Lessons from the French Funding Debate

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Lessons from the French Funding Debate

KATHRYN L. MOORE

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

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

I. INTRODUCTION

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

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1 Everett H. Metcalf, Jr. Professor of Law, University of Kentucky College of Law. The author would like to thank the participants in the Saint Louis University School of Law Faculty Workshop for their helpful comments and Arnaud d’Yvoire, Nancy Fritz, Carol Paris, Pascal Petit, and Amy Osborne for their assistance in finding many of the authorities cited in this Article.

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

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

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


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


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

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

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

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

II. OVERVIEW OF THE FRENCH RETIREMENT SYSTEM

The French retirement system may be characterized by three principal features: (1) it is quite complex, (2) it is funded principally on a pay-as-you-go basis, and (3) it is rather generous relative to the pension systems in other countries.
<table>
<thead>
<tr>
<th>OCCUPATIONAL CATEGORY</th>
<th>'PAY-AS-YOU-GO' PENSIONS</th>
<th>FUNDED PENSIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BASE SCHEME</td>
<td>SUPPLEMENTARY REGIMES</td>
</tr>
<tr>
<td>FARM SECTOR</td>
<td>Farm workers and employees</td>
<td>MSA (Social Insurance for Farmers (83 funds))</td>
</tr>
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<td></td>
<td>Farm executives</td>
<td>Obligatory for all farm employees</td>
</tr>
<tr>
<td>EXECUTIVES OF THE PRIVATE SECTOR</td>
<td>Executives of industry, commerce, and services</td>
<td>Social Security General Regime administered by the CNVTS, the CRAM (Alsace, Moselle) 14 CRAM and 4 CGS (overseas French departments)</td>
</tr>
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<td></td>
<td></td>
<td>Obligatory for executives</td>
</tr>
<tr>
<td>EMPLOYEES OF THE PUBLIC AND PARAPUBLIC SECTOR</td>
<td>Contract employees of the public and parapublic sector</td>
<td>Social Security Special Regimes</td>
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<td></td>
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<td>Salaried employees of the public and parapublic sector</td>
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<tr>
<td>SELF-EMPLOYED</td>
<td>Farmers</td>
<td>MSA (83 funds) Obligatory</td>
</tr>
<tr>
<td></td>
<td>Shopkeepers and industrialists</td>
<td>ORGANIC BASE 26 inter-occupational and 5 occupational funds - Obligatory</td>
</tr>
<tr>
<td></td>
<td>Craftsmen</td>
<td>CANCABA BASE 30 inter-professional funds + CANAVIA (meat occupations) and Hairdressers - Obligatory</td>
</tr>
<tr>
<td></td>
<td>Liberal professions</td>
<td>CNAVPL BASE Obligatory regime</td>
</tr>
<tr>
<td></td>
<td>Lawyers</td>
<td>CNBF BASE Obligatory regime</td>
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<td></td>
<td>Clergy</td>
<td>CAVIMAC * Obligatory regime</td>
</tr>
</tbody>
</table>


**Difficult Path to Consensual Reforms**, in SOCIAL SECURITY PENSION REFORM IN EUROPE 109, 111 (Martin Feldstein & Horst Siebert eds., 2002).
The complexity of the French retirement system arises principally from the fact that it is organized along occupational lines. As the diagram on the previous page illustrates, there are four basic occupational categories: (1) farm sector employees, (2) private sector employees, (3) employees of the public and parapublic sectors, and (4) the self-employed. Of these categories, private sector employees are by far the most significant, and represent about two-thirds of the working population. Public and parapublic sector employees, representing about 20% of the working population, are the next most significant, with the self-employed representing about 12% of the working population, and farm workers representing about 3% of the working population.

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

The second tier of the French Social Security, mandatory complementary

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13 CONSEIL D’ORIENTATION, supra note 6, at 51.

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

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

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

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

18 See Moore, supra note 1, at 456 and authorities cited therein; see also Blanchet & Legros, supra note 12, at 111–13.
regimes, is unique to France and has no counterpart in the United States. Most of these regimes are pay-as-you-go systems that use a point system to distribute benefits. Throughout their working lives, participants accumulate points in proportion to their contributions. Their pension benefits are then based on their total accumulated points multiplied by the value of a point, which is fixed each year. Not all occupational categories participate in a mandatory complementary regime. Of particular significance, salaried employees of the public and parapublic sector almost never participate in mandatory complementary regimes. Instead, the special regimes (the mandatory base regimes for public and parapublic sector employees) typically provide such generous benefits that the special regime benefits are about equal to or may even exceed the combined benefits that private sector employees receive from the general regime (the base regime for private sector employees) and ARRCO and AGIRC (the mandatory complementary regimes for private sector employees).

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

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

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

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

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

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

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

24 See supra note 11 and accompanying text.
maintained, current benefits are funded principally with current contributions. Only the third tier of the French retirement system, the supplementary occupational plans, is pre-funded, and, as noted above, it currently plays a relatively minor role in the French retirement system. Whether, or how much, the role of the third tier should be expanded is a significant issue in the reform debate in France today.26

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

III. RECENT REFORMS OF THE FRENCH RETIREMENT SYSTEM

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

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

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

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

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

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

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

31 Id.
generation that is followed by relatively smaller generations.\textsuperscript{32} Principally as a result of these demographic changes, the elderly dependency ratio, the ratio of retirees to working age individuals, is expected to increase from .38 in 2000 to between .61 and .73 (depending on mortality assumptions) in 2040.\textsuperscript{33} This increased dependency ratio is placing significant pressure on the French retirement system because it is funded principally on a pay-as-you-go basis.\textsuperscript{34}

French policymakers first began to recognize the need to reform the French retirement system in light of these demographic changes in the 1980s.\textsuperscript{35} During that decade, the government published a number of reports explaining the need to reform the system,\textsuperscript{36} but serious public debate did not occur until the publication of the White Book\textsuperscript{37} in 1991.\textsuperscript{38} The first major reform of the system was enacted of 1993,\textsuperscript{39} and the French retirement system has been reformed a multitude of times in a multitude of ways since then. This Section will briefly describe the most significant of these reforms, as well as other significant reforms that were proposed, but ultimately failed.

A. First Tier Reforms

During the summer of 1993, the Balladur government reformed the general regime\textsuperscript{40} in three different ways, and the effect of each was to reduce

\begin{itemize}
\item \textsuperscript{32} Id. at 107.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} See Moore, supra note 1, at 475 & n.246 and authorities cited therein.
\item \textsuperscript{35} Bonoli, supra note 29, at 115 ("Perhaps one of the most striking features of French pension policy throughout the 1980s and early 1990s is the gap between the official debate, where the need for a reform is emphasised [sic], and the practice of pension policy, in which no action was taken until 1993."); see also Blanchet & Legros, supra note 12, at 113 ("Questions have been intensively raised about the long-term viability of this system during the 1980s.").
\item \textsuperscript{36} Bonoli, supra note 29, at 115 (noting that "between 1985 and 1993 at least seven official reports were produced, which, moreover, made roughly the same suggestions as to how to reform pensions"); see also GRECIANO, supra note 17, at 173–74 (discussing reports that were issued during the 1980s).
\item \textsuperscript{37} Commissariat Général du Plan, Livre blanc sur les retraites: garantir dans l'équité les retraites de demain (1991).
\item \textsuperscript{38} Didier Blanchet, Population Aging and French Economic Performance, in AGING SOCIETIES: THE GLOBAL DIMENSION 111, 127 (Barry Bosworth & Gary Burtless eds., 1998).
\item \textsuperscript{39} Contribution rates, however, were already increased between 1985 and 1991. See Palier & Bonoli, supra note 28, at 225 (noting that between 1985 and 1991 contribution rates for the general regime were increased from 4.7% to 6.55% of the general regime wage ceiling); Bonoli, supra note 29, at 115 (noting that an additional 1.6% employer contribution was added in 1990).
\item \textsuperscript{40} These reforms also apply to the three base regimes that are "aligned" with the general regime: the base regime for salaried agricultural workers, the base regime for industrialists and merchants, and the base regime for craftsmen.
\end{itemize}
As noted above, the general regime uses a defined benefit formula to calculate benefits. That formula may be described as $P = S.A.M \times t \times d/D$, where $P$ represents pension, $S.A.M$ is average annual salary (capped at the social security wage ceiling—which is roughly equivalent to the average wage), $t$ stands for rate, $d$ is duration of participation in the general regime, and $D$ equals maximum duration of participation taken into account. Prior to the 1993 reform, the first element of that formula, average annual salary, was based on the retiree's highest ten years of earnings. The 1993 reform gradually increases the number of years of salary taken into account until it reaches twenty-five years of earnings for retirees who reach age sixty on or after January 1, 2008. The second element of the formula, rate, is capped at fifty percent and is generally a function of both the age at which the retiree begins to collect benefits and the amount of time the retiree contributed to any base regime. Prior to the 1993 reform, retirees were entitled to begin collecting benefits at age sixty at the maximum rate of fifty percent if they had 150 quarters, or 37.5 years, of participation in a base regime by age 60. The 1993 reform gradually increases the number of quarters required for benefits at the maximum rate to 160 quarters or 40 years by 2008. Finally, the third change wrought by the 1993 reform was a change in the method of indexing from one based on changes in wages to one based on changes in prices.

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

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

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


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

45 Id.

46 Id.

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

48 Id. at 453 and authorities cited therein.

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

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

51 Specifically, it funds minimum retirement benefits and additional retirement benefits awarded for periods of unemployment, national service, and time out of the workforce to raise children. See id. at 480 n.273 and authorities cited therein; Bonoli, supra note 29, at 118.
Prior to the 1993 reform, these non-contributory benefits were partially financed by wage-related contributions to the retirement regimes.\textsuperscript{52} This shift in the financing of these non-contributory benefits was very important to the labor movement and is viewed as a key factor in the political success of the 1993 reform.\textsuperscript{53}

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

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

\textsuperscript{52} See Moore, \textit{supra} note 1, at n.273 and authorities cited therein; Bonoli, \textit{supra} note 29, at 118.

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

\textsuperscript{54} See Bonoli, \textit{supra} note 29, at 120 (noting that the content of the 1995 proposed reform of the special regimes was "roughly the same" as that of the 1993 reform of the general regime).

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


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

\textsuperscript{58} See, e.g., Palier & Bonoli, \textit{supra} note 28, at 227; Bonoli, \textit{supra} note 29, at 112.

\textsuperscript{59} Recognizing the power of rail workers to disrupt the proposed reform, the plan does not
Fillon plan (named after the Minister for Labor and Social Affairs) proposed, among other things, to increase the number of years of participation required for retirement at the full rate from 37.5 years to forty years by 2008. Although the trade unions organized demonstrations and strikes against the Fillon plan, the French government made more of an effort to negotiate with the trade unions and the proposed reform was approved by the National Assembly on July 3, 2003, and received Senate approval soon thereafter.

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

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


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

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


65 See Blanchet & Legros, supra note 12, at 111 ("One characteristic of the French pension system is its almost exclusive reliance on PAYGO financing: French pension schemes did not accumulate more than marginal provisions, covering no more than a few months' worth of benefits.").
tradition and created a reserve to finance future general regime retirement benefits. The law’s objective is to accumulate financial reserves on the order of 150 billion Euros between 1999 and 2020 and use the reserve to pay benefits between 2020 and 2040. The reserves had reached 7.9 trillion Euros by the end of 2001 and were expected to have reached thirteen trillion Euros by the end of 2002.

B. Second Tier Reforms

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

In the spring of 2003, the French government proposed to create a new
mandatory complementary retirement regime for shopkeepers and industrialists.\textsuperscript{73}

The National Assembly adopted the proposal on July 3, 2003;\textsuperscript{74} the Senate approved it shortly thereafter.\textsuperscript{75}

C. Third Tier Reforms

In 1994, the French legislature enacted a law (referred to as the Madelin law) which, among other things, permits the self-employed to make voluntary tax deductible contributions to supplementary retirement plans.\textsuperscript{76} Contributions are tax deductible and benefits must be paid in the form of an annuity.\textsuperscript{77} The law is viewed as a limited success with about two million self-employed individuals contributing about 700 million Euros to such plans in 2000.\textsuperscript{78}

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

\textsuperscript{73} Exposé des Motifs, \textit{supra} note 7, at Titre IV, 35–41.
\textsuperscript{74} See Taupin, \textit{supra} note 63.
\textsuperscript{75} See Article 389, \textit{supra} note 64.
\textsuperscript{78} Lavigne, \textit{supra} note 8, at 133, 147, tbl.17. For a more detailed discussion of the reasons why the Madelin law is of limited success, see CHARPENTIER, \textit{supra} note 11, at 310–18.
\textsuperscript{79} Lavigne, \textit{supra} note 8, at 128.
\textsuperscript{82} See Lavigne, \textit{supra} note 8, at 138.
\textsuperscript{83} Moore, \textit{supra} note 1, at 472 and authorities cited therein.
\textsuperscript{84} "The entire trade union movement—including the managers union (CGC)—strongly opposed the law mainly on the ground that exemption of taxation on employers' contributions
enacted, it declined to promulgate the eleven decrees required to give effect to the law. The law was officially abrogated in 2002.

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

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

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

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

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

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


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

Lavigne, supra note 8, at 138.

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

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

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

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

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

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

The Fillon plan also proposed to transform the voluntary salary savings plans, created in 2001, into voluntary salary savings plans for retirement (plan d'épargne pour la retraite). The new retirement savings plans are similar, but not identical to the retirement savings plans introduced by the Thomas law. First, unlike the first retirement savings plans, the new retirement savings plans are to be available to all workers, not just private sector workers. Workers can participate in these plans individually, through their employer, or through a professional organization. Like the Thomas retirement savings plans, the new retirement savings plans must be paid in the form of an annuity and are eligible for tax favorable treatment.

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

IV. THE FUNDING DEBATE

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

103 Id.
104 Id.
105 Exposé des Motifs, Art. 81, supra note 7, at 42.
106 See Article 389, supra note 64.
107 See supra notes 76–78 and accompanying text.
108 For additional reasons why the change was of limited success, see Charpentier, supra note 11, at 310–18.
109 See supra notes 79–83 and accompanying text.
110 See supra notes 88–98 and accompanying text.
111 See supra notes 99–106 and accompanying text.
112 See Article 389, supra note 64.
of the third tier. 113

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

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

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


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

116 Blanchet & Legros, supra note 12, at 119 n.2; Crist & Le Duigou, supra note 114, at 50–51.

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

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

119 Crist & Le Duigou, supra note 114, at 93–94 (contending that French savings rate does not need to be increased but that savings simply need to be reallocated and creating third tier private pensions not necessary to reallocate savings); see also Florence Legros, Pension Schemes: Limiting PAYG to Increase Savings?, La Lettre du CEPII (Centre d'études prospectives et d'informations internationales) May 2002, at 2 (showing that contrary to expectations, France, with only pay-as-you-go pension schemes, has much higher savings rate than United States, with significant pre-funded pension schemes); Org. for Econ. Cooperation and Dev., Economic Outlook No. 72 annex tbl. 24 (2002) (showing that household savings rate in France was 11.4% in 2001 compared with 2.3% in the United States that year).
benefits of such a system.120

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

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

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

121 See Greciano, supra note 17, at 126–27; Blanchet, supra note 114, at 94; Crist & le Duigou, supra note 114, at 127, 133–34.

122 Blanchet, supra note 114, at 105.

123 Crist & le Duigou, supra note 114, at 95–96.

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

125 One author observed:

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

Anne-Marie Guillemard, Aging and the Welfare-State Crisis 53 (2000); see also Greciano, supra note 17, at 20 (noting that pay-as-you-go financing was justified in 1945 by the strong uncertainties regarding the level and future evolution of economic activity (notably marked by high inflation which significantly reduced the value of annuities) which prohibited, at least in the short term, a return to a pre-funded system).

126 See Crist & le Duigou, supra note 114, at 43–45; Greciano, supra note 17, at 189.
inequality.\textsuperscript{127} Private pensions impose investment risk on individuals and provide participants with no guarantees regarding future returns. Moreover, expanding the third tier places the current pay-as-you-go system at risk.\textsuperscript{128}

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

V. LESSONS FROM THE FUNDING DEBATE

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

\textsuperscript{127}GRECIANO, supra note 17, at 189.
\textsuperscript{128}See CRIST & LE DUIGOU, supra note 114, at 51–52, 131–32; GRECIANO, supra note 17, at 189.
\textsuperscript{129}See CRIST & LE DUIGOU, supra note 114, at 46 (noting that American pension plans own about one-third of the 40 largest French companies); Lavigne, supra note 8, at 137 (noting that “about 40 per cent [sic] of equities issued by French quoted firms are held by foreign investors”); see also GRECIANO, supra note 17, at 134 (noting significant influence of Anglo/American pension funds on governance of large French corporations).
\textsuperscript{130}GRECIANO, supra note 17, at 189.
\textsuperscript{131}CRIST & LE DUIGOU, supra note 114, at 45–46.
\textsuperscript{132}Id. at 46 (noting that 150 billion French francs, often more, are invested abroad, and that French investments tend to be in public and private bonds rather than equities); see also GRECIANO, supra note 17, at 150–51 (describing overwhelmingly conservative nature of French investments).
\textsuperscript{133}Of particular significance, William Dale Crist, economist and President of the California Public Employees' Retirement Fund (CalPERS), and Jean-Christophe Le Duigou, the secretary national of the CGT (Confédération Générale du Travail, a trade union of Communist origin) responsible for economic questions, in CRIST & LE DUIGOU, supra note 114.
French economists to participate in their international debates.\textsuperscript{134}

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

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

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

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

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

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

\textsuperscript{136} Lavigne, \textit{supra} note 8, at 136:

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

\textsuperscript{137} \textit{Guillemand}, \textit{supra} note 125, at 65 (internal quotations omitted).
which led to the enactment of ERISA,\textsuperscript{138} the federal law which requires, among other things, that private pension plans be funded.\textsuperscript{139}

The difference may also be partially ideological. Although individual choice is occasionally raised as an interest worth promoting in the French funding debate, individual choice—and individual responsibility—is much more of an American value\textsuperscript{140} than a French value. Indeed, the terminology used in the respective debates helps to illustrate the different ideological values. The French do not use the term “pay-as-you-go” to describe the principal funding mechanism of their retirement system. Instead, they use the term “r\textsuperscript{é}partition,” which means “distribution” in English.\textsuperscript{141} “Pay-as-you-go” seems to suggest something a little irresponsible about the funding mechanism while “distribution” appears a bit more neutral\textsuperscript{142} and perhaps even praiseworthy in a socialist society.\textsuperscript{143} Moreover, the French do not use the Anglo/American term “funded,” “which gives an impression of seriousness and security”\textsuperscript{144} in describing pension funding. Instead, they use the term “capitalisation,” which “evokes capitalism, a word which remains linked with the exploitation of workers in the nineteenth century in many minds.”\textsuperscript{145}

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


\textsuperscript{139} ERISA §§ 301-08; 29 U.S.C. §§ 1081-86 (2002).

\textsuperscript{140} Cf. Crist & Le Duigou, supra note 114, at 103 American William Crist, President of CalPERS, contends that the principal advantage of private pensions is that we ourselves are responsible for our own destiny. Id.

\textsuperscript{141} CASSELL’S FRENCH DICTIONARY 640 (3d ed. 1979).


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

\textsuperscript{144} Observatoire des Retraites, supra note 112.

\textsuperscript{145} Id.

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

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

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

147 See supra text accompanying notes 54–58.
148 Blanchet & Legros, supra note 12, at 110.
149 Id. at 113–14.