specified limit.\textsuperscript{312} The Mandatory Universal Pension System (MUPS) that was recommended in 1981 by the President’s Commission on Pension Policy had a similar objective, and required a 3 percent contribu-

\textsuperscript{307} See supra Part III.

\textsuperscript{308} See Jefferson, Increasing Coverage, supra note 99, at 475–78 (noting that a 2008 study showed that half of workers earning between $20,000–$40,000 saved less than $5,000 yearly); see also Allison Christians, Fair Taxation as a Basic Human Right 4 (Univ. of Wisconsin Legal Studies Research Paper Series, Paper No. 1066, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272446 [https://perma.cc/7YRG-NBKX]; Min, supra note 10.


\textsuperscript{310} This proposal is based on previous work suggesting an optimal defined benefit contribution insurance program for private sector plans. See Jefferson, Rethinking Risk, supra note 102, at 649–69; see also Jefferson, Redistribution, supra note 2, at 311–17; Jefferson, Re-Envisioning Retirement Security, supra note 309.

\textsuperscript{311} See I.R.C. § 414(q) (2012); see, e.g., Internal Revenue Service, 401(k) Plan Fix-It Guide – The Plan Failed the 401(k) ADP and ACP Nondiscrimination Tests, https://www.irs.gov/retirement-plans/401k-plan-fix-it-guide-the-plan-failed-the-401k-adp-and-acp-nondiscrimination-tests [https://perma.cc/3X89-3FGY] (defining highly compensated employees as an employee who holds a 5 percent ownership in the current or prior year, was paid more than $120,000 in the prior year, or who was in the prior year’s group of 20 percent top-paid employees); see also Contribution and Benefit Base, supra note 223.

\textsuperscript{312} See Press Release, Internal Revenue Service, IRS Announces 2017 Pension Plan Limitations (Oct. 27, 2016) (“The contribution limit for employees who participate in 401(k) . . . plans . . . remains unchanged at $18,000.”); see also Jefferson, Redistribution, supra note 2, at 313 (2010); see also President’s Commission on Pension Policy, Coming of Age: Toward a National Retirement Income Policy 875 (1981).
Because 3 percent is unlikely to meet today’s standards for adequacy, this proposal requires a total contribution level of 6 percent. The contributions of low- and moderate-income wage earners would be publicly subsidized. The level of the subsidy would be determined by the worker’s income and would gradually phase-out as compensation increased beyond a certain level. Employees desiring to contribute beyond the required amount would be permitted to do so at their own expense. Such contributions would be subject to a limit, such as the section 415 limit for defined contribution plans.

For administrative ease, contributions would be made to a clearinghouse established within either the Social Security Administration or another existing entity such as the Pension Benefit Guaranty Corporation (PBGC). The clearinghouse would offer employers a limited choice of pooled investment options, with a default provision. The clearinghouse would also be used to maintain benefit records for the program. In order to mitigate costs, the program would be phased-in over a period of time. To avoid unduly burdening small employers, the employer contribution could be waived for employers with less than a specified number of employees. Regardless of size, however, all employers would be required to facilitate government and employee contributions.

The proposal aims to encourage adequate retirement savings and to provide protection against the risk of loss of those savings. The proposal is innovative because of the minimum benefit guaranteed by the insurance program for individual account plans and the portfolio parameters that define the insured amounts.

The key features of the proposed insurance program are as follows. All required contributions made to the Universal Retirement Savings Program would be protected by a risk-based, government-sponsored insurance program. The program would protect the individual account balances by guar-

313. Id.
314. See Jefferson, Redistribution, supra note 2, at 313.
316. For further discussion on the impact of this proposal on the PBGC, see Jefferson, Rethinking Risk, supra note 102, at 665–67.
317. See Jefferson, Redistribution, supra note 2, at 313.
318. See id. at 314.
319. Id.
320. The Department of Labor records pension statistics based on plans of either 1–100 participants or 100+ participants. See U.S. DEPARTMENT OF LABOR EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS (2014), http://www.dol.gov/ebsa/pdf/historicatables.pdf [https://perma.cc/LG4H-4QQA]. However, in 2012, 34.3 percent of U.S. employees were employed by firms with fewer than one hundred employees. See ANTHONY CARUSO, U.S. CENSUS BUREAU, G12-SUSB, STATISTICS OF U.S. BUSINESS EMPLOYMENT AND PAYROLL SUMMARY: 2012, at 2 tbl.2 (2015), http://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf [https://perma.cc/EJA6-2FXQ]. Excluding employers with fewer than twenty employees would be more appropriate, as that would exempt employer contributions on behalf of only 17.6 percent of employees. Id.
anteeing a minimum retirement benefit based on average investment returns over a fixed period of prior years. The proposed guaranteed minimum benefit is distinguishable from a guaranteed annual return on the account in that it would be based on a hypothetical return, measured over a worker's total years of participation in a plan. This proposal is specifically designed to protect participants against the negative effects of severe market contractions that occur close to retirement, when there is insufficient time to recover through market corrections or to accumulate additional personal savings. Accordingly, in the event of a sudden downturn in the market, such as the one that occurred in 2008 and caused individual account balances to decline precipitously, participants planning to retire within a short period would be assured of receiving a guaranteed minimum benefit, regardless of their actual account balances.

The insurance portion of the proposal relies on the use of a "prescribed diversification standard" that is designed to approximate the average rate of return for individual accounts invested in average risk investments over the participants working life. In connection with the prescribed diversification standard, it would be necessary to develop an indexing system to evaluate all investment funds in order to determine the level of risk exposure for a given account. The actual risk exposure of a participant's investment allocation would be compared to the risk of the prescribed diversification standard in order to determine eligibility for the guaranteed benefit. The guaranteed benefit, as well as the insurance premiums, would be determined by the degree to which the account balance complied with the diversification standard. Thus, the diversification standard solves the moral hazard problem by placing limitations on the level of risk to which an insured account could be exposed.

The insured benefit would be payable in the form of a single or joint life annuity, depending on the participant's marital status. To avoid leakage there would be no pre-retirement distributions, similar to the Social Secur-

324. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, supra note 309.
325. Jefferson, Rethinking Risk, supra note 102, at 652.
326. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, supra note 309.
327. Id.
328. For purposes of defining moral hazard problems, it is important to distinguish between two types of risks: reactive and fixed. A reactive risk is one over which the insured has some control. For example, a car accident due to a controllable cause, such as speeding, is a reactive risk. A fixed risk is one over which the insured has zero control, such as damage from floods and other acts of God. "For a moral hazard problem to exist, there must be some element of reactive risk involved." In short, the insured must have some opportunity to exercise due care. See Daniel Keating, Pension Insurance, Bankruptcy and Moral Hazard, 1991 Wis. L. Rev. 65, 68 (1991).
Survivor benefits would be structured consistently with those of other defined contribution plans regarding spousal and non-spousal benefits. Insured benefits would be paid only in the event of death, disability, or the attainment of the worker’s Social Security full retirement age. To discourage deferral of the use of the funds beyond retirement age, insured benefits would not be upwardly adjusted for post-retirement age contributions; however, to avoid penalties for postponement, there would be an actuarial adjustment to reflect a delayed annuity start date.

The concepts described in this proposal are based on the author’s previous works that call for an optional defined contribution insurance program for private sector defined contribution plans. These works provide additional details regarding the structure and design of the proposal.

**CONCLUSION**

The retirement savings crisis in this country is a complex and difficult problem. Although the private retirement system continues to be an important source of retirement income for many workers, there are serious deficiencies in the system for the distribution of benefits to low- and middle-income workers. The confluence of demographic changes, a shift in the balance of individual and collective risks made manifest by the prevalence of 401(k) plans in the private sector, and the most recent economic downturn have made the current private retirement system incapable of providing retirement security across the income spectrum. This raises serious concerns about both pension policy goals and human rights obligations. Thus, as policymakers address the retirement savings crisis, they should think more broadly about the relationship between retirement security and human rights, the role of government, and the responsibility of community to individuals.

The proposals described above respond to the retirement savings crisis by ensuring that retirement benefits for individuals with regular work histories are over the poverty level and are not eroded by inflation. Providing an additional source of retirement income in the form of a Universal Retirement Savings System responds to the retirement savings crisis by providing

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329. See Norman P. Stein & Patricia E. Dilley, Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate, 58 WASH. & LEE. L. REV. 1369, 1371–72 (2001) ("By leakage, we refer to the idea that pension plans are intended to provide retirement income, and, therefore, plan assets should not leak out of the plan for non-retirement purposes."). Social Security has age 62 early retirement but not hardship distributions or loans.

330. For the rules governing distributions in defined contribution plans, see 26 U.S.C. § 401(a)(9)(B), (D).

331. SOCIAL SECURITY ADMINISTRATION, SSA PUB. NO. 05-10035, RETIREMENT BENEFITS 1, 3–4 (2015). For example, the full retirement age for individuals born between 1943 and 1954 is 66.

332. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, supra note 309; see also Jefferson, Rethinking Risk, supra note 102 at 649–65.

333. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, supra note 309; see generally Jefferson, Rethinking Risk, supra note 102.
a meaningful level of benefits from the private retirement system to all workers. The subsidy for low- and middle-income workers in connection with the proposed Universal Retirement Savings System reflects the reality that low-wage workers are often not covered by employer sponsored plans or are unable to make elective contributions when employers offer 401(k) plans.\(^{334}\) The mandatory feature of the proposal forces workers who can afford to save to do so and thereby minimizes the risk that they will live in poverty in their old age.\(^{335}\) Equally important, however, these proposals are responsive to fundamental human rights principles, which should impact both national and international laws and policies. By ensuring that workers have adequate resources and protections in retirement, the proposals actualize the belief that all individuals across the income spectrum have the right to live with dignity and security in their old age.

As discussed above, there are three important human rights documents that directly apply to the elderly—the UDHR, the ICESCR, and the United Nations Principles for Older Persons.\(^{336}\) While all three documents promote the use of national resources to prevent poverty in old age, there are specific provisions in each that support the proposals for pension reform described above. For example, Article 25 of the UDHR provides that every individual has the right to an adequate standard of living "in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."\(^{337}\) Most retired workers will fit one or more of these descriptions in their lifetimes. Furthermore, Article 10 of the Principles for Older Persons provides that, "[o]lder people should benefit from family and community care and protection in accordance with each society’s system of cultural values."\(^{338}\) Additionally, Article 17 of the same document further states that "[o]lder persons should be able to live in dignity and security . . . ."\(^{339}\) Thus, the failure to take affirmative measures to address the retirement savings crisis by providing adequate resources for workers to meet their basic needs in retirement is in direct opposition to many of these principles.

Although using a human rights analysis does not present a perfect solution to the retirement savings crisis, it does help to frame additional policy considerations and responses. Using a human rights approach to evaluate the United States retirement savings system suggests that strengthening and expanding Social Security along with introducing a new Universal Retirement Savings Program with Guaranteed Minimum Benefits would be an effective and equitable way of increasing retirement security for low- and middle-income workers.

\(^{334}\) See Copeland, supra note 136, at 30 n.35.

\(^{335}\) See discussion supra Part II.B.

\(^{336}\) See discussion supra Parts I.A.

\(^{337}\) UDHR, supra note 13.

\(^{338}\) U.N. Principles for Older Persons, supra note 16.

\(^{339}\) Id.