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Foreword

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Providing retirement security for our burgeoning retired population is one of our nation's major challenges. Currently there are 3.3 workers per Social Security beneficiary, and the ratio is scheduled to decline to 2.2 in 2030, with further decreases expected after that date.¹ According to projections in the 2003 Annual Report of the Social Security Trustees, Social Security payments will exceed benefits by 2018, and the trust fund will be exhausted in 2042.² Unless general revenues are used to fund Social Security, either Social Security benefits will have to be reduced or payroll taxes will have to be increased. Whatever changes are made to Social Security, other programs for achieving retirement security will also be critical. About half of American workers currently participate in employer-sponsored retirement plans, and these plans have approximately three trillion dollars in assets.³ Both employer-sponsored retirement plans and individual savings or retirement accounts will necessarily play an important role in our meeting the challenge of retirement security.

The *Ohio State Law Journal* devoted its spring 2003 symposium to the national goal of achieving retirement security for our country's workforce. On April 11, 2003, a distinguished group of scholars met at the Michael E. Moritz College of Law to explore the legal, political, and social issues raised by this goal. As has been true for all of the recent Law Journal symposia, the panels were truly interdisciplinary, with scholars specializing in law, economics, and political science presenting papers and participating in the discussion. All of us are fortunate that most of the participants have submitted articles preserving and expanding upon their presentations.

Several participants had extensively studied the efforts and experiences of other countries that are confronting the same problems and demographics as the United States. In the first panel three presentations illustrated experiences of

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¹ See June E. O'Neill, *Why Social Security Needs Fundamental Reform*, 65 OHIO ST. L.J. 79, 81 (2004); see also Jonathan Barry Forman, *Making Social Security Work*, 65 OHIO ST. L.J. 145, 155 n.59 (2004).

² O'Neill, *supra* note 1, at 84-85.

³ Kathryn Moore, *Lessons from the French Funding Debate*, 65 OHIO ST. L.J. 5, 7 (2004).

France, Canada, and Sweden.⁴ Each provided extensive background on the respective country's public and private pension programs, delving into the political controversies when relevant and distilling lessons for the United States. As Professor Moore tells us, the French retirement system is "quite complex,"⁵ principally because it is organized along occupational lines, but she is able to provide a clear explanation of its structure. France is not considering privatizing its basic (or first tier) public pensions, in large part because it tried pre-funded pensions in the 1930s and the effort failed. These failed schemes should "give advocates of partial privatization of social security some cause for concern."⁶ Interestingly, the debate in France is whether voluntary prefunded plans should be expanded. Currently, prefunded private plans play a much more important role in the United States than in France. Although one of the lessons that Professor Moore imparts to us is that "there simply isn't much new under the sun,"⁷ it is clear that we obtain many insights by examining the French experience. Dr. John Turner describes both the context and operation of a new funded mandatory individual account system in Sweden.⁸ One of the objections to mandatory prefunded individual accounts is that administrative costs will be high. Sweden, however, has designed the system so that costs are quite moderate. The operation and success of Sweden's plan should be very useful if privatizing Social Security becomes a real possibility in this country, although some of its features—such as all participants' contributions for an entire year credited to the appropriate mutual funds over a four to five day period—would probably have to be modified because of the much larger size of the United States workforce. Professor Weaver's description of reforms of the Canadian pension system shows that there are many possible lessons for the United States—in fact, too many to describe here. Perhaps, most intriguing is that Canada "was able to enact huge across-the-board increases in pension payroll taxes in the late 1990s,"⁹ as well as some cuts in benefits. In addition, it enacted a fail-safe mechanism that would automatically cut benefits and raise taxes in the event of unexpected financial distress. Canada has also succeeded in investing the surpluses of its public pension plan in a variety of financial instruments "with relatively little

⁴ Moore, *supra* note 3; John Turner, *Individual Accounts: Lessons from Sweden*, 65 OHIO ST. L.J. 27 (2004); R. Kent Weaver, *Pension Reform in Canada: Lessons for the United States*, 65 OHIO ST. L.J. 45 (2004).

⁵ Moore, *supra* note 3, at 7.

⁶ *Id.* at 26.

⁷ *Id.* at 23.

⁸ Turner, *supra* note 4.

⁹ Weaver, *supra* note 4, at 45.

U.S. that it was in Canada.”¹¹

The second panel discussed whether there should be fundamental changes to Social Security—most importantly, whether there should be mandatory prefunded individual accounts. There was substantial disagreement among the panelists, but the interchange, and now the articles, significantly advance our understanding of what are the real issues and what is at stake.¹² Professor Halperin is strongly against allocating a portion of current Social Security taxes to individually managed private accounts. The guarantee of retirement income that is inherent in Social Security is too important to risk. Professor O’Neill, on the other hand, stresses that only a relatively small portion of Social Security benefits directly prevents poverty. Funding private plans would mitigate the work disincentives and reduction of private saving that Professor O’Neill finds are probable consequences of our current system. Professor Shaviro explains that the privatization debate can be understood to be about three different components: portfolio choice, transfers within the system, and the nomenclature given to individuals’ rights to benefits. Changes to the first two components are debatable at best, and a change to the third component, admittedly not a change in substance, might be only modestly helpful. Direct steps to address our nation’s fiscal problems are needed instead.

In their presentations and now their articles Professors Forman and Brown explore some of the consequences of the present structure of Social Security.¹³ Professor Forman demonstrates how the current Social Security program discourages individuals from working. He then suggests both some “modest changes” that would mitigate this problem and a more comprehensive solution. In addition to an amazingly clear description of many arcane rules and computations, he provides some fascinating background information such as the identity and experiences of the “very first” Social Security beneficiary.¹⁴ Professor Brown is concerned with how the two-earner bias in the Social Security program impacts Black families, an issue of obvious importance. She explains how Social Security penalizes married couples in which both spouses work and, secondly, how it reduces spousal and survivor benefits to wives the greater their relative contribution to household income. She then explores the empirical data

¹¹ *Id.* at 74.

¹² Daniel Halperin, *The Case Against Privatization*, 65 OHIO ST. L.J. 75 (2004); O’Neill, *supra* note 1; Daniel Shaviro, *Social Security Privatization and the Fiscal Gap*, 65 OHIO ST. L.J. 95 (2004).

¹³ Forman, *supra* note 1; Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004).

¹⁴ Forman, *supra* note 1, at 157. The first Social Security beneficiary, Ida May Fuller, paid a total of \$22.54 in Social Security taxes and, having lived to be one hundred years old, collected a total of \$22,889 in benefits. *Id.*

explains how Social Security penalizes married couples in which both spouses work and, secondly, how it reduces spousal and survivor benefits to wives the greater their relative contribution to household income. She then explores the empirical data concerning spousal contributions to household income based upon race, and demonstrates that “the two-earner bias result[s] in lower social security benefits paid to married Black couples.”¹⁵

Professors Gallanis and Muir discuss important aspects of private pension plans.¹⁶ Professor Gallanis explains the troubling consequences of the Supreme Court decision in *Egelhoff v. Egelhoff*.¹⁷ In that case the preemption of state law by ERISA resulted in a distribution of benefits for a deceased employee that almost certainly would have been contrary to the employee’s intent. Professor Gallanis makes the excellent suggestion that federal common law should be deemed to incorporate the Restatement (Third) of Property and the Uniform Probate Code. Professor Muir explores regulation of fiduciary responsibility in both defined benefit and defined contribution cases. She argues convincingly that courts have misapplied ERISA and traditional judicial doctrines in not allowing employees to sue or recover for breach of fiduciary duty in particular cases. She also makes some sound suggestions about increasing the role for investment advice in defined contribution plans.

I join the editors of the *Ohio State Law Journal* in thanking the Symposium participants for their excellent presentations and articles and in hoping that readers will enjoy and benefit from this extraordinary collection of articles.

¹⁵ Brown, *supra* note 13 at 113.

¹⁶ T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185 (2004); Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199 (2004).

¹⁷ 532 U.S. 141 (2001).