

FAILING AGING: CONGRESS, THE SOCIAL CONTRACT, AND “SAVING” SOCIAL SECURITY AND MEDICARE

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Abstract

Social Security and Medicare are part of the retirement security social contract the government has with the American people, but without action from Congress, Trustees of Social Security and Medicare predict shortfalls within the next decade. This Essay begins with a look at the social contract generally, then as applied to Social Security and Medicare. Focusing on Social Security, the Essay explores the reasons for the creation of Social Security and its foundational importance to Americans of all ages, the economy, and social policy. The Essay examines the promises made by various U.S. presidents to the American people, arguing that those promises create an obligation to the American people and are not just political posturing. After examining the addition of Medicare to the retirement security social policy, the Essay considers the forces contributing to the coming shortfalls, including how prior administrations had responded, and argues that when Congress makes changes to the programs, Congress must be guided by the purposes and principles of the programs and the social contract between the government and the people.

I. Introduction

Social Security is in financial trouble—again.¹ So is Medicare.² “Millions of Americans worry about Social Security—whether they will get the full retirement paychecks promised to them in years to come. And many younger people believe . . . that by the time they are ready to retire, Social Security will no longer be there for them.”³

According to the 2025 Social Security Trustees Report, the Social Security Trustees estimate that, without any changes, Social Security will have to pay reduced benefits to beneficiaries starting in 2034.⁴ Medicare Part A is also projected to be unable to pay its obligations starting in 2033.⁵ These financial challenges are of no surprise. As has happened more than once since its inception,⁶ Social Security is headed toward a shortfall. The high cost of health care in the United States makes it hard for Medicare Part A to stay solvent.⁷ The popularity of these programs among Americans⁸ coupled with politicians’ need to win and stay in office, as well as cultural and health

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¹ THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2025 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 119-62, at 2–7 (2025) [hereinafter 2025 SSA TRUSTEES].

² THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2025 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 119-63, at 1–5 (2025) [hereinafter 2025 MEDICARE TRUSTEES].

³ Jeff Sommer, *The Social Security Fix Nobody Wants to Talk About*, N.Y. TIMES (June 4, 2024), <https://www.nytimes.com/2024/05/31/business/social-security-trust-funds.html>.

⁴ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 3.

⁵ 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 6–8, 26.

⁶ *Id.* at 25 (“[T]he HI trust fund [has] experienced various periods of surpluses and deficits.”); 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 175 (“The 1983 report was the last report for which the actuarial balance was positive for the OASDI program.”).

⁷ 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 26.

⁸ See, e.g., Lydia Saad, *Americans Fairly Satisfied with Social Security System*, GALLUP (Feb. 24, 2023), <https://news.gallup.com/poll/470894/americans-fairly-satisfied-social-security-system.aspx>.

changes, makes it easy to lose sight of the original purpose of these programs, especially when it comes time to “save” them.

This Essay will discuss the retirement security social contract between the government and the American people, the representations made by certain presidents regarding Social Security and Medicare, the importance of these programs in providing retirement financial security to older Americans, and how congressional actions to “save” the programs further the intent of these programs—or not.

First, this Essay will briefly examine the concept of the social contract between the U.S. government and older Americans. Then it will give a brief overview of Social Security as it pertains to the social contract, emphasizing the promises to older Americans made by various presidents regarding the purpose of Social Security. Next, the Essay discusses the enactment of Medicare after many efforts, with a focus on Medicare Part A. There is a brief discussion of the impact, if any, made by the retirement of the baby boomers on the solvency of the programs.

This Essay then argues that this retirement security social contract creates moral and political obligations between Congress and the American people, and that Congress must consider these obligations in any actions it takes regarding Social Security and Medicare. To support this thesis, the Essay turns to an analysis of whether congressional action or inaction, as the case may be, is failing older Americans through the changes to Social Security and Medicare. These changes may be done to make the programs more financially secure, but are made seemingly without an acknowledgement of the government’s social contract with older Americans. There is no doubt that Congress has the authority to change these programs,⁹ but in order to fulfill the intent of these programs, this Essay argues that what matters are the ways the programs are changed and that without these considerations, Congress is, in fact, failing aging.

II. The Social Contract Generally

Black’s Law Dictionary defines social contract as “[t]he express or implied agreement between citizens and their government whereby individuals agree to surrender certain freedoms in exchange for mutual protection; an agreement forming the foundation of a political society.”¹⁰ Jean-Jacques Rousseau advanced the concept of the social contract in his writings.¹¹ Rousseau’s political philosophy was that “[t]he point of the Social Contract theory . . . is that legitimate society exists by the agreement of the people, and acts by popular will.”¹²

As is true with a contract, both parties enter a bargain of sorts. In the case of a social contract between the government and its citizens, there is an “agreement” where citizens give up freedoms in return for something from the government that brings protections of some kind to those citizens. There is a common need, problem, or interest of citizens that can be met through government action or programs. A social contract gives a framework

⁹ 42 U.S.C. § 1304; *see also infra* text accompanying note 29.

¹⁰ *Social Contract*, BLACK’S LAW DICTIONARY (12th ed. 2024). For a detailed discussion of social contract theory, see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

¹¹ *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans., J.M. Dent & Sons 1913). For an in-depth discussion of the social contract, its evolution, and application in the United States, see Brian Gilmore, *American Rousseau: Barack Obama and the Social Contract*, 35 T. MARSHALL L. REV. 9 (2009).

¹² ROUSSEAU, *supra* note 11, at xxxv. In his book Rousseau writes:

[If] the State is a moral person whose life is in the union of its members, and if the most important of its cares is the care for its own preservation, it must have a universal and compelling force, in order to move and dispose each part as may be most advantageous to the whole . . . [T]he social compact gives the body politic absolute power over all its members also; and it is this power which, under the direction of the general will, bears, as I have said, the name of Sovereignty.

But, besides the public person, we have to consider the private persons composing it, whose life and liberty are naturally independent of it. We are bound then to distinguish clearly between the respective rights of the citizens and the Sovereign, and between the duties the former have to fulfil as subjects, and the natural rights they should enjoy as men.

Id. at 24. As far as the impact a social contract has on citizens, Rousseau offers that “[e]ach [person] alienates . . . by the social compact, only such part of [their] powers, goods, and liberty as it is important for the community to control; but it must also be granted that the Sovereign is sole judge of what is important.” *Id.*

for understanding the relationship of the government to its citizens vis-à-vis a specific program, and provides an understanding of the reasons for such program.¹³

Compare the social contract with a private contract between two citizens or their representatives. With the private contract, these citizens would be actively involved in crafting the terms of the agreement to which they will be bound, and both would benefit from the bargain and bind themselves to the obligations.¹⁴ However, with a social contract, citizens are not actively involved in the crafting of the agreement except in a limited way—their vote regarding the election or retention of their representative or senator, or through a constituent communication. The citizens would benefit from the programs and services provided through the social contract¹⁵ but have no direct impact on the obligations to which they find themselves bound, and are unlikely to have any remedies, contractual or otherwise, regarding their actions under the social contract.

With the creation of the Social Security program, the government assumed a duty to citizens who paid taxes into the system.¹⁶ At the time of enactment, the country was fighting through the Great Depression and poverty was widespread.¹⁷ As part of the New Deal, congressional enactment of Social Security created a social contract to ensure retirement security. Under this contract, individuals would give up part of their earnings through the payment of taxes on covered employment, and, on their retirement, they would have a guaranteed income that would keep them from destitution.¹⁸ The program would ultimately serve the greater good, protect older individuals from forces outside their control,¹⁹ garner significant support in Congress,²⁰ and be extremely popular

¹³ Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1414–15 (2001); see also ROUSSEAU, *supra* note 11, at 24. Rousseau explains the reciprocal obligations between the government and citizens as follows:

The undertakings which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them we cannot work for others without working for ourselves . . . It proves that the general will, to be really such, must be general in its object as well as its essence; that it must both come from all and apply to all; and that it loses its natural rectitude when it is directed to some particular and determinate object . . .

Id. at 24–25.

¹⁴ See, e.g., *Contract*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“[A]greement between two or more parties creating obligations that are enforceable or otherwise recognizable at law . . .”).

¹⁵ See, e.g., Fineman, *supra* note 13.

¹⁶ See, e.g., Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 817 (1996) (“Under the New Deal increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations. . . . [i]f the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as *entitlements*—a substitute for old forms of property.”); see also Randall G. Holcombe, *The Continuing Social Contract*, 53 SOC. SCI. 211, 211 (1978) (“The basis of the social contract theory of government is that all individuals in a free society are bound in their interactions by an implicit social contract, which dictates the rights and responsibilities of the individual within society.”).

On March 25, 2024, Justice Stephen Breyer appeared on the Late Show with Steven Colbert, discussing his new book, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM*. As part of their discussion regarding judicial philosophy, Justice Breyer mentioned the New Deal and how the Supreme Court had to change its view of the Constitution and property, resulting in allowing more control to Congress and federal agencies to govern. See The Late Show with Steven Colbert, *Justice Breyer: You Don’t Want a Judge to be Influenced by Popular Opinion when Judging a Case*, YOUTUBE, at 30:01–55 (Mar. 25, 2024), <https://www.youtube.com/watch?v=j6H8jgBg2Bc>; see also STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 237–41 (2023). In Chapter 19, titled *Three Paradigm Shifts*, Justice Breyer discussed the “New Deal Court” and explained a change in the Court’s direction, especially that of the approach in “interpreting the Constitution.” *Id.* at 238.

¹⁷ See *infra* Part III(A).

¹⁸ Fernando M. Torres-Gil, *The New Aging: Individual and Societal Responses*, 10 ELDER L.J. 91, 95 (2002) (discussing the New Deal and Social Security); see also *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) (quoting *Helvering v. Davis*, 301 U.S. 619, 641 (1937)) (“The ‘right’ to Social Security benefits is in one sense ‘earned,’ for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from ‘the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey’s end is near.’”).

¹⁹ See, e.g., *FDR’s Statements on Social Security*, SOC. SEC., <https://www.ssa.gov/history/fdrstmts.html> (last visited Mar. 24, 2026) (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration) [hereinafter *FDR’s Statements*]; *id.* (Presidential Statement Signing the Social Security Act).

²⁰ *Birth and Early Days of Social Security in the U.S.: Edwin Witte*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ew25.html> (last visited Mar. 24, 2026) (noting overwhelming bipartisan support in passing the law).

with the American people.²¹

Congress, in enacting the Social Security and Medicare programs, imbued them with several core principles as part of this social contract: to give Americans retirement and health security through payment of taxes that are tied to employment; to recognize that the government's obligation to protect citizens from impoverishment in their later years is tied to taxation; and to provide that Americans who meet the requirements of the programs are entitled to benefits. In other words, "Social Security has come to symbolize a social contract and an expectation by all Americans that they will have a measure of protection from the vicissitudes of old age."²² There is a benefit of this contract for Americans—mandatory saving for their future retirement, and an obligation—paying taxes into Social Security, but as discussed later, very little remedy for those who will or are receiving the benefit. Congress makes the laws; it can change them.²³

III. The Social Contract and Social Security²⁴

Social Security is a multi-faceted, complex program of great importance to recipients. Three points about Social Security are discussed in this section: first, why Social Security was created when it was, next, why it was changed so soon after its enactment, and finally, Social Security's importance to recipients, the economy, and the country.

A. Why Social Security?

As explained in Section II, on the heels of the Great Depression and the Dust Bowl,²⁵ Congress and President Roosevelt moved to pass the Social Security Act.²⁶ There had been many wide-ranging proposals for some kind of economic security for older Americans.²⁷ The traditional informal way of providing economic security was and is through support of family and other relatives.²⁸

Hopefully older Americans had worked and saved, but unforeseen circumstances may have rendered their resources insufficient or nonexistent. Before the passage of the Social Security Act, charity was an important, and perhaps the only, option for some.²⁹ Thus, prior to President Roosevelt assuming office, it seemed the primary

²¹ See, e.g., Emerson Sprick, *Social Security: On Autopilot and Heading Toward a Cliff*, BIPARTISAN POL'Y CTR. (May 6, 2024), <https://bipartisanpolicy.org/article/social-security-autopilot-heading-toward-cliff/> (describing Social Security as the "nation's most effective and most popular federal program").

²² Torres-Gil, *supra* note 18; see also *Future of Government: The Social Contract*, WORLD BANK GRP., <https://www.worldbank.org/en/programs/futureofgovernment/social-contract-role> (last visited Mar. 24, 2026) (social contract relies on broader society and citizens benefiting from the bargain with the state, recognizing impact of imbalance of power and resources).

²³ *Supreme Court Case: Fleming v. Nestor*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/nestor.html> (last visited Mar. 24, 2026) ("More so than general federal income taxes can be said to establish 'rights' to certain government services. [It] is often expressed . . . that Social Security benefits are 'an earned right.' This is true enough in a moral and political sense. But like all federal entitlement programs, Congress can change the rules regarding eligibility . . . The rules can be made more generous, or they can be made more restrictive. Benefits which are granted at one time can be withdrawn . . .").

²⁴ For an in-depth discussion of the politics of Social Security from President Roosevelt to President George W. Bush, see NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* (2005). For a more general discussion, see R. DOUGLAS ARNOLD, *FIXING SOCIAL SECURITY: THE POLITICS OF REFORM IN A POLARIZED AGE* (2022).

²⁵ See, e.g., Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SEC. BULL., no. 3, 2010, at 4 (discussing the country's recovery and actions yet to be taken).

²⁶ The catalyst for its passage was the Great Depression, but the "reason" for it was individuals' economic insecurity. *Id.*

²⁷ See, e.g., *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (last visited Mar. 24, 2026) (discussing proposals and development of programs to provide economic security including guilds in Europe, "Poor Laws", fraternal organizations in the U.S., military pensions, company pensions, state aid, "Share Our Wealth", the Townsend Plan, and the Bigelow Plan, to name a few); see also Reich, *supra* note 16, at 817–18 (discussing "economic citizenship" and the importance of treating benefits as "legally protected rights").

²⁸ *Historical Background and Development of Social Security*, *supra* note 27; see also ALTMAN, *supra* note 24, at 7 (older Americans would live with children where possible; otherwise, the option was living in "poorhouse").

²⁹ See, e.g., ALTMAN, *supra* note 24, at 16.

way of providing economic security to those in need was an ad hoc welfare approach at the local or state level.³⁰ Creating Social Security was a major change in the government’s approach to retirement security, shifting the focus for retirement security to an organized, proactive one. Americans, in partnership with the government, could plan for, and be forced to save toward, their own financial security for when they became older.

With President Roosevelt’s approach, the provision of economic security turned from welfare to social insurance,³¹ using traditional insurance principles.³² As an explanation for the need for this program of economic security, President Roosevelt noted the importance of providing “security against the hazards and vicissitudes of life.”³³ President Roosevelt went on to note that “[f]ear and worry based on unknown danger contributed to social unrest and economic demoralization. If, as our Constitution tells us, our Federal Government was established among other things, ‘to promote the general welfare,’ it is our plain duty to provide for that security upon which welfare depends.”³⁴ But this was only part of the solution to providing financial security.

The Social Security program lasts through the life of the beneficiary, although the role of the beneficiary changes once they reach retirement age. They start as workers paying taxes into the program and then they become beneficiaries of the program, receiving benefits for the remainder of their lives.³⁵

B. Design the Contract, Then Change the Terms Through Congressional Action?

The program as initially designed was not without flaws,³⁶ which to some extent are contributing to the solvency problem today. Nor was there unanimous support for the bill.³⁷ Yet today, the importance of Social Security and Medicare cannot be overstated.³⁸

Almost from the start, the viability of the Social Security program was destined to change. The 1939 Amendments to the Social Security Act³⁹ added, among other changes, the Social Security Trust fund.⁴⁰ Before

³⁰ *Historical Background and Development of Social Security*, *supra* note 27. The Social Security Administration noted that prior to the Great Depression, states were faced with citizens experiencing economic insecurity. *Id.*; see also James P. Cooney & H. David Prior, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME L. REV. 606–07 (1969) (noting Social Security amounted to major change in how the United States approached the issue of poverty by moving the focus to the federal government for solutions).

³¹ *Historical Background and Development of Social Security*, *supra* note 27. Social Insurance is defined as “[i]nsurance provided by a government to persons facing particular perils (such as unemployment) [or disability] or to persons who have a certain status [such as the elderly or the blind]. Social insurance, such as that created by the Social Security Act of 1935, is typically part of a government’s broader social policy.” BLACK’S LAW DICTIONARY (12th ed. 2024); see also *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (“general welfare” spending as social policy).

³² *Historical Background and Development of Social Security*, *supra* note 27 (discussing the significance of social insurance in the design of the program, its historical development, and its flexible application); see also, e.g., ARNOLD, *supra* note 24, at 23; DeWitt, *supra* note 25, at 1–2 (“Social insurance provides a method for addressing the problem of economic security The concept of social insurance is that individuals contribute to a central fund managed by governments, and this fund is then used to provide income to individuals when they become unable to support themselves through their own labors. Social insurance differs from private insurance in that governments employ elements of social policy beyond strict actuarial principles, with an emphasis on the social adequacy of benefits as well as concerns of strict equity for participants.”); MITCHELL BARNES ET AL., THE HAMILTON PROJECT, THE SOCIAL INSURANCE SYSTEM IN THE U.S.: POLICIES TO PROTECT WORKERS AND FAMILIES 2–16 (2021) (discussing social insurance protections and support).

³³ *FDR’s Statements*, *supra* note 19 (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration); see also *id.* (Message to Congress on Social Security); *id.* (Presidential Statement Signing the Social Security Act).

³⁴ *Id.* (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration). *But see, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737 (1964) (discussing that the money paid by workers into Social Security, for example, cannot be used by the worker for “savings or insurance”).

³⁵ *Flemming v. Nestor*, 363 U.S. 603, 609 (1960).

³⁶ See, e.g., Alicia H. Munnell, *Social Security’s Financial Outlook: The 2023 Update in Perspective*, 23 CTR. RETIREMENT RSCH. BOS. COLL., no. 9, Apr. 2023, at 1 (“This financing approach is the result of a policy decision in the late 1930s to pay benefits far in excess of contributions for the early cohorts of workers. The decision essentially gave away the trust fund that would have accumulated and, importantly, gave away the interest on those contributions.”).

³⁷ TAMAR B. BRESLAUER & WILLIAM R. MORTON, CONG. RSCH. SERV., RL30920, SOCIAL SECURITY: MAJOR DECISIONS IN THE HOUSE AND SENATE SINCE 1935, at 3–4 (2025) (discussing some objections to the retirement program, including preference for a charity model, or reliance on employer pensions); see also ALTMAN, *supra* note 24. Some objections from Republicans noted by Altman included the preference for a welfare system and concerns about competing against and putting an untenable burden on the private sector. *Id.* at 68–70.

³⁸ Perhaps President Roosevelt foresaw how they would be a critical part of our economy, culture, and social structure. See *FDR’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

³⁹ Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (codified as 42 U.S.C. §§ 401–433).

⁴⁰ *Id.* § 201, 53 Stat. at 1362 (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. § 401(a).

the 1939 Amendments, the vision for Social Security was the buildup of the trust fund, but with the 1939 Amendments it was basically turned into a “pay as you go” system, resulting in the situation where retirees received benefits that exceeded the amount of their contributions.⁴¹ The slowly growing problems with the program’s long-term solvency had begun.

C. Social Security’s Importance

Unfortunately, Social Security has taken on increasing importance in providing financial security to older Americans.⁴² With widespread support for the program from their constituents,⁴³ Social Security has been viewed as untouchable by politicians,⁴⁴ and for some time viewed as “the *third rail* of American politics.”⁴⁵

How important are Social Security retirement benefits not only in fulfilling the goals of President Roosevelt through this social contract but as an income source for retired Americans? According to Social Security, almost 100% of older adults (60 to 89 years of age) currently draw funds or will in the future.⁴⁶ It is the biggest income source for the majority of beneficiaries; in 2015, forty percent of beneficiaries received more than fifty percent of their income from Social Security and for a smaller number of beneficiaries, it was ninety percent.⁴⁷ The benefits, provided in an effective and efficient way, are clearly integral to retirement security.⁴⁸

Although Social Security data shows the importance of Social Security in providing some form of retirement security for older Americans,⁴⁹ Social Security is not only important to individual beneficiaries;⁵⁰ it is also important to the economy, the federal government, and the states. Without Social Security, many people would be at risk for financial insecurity.⁵¹ Many recipients might fall below the poverty line,⁵² likely resulting in a greater reliance on state aid for services and supports. According to the 2025 SSA Trustees’ Report, approximately 54 million retired older Americans and dependents received benefits, with 6 million receiving survivors’ benefits.⁵³

⁴¹ Munnell, *supra* note 36; *see also* ARNOLD, *supra* note 24, at 2–5.

⁴² *See, e.g.*, Torres-Gil, *supra* note 18, at 94 (“The politics of aging in the year 2002 have led to an interesting and important debate over the future of Social Security, the bedrock of the New Deal. This program has become the basic income security for persons over sixty-five.”); KATHLEEN ROMIG, CTR. BUDGET & POL’Y PRIORITIES, SOCIAL SECURITY LIFTS MORE PEOPLE ABOVE THE POVERTY LINE THAN ANY OTHER PROGRAM 1–2 (2025) (citing *Policy Basics: Top Ten Facts About Social Security*, CTR. BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/social-security/policy-basics-top-ten-facts-about-social-security> (last updated May 31, 2024)); *see also, e.g.*, Reich, *supra* note 16, at 734 (noting that government benefits are the primary income source for many Americans.); *Keeping Our Promise to Older Adults and People with Disabilities: The Status of Social Security Today: Hearing Before the S. Spec. Comm. on Aging*, 118th Cong. 19 (2024) (statement of Martin O’Malley, Comm’r, Soc. Sec. Admin.) (eighty percent of Americans support Social Security).

⁴³ *See, e.g.*, Saad, *supra* note 8.

⁴⁴ *See* Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL’Y REV. 73, 79–80 (2010) (“By making these programs automatic and tying them not only to contributions but also to past work, FDR ensured that they would become the large, politically sacrosanct programs they are today. Indeed, FDR famously stated that he created the payroll tax so that ‘no damn politician can ever scrap my social security program.’”) (citing 2 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 309 (Mariner Books 1st ed., 2003)).

⁴⁵ William Safire, *Third Rail*, N.Y. TIMES (Feb. 18, 2007), <https://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html> (emphasis in original) (discussing the origin of the phrase as applied to Social Security during the Reagan administration and attribution of it to Kirk O’Donnell, counsel to House Speaker Tip O’Neill).

⁴⁶ ROMIG, *supra* note 42; *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (noting in Fact #3 that Social Security provides a foundation of retirement protection for nearly all people in the U.S.).

⁴⁷ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (citations omitted); *see also* ROMIG, *supra* note 42.

⁴⁸ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (citations omitted); *see also* DeWitt, *supra* note 25, at 1 (explaining that insurance principle is the strategy of reducing a person’s economic risk through paying into a fund from which payments are made).

⁴⁹ *Fact Sheet*, SOC. SEC. ADMIN, <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Mar. 24, 2026); Irena Dushi & Brad Trenkamp, *Improving the Measurement of Retirement Income of the Aged Population* 14, 18 (Soc. Sec. Admin., ORES Working Paper No. 116, Jan. 2021), <https://www.ssa.gov/policy/docs/workingpapers/wp116.pdf>.

⁵⁰ *Fact Sheet*, *supra* note 49.

⁵¹ *See, e.g.*, ROMIG, *supra* note 42.

⁵² *Id.*

⁵³ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 2; *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106667, SOCIAL SECURITY SERIES PART 1: THE DILEMMA 1 (2023).

Regarding the monthly payments a recipient receives, the Government Accountability Office (“GAO”) reported that the benefits replace some lost income when the worker retires or dies.⁵⁴ With Social Security’s periodic funding issues, it is unfortunate that a significant number of social security recipients receive most of their retirement income from their Social Security benefits.⁵⁵ Beneficiaries rely on those benefits for their normal living expenses.⁵⁶ The Center for Budget and Policy Priorities⁵⁷ described the received benefits as “modest,” but a significant source of income for many.⁵⁸

Because of this, the financial stability of the program has become even more important. Although Congress has the power to amend or even eliminate Social Security,⁵⁹ their importance to America means Congress and the courts should be giving great deference to these programs before changes are made. Congress has a special responsibility to older Americans to consider the promises made to them over the years about these programs and to view any proposed changes to these programs through the lens of the social contract⁶⁰ as originally outlined by President Roosevelt.⁶¹

D. The Promise of Retirement Security for Older Americans:

President Roosevelt, in a message to Congress reflecting on the Nation’s recovery from the Great Depression and tasks remaining for recovery, identified three objectives or factors for the nation’s recovery. The first was security for Americans, the second, “economic circumstances and the forces of nature,” and the third, setting the stage for the argument for passage of Social Security.⁶² Roosevelt was looking for an insurance solution to give solid protection against the financial limitations of aging; the solution would be a joint partnership between the federal government and the states.⁶³

Not too long after the program’s establishment, questions about Social Security were brought to the Supreme Court of the United States. Recall President Roosevelt’s insistence that Social Security be social insurance.⁶⁴ The Court recognized this in *Flemming v. Nestor*,⁶⁵ pointing out that a worker’s benefits were “noncontractual . . . [and] cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.”⁶⁶

But for one of the most compelling questions—whether Social Security beneficiaries had any property rights in the money they paid through taxes into the Social Security Trust Fund—the Supreme Court made clear that a recipient had *no* property right in their Social Security benefits; the program’s need for flexibility was paramount.⁶⁷

⁵⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 53.

⁵⁵ *Id.* (“In 2023, Social Security benefits will replace just over 71 percent of pre-retirement earnings for newly entitled beneficiaries with relatively low career average earnings of about \$15,900 per year—these beneficiaries will receive about \$11,300 in benefits for the year. Social Security benefits also represent a substantial percentage of some workers’ total retirement income, ranging from 83 percent of income for the lowest income quintile (with a median income of about \$14,400 per year) to 30 percent for the fourth income quintile (with a median income of just over \$81,500 per year) in 2017. Of those receiving benefits in January 2023, 74 percent were retired workers who received an average annual benefit of nearly \$22,000.”) (citations omitted).

⁵⁶ *Id.*

⁵⁷ CTR. BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org> (last visited Mar. 24, 2026).

⁵⁸ KATHLEEN ROMIG, CTR. BUDGET & POL’Y PRIORITIES, RAISING SOCIAL SECURITY’S RETIREMENT AGE WOULD CUT BENEFITS FOR ALL NEW RETIREES 2 (2025)

⁵⁹ *Supreme Court Case: Fleming v. Nestor*, *supra* note 23.

⁶⁰ Thank you, Judge Allen, for this point.

⁶¹ *FRD’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act) (framing the Act as “protection to the average citizen and to his family . . . against poverty-ridden old age” and “tak[ing] care of human needs . . .”).

⁶² *Id.* (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration); *see also Great Depression Facts*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, <https://www.fdrlibrary.org/great-depression-facts> (last visited Mar. 24, 2026).

⁶³ *FRD’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

⁶⁴ *Id.*

⁶⁵ 363 U.S. 603 (1960); *see also Supreme Court Case: Fleming v. Nestor*, *supra* note 23.

⁶⁶ *Flemming*, 363 U.S. at 609–10 (citations omitted).

⁶⁷ *Id.* at 610.

The complexity of the program design demanded flexibility that would be lost if beneficiaries had property rights in prospective benefits.⁶⁸ It was doubtless that Congress, aware of the need for such flexibility, included in the original Act, and has since retained, a clause expressly reserving to it “[t]he right to alter, amend, or repeal any provision of the Act.”⁶⁹

E. The Social Contract Expanded: Medicare⁷⁰

Social Security retirement benefits were only one-half of the promise by President Roosevelt. The other half was insurance to cover medical care.⁷¹ As President Johnson commented, the advantage of Social Security could not be fully attained without a concomitant health care program.⁷²

In President Johnson’s 1965 message to Congress, he repeatedly referred to the proposal that became Medicare as health insurance, although beneficiaries pay taxes for Part A during the working phase of their lives.⁷³ Although President Johnson was successful in securing the Medicare program, he was not the first or only President to see its need. For example, in 1945, President Roosevelt spoke to Congress about adding health insurance to the Social Security program.⁷⁴ President Truman followed up in November of 1945, urging Congress to adopt a national health insurance program.⁷⁵

Prior to the adoption of Medicare, older Americans had few options. Private insurers thought them to be a “bad risk,” and insurers found themselves unable to provide “comprehensive, affordable health care coverage” for this cohort of the population.⁷⁶ Originally, Medicare was intended to cover the expenses from hospitalization since that seemed to be the most pressing issue in financing such health care.⁷⁷ Nowadays, there are many more problems in health care financing for older Americans, including prescription drug coverage and drug prices,⁷⁸

⁶⁸ *Id.*

⁶⁹ *Id.* at 611 (citing 42 U.S.C. § 1304).

⁷⁰ For an excellent discussion of the history of Medicare up until 1965, see PETER A. CORNING, THE EVOLUTION OF MEDICARE . . . FROM IDEA TO LAW (Soc. Sec. Admin., ORS Rsch. Rep. No. 29, 1969), <https://www.ssa.gov/history/corning.html>.

⁷¹ In his chapter titled *Who Makes Social Welfare Policy?*, Peter A. Corning discussed this half of the promise, noting that there was agreement on certain ideas and debating society’s duty to provide for it. *Id.* at 118–19.

⁷² *Special Message to the Congress: “Advancing the Nation’s Health”*, THE AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/special-message-to-the-congress-advancing-the-nations-health> (last visited Mar. 24, 2026); see also *Historical Background and Development of Social Security*, *supra* note 27 (“Since World War II, there has been increasing awareness of the fact that the full value of Social Security would not be realized unless provision were made to deal with the problem of costs of illnesses among our older citizens . . . Compassion and reason dictate that this logical extension of our proven Social Security system will supply the prudent, feasible, and dignified way to free the aged from the fear of financial hardship in the event of illness.”).

⁷³ *Special Message to the Congress: “Advancing the Nation’s Health”*, *supra* note 72.

⁷⁴ ALTMAN, *supra* note 24, at 146; see also *State of the Union Address*, THE AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/state-of-the-union-address> (last visited Mar. 24, 2026) (“An expanded social-security program and adequate health . . . programs must play essential roles in a program designed to support individual productivity and mass purchasing power.”).

⁷⁵ ALTMAN, *supra* note 24, at 147; see also Howard Markel, *How Medicare Came to Be, Thanks to Harry S. Truman*, PBS NEWS (July 30, 2014, 12:50 PM EDT) (noting that even though there were some attempts with the Eisenhower and Kennedy administrations, it was Truman’s efforts in 1945, 1947, and 1949 that gave the impetus for the Johnson administration to achieve success); *Special Message to the Congress Recommending a Comprehensive Health Program*, HARRY S. TRUMAN LIB. & MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/192/special-message-congress-recommending-comprehensive-health-program> (last visited Mar. 24, 2026); *Special Message to the Congress on Health and Disability Insurance*, HARRY S. TRUMAN LIB. & MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/98/special-message-congress-health-and-disability-insurance> (last visited Mar. 24, 2026); *Special Message to the Congress on the Nation’s Health Needs*, HARRY S. TRUMAN LIB. & MUSEUM <https://www.trumanlibrary.gov/library/public-papers/85/special-message-congress-nations-health-needs> (last visited Mar. 24, 2026); *Medicare and Medicaid (1965)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/medicare-and-medicaid-act> (last updated Feb. 8, 2022) (critics claimed this would result in “socialized medicine”).

⁷⁶ *Medicare and Medicaid (1965)*, *supra* note 75.

⁷⁷ See NAT’L ACAD. OF SOC. INS., MEDICARE AND THE AMERICAN SOCIAL CONTRACT ch. 2 (1999).

⁷⁸ See, e.g., Craig Palosky, *3 Charts: Drug Prices in the United States*, KFF (Feb. 7, 2024), <https://www.kff.org/health-costs/press-release/3-charts-about-drug-prices-in-the-united-states/> (discussing concerns about the costs of prescription drugs); see also Dan Witters, *In U.S., 66% Report Increase in Cost of Prescription Drugs*, GALLUP (Apr. 28, 2020), <https://news.gallup.com/poll/308036/report-increase-cost-prescription-drugs.aspx>.

the high cost of health care in the U.S.,⁷⁹ the cost of long-term care,⁸⁰ and the availability of, and costs for, caregivers.⁸¹

Medicare has long been considered part of the social contract the government has with older Americans⁸² and, like Social Security, has its own solvency struggles.⁸³ For example, the panel of the National Academy of Social Insurance offered criteria for considering Medicare in upcoming years.⁸⁴ The criteria included financial security of beneficiaries.⁸⁵ Another criterion addressed political accountability, which is the ability to measure the completion of goals and to identify and rectify problems in a way that is equitable to providers, beneficiaries, and taxpayers.⁸⁶ Given the high cost of health care, it makes sense to have Medicare structured as a social insurance program, since the program provides protection to those not able to be otherwise insured.⁸⁷

Medicare is certainly part of the social contract that supports the promise, made by President Roosevelt, to provide financial security to older Americans.⁸⁸ This program not only provides a level of financial security by providing some coverage for health care costs, but it also demonstrates the government’s commitment to older Americans.

Finally, with the passage of the Medicare Act, older Americans had access to health care coverage tied to Social Security.⁸⁹ This combination of the two programs completed the plan to provide retirement security to older Americans.

⁷⁹ See, e.g., Grace Sparks et al., *Americans’ Challenges with Health Care Costs*, KFF (Apr. 30, 2026), <https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/>.

⁸⁰ See, e.g., Liz Hamel & Alex Montero, *The Affordability of Long-Term Care and Support Services: Findings from a KFF Survey*, KFF (Nov. 14, 2023), <https://www.kff.org/health-costs/poll-finding/the-affordability-of-long-term-care-and-support-services/>; see also Ben Harris & Liam Marshall, *Immigration to Address Caregiving Shortfall*, BROOKINGS INST. (Apr. 2, 2024), <https://www.brookings.edu/articles/immigration-to-address-the-caregiving-shortfall/> (warning of a significant caregiver shortage in the future); RICHARD W. JOHNSON, U.S. DEPT. HEALTH & HUMAN SERV., ASPE RESEARCH BRIEF: WHAT IS THE LIFETIME RISK OF NEEDING AND RECEIVING LONG-TERM SERVICES AND SUPPORT? 8 (2019).

⁸¹ See Harris & Marshall, *supra* note 80; JOHNSON, *supra* note 80.

⁸² See NAT’L ACAD. OF SOC. INS., *supra* note 77, at I (executive summary noting the design of Medicare included components of both social insurance and social welfare).

⁸³ See THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2023 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 118-22, at 6, 64 (2023) [hereinafter 2023 MEDICARE TRUSTEES]; THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2024 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 118-136, at 5, 44 (2024) [hereinafter 2024 MEDICARE TRUSTEES]; 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 4–5 (2025); see also Alessandra Malito, *Forget the Social Security Crisis. Medicare Funding Could Be a Much Bigger Problem*, MARKETWATCH (May 9, 2024, 7:00 AM EDT), <https://www.marketwatch.com/story/forget-the-social-security-crisis-medicare-funding-could-be-a-much-bigger-problem-ab192c99> (discussing options for “fix[ing]” Medicare, its importance, and political ramifications).

⁸⁴ The elements of social insurance vis-à-vis Medicare include mandatory participation, government control, financing through mandatory contributions, eligibility tied to contributions, benefit determination by statute, and the benefits are not specifically tied to the beneficiary’s contributions. NAT’L ACAD. OF SOC. INS., *supra* note 77.

⁸⁵ *Id.* at I.

⁸⁶ *Id.*

⁸⁷ *Id.* ch. 2 (the program also works as insurance since it “pools” risk) (citation omitted); see also *Special Message to the Congress: “Advancing the Nation’s Health”*, *supra* note 72.

⁸⁸ See *FDR’s Statements*, *supra* note 19 (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration).

⁸⁹ Both Presidents Truman and Johnson spoke at the signing ceremony. ALTMAN, *supra* note 24, at 205.

IV. Trouble on the Horizon? The Boomers Start to Retire⁹⁰

It may seem logical that the sheer number of baby boomers has an impact on today's shortfall to Social Security⁹¹ and Medicare,⁹² given the actuaries' analysis of those programs.⁹³ It is undisputed that Social Security is in financial trouble.⁹⁴ In fact, as one expert stated, "[t]he depletion of the OASI trust fund is not news. Virtually since the year the trust fund began accumulating assets, the Trustees have projected its demise."⁹⁵ The programs' precarious financial position was foreseeable when considering the cost of health care, outside forces, and population fluctuations.

The retirement of the baby boomers certainly contributed to these financial stresses.⁹⁶ It was not so much that the Social Security Actuaries failed to account for the baby boomers retiring.⁹⁷ Their existence has been known and considered for some time.⁹⁸ In fact, Social Security Commissioner Martin O'Malley, in testimony to the Senate Select Committee on Aging, relayed a discussion he had with the Actuary about the program's long-term solvency.⁹⁹ The error that was made was not in ignoring the baby boomers. Instead, the error was underestimating the scope and length of the recession as well as congressional revisions to the Tax Code after the 1982 Amendments, resulting in an insolvency date of 2034 instead of 2050.¹⁰⁰

One reason Medicare's finances are precarious is the cost of health care in the United States.¹⁰¹ One expert compared the differences between Medicare and Social Security, vis-à-vis their financial stability, noting Social Security's increased payouts are due to the U.S. aging population (e.g., baby boomers): half of Medicare's increased expenditures can be explained by the aging population, with the other half from the costs for U.S. health care.¹⁰²

Reviewing Social Security Trustee reports show how outside forces, such as congressional action, the economy, inflation, birth rates, and the occurrence of major events, impact the long-term financial stability of the

⁹⁰ It is likely that some years passed after their births before Kathleen Casey-Kirschling and Carlos Barientos III found their birthdays remarkable. In reality, their birthdays marked the beginning and end of the baby boomer generation. Casey-Kirschling was born one minute past midnight on January 1, 1946. Walecia Konrad, *America's First Baby Boomer Retires Her Own Way*, NEXT AVE. (Jan. 25, 2012), https://www.huffpost.com/entry/americas-first-baby-boomer_n_1761710. Barientos, born on December 31, 1964 at 6:45 p.m., is likely the last of the baby boomers. Brigitte Miksa, *The Last of the Baby Boomers*, WORLD ECON. F. (Dec. 15, 2014), <https://www.weforum.org/agenda/2014/12/the-last-of-the-baby-boomers/>.

Casey-Kirschling became somewhat famous due to being the first boomer. *Kathleen Casey-Kirschling: Biography*, IMDB, <https://www.imdb.com/name/nm2465556/bio/> (last visited Mar. 24, 2026). An article from Hawaii, Barientos' birthplace, featured his standing as the last boomer. Michael Tsai, *Graying of Hawaii*, HONOLULU STAR-ADVISER (Nov. 15, 2010), <https://www.staradvertiser.com/2010/11/15/hawaii-news/graying-of-hawaii/>.

⁹¹ For an in-depth analysis see ARNOLD, *supra* note 24.

⁹² 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 23 (2023).

⁹³ For the most current actuarial analysis and discussion, see 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63.

⁹⁴ See 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 at 27.

⁹⁵ Munnell, *supra* note 36, at 4; see also, e.g., *Detailed Reports on the Financial Outlook for Social Security's Old-Age, Survivors, and Disability Insurance (OASDI) Trust Funds*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/tr/> (select year) (last visited Mar. 24, 2026) (recognizing correlation between taxes collected and payments made since the reports' inception).

⁹⁶ See BRESLAUER & MORTON, *supra* note 37, at 55. In discussing the 1983 amendments and solvency issues, the report noted that "beginning about 2025, the effects of the retirement of the baby-boom were projected to plunge the system into deficit again." *Id.*; see also Torres-Gil, *supra* note 18, at 97 ("The fuel for these burning debates [about privatization of Social Security] hinges on the aging of the baby boomer cohort and the reality that, although Social Security is running big surpluses today and can cover the forty-five million disabled and retired persons now living in the United States, those surpluses will disappear and turn into annual deficits after 2038, when all of the baby boomers will have retired.") (citations omitted); 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 4 (2025).

⁹⁷ See ALTMAN, *supra* note 24, at 250 (discussing proposals from the National Commission on Social Security Reform).

⁹⁸ AM. ACAD. ACTUARIES, ISSUE BRIEF: AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT 1 (2023).

⁹⁹ *Keeping Our Promise to Older Adults and People with Disabilities*, *supra* note 42, at 9–10 (statement of Martin O'Malley, Comm'r, Soc. Sec. Admin.).

¹⁰⁰ *Id.* at 20.

¹⁰¹ See Alicia H. Munnell & Michael Wicklein, *Medicare Finances: A 2023 Update*, 23 CTR. RETIREMENT RSCH. BOS. COLL., no. 11, May 2023, at 1 (identifying expensive health care costs in U.S. as a reason for Medicare's high costs).

¹⁰² *Id.*

program.¹⁰³ From the first trustees report in 1941,¹⁰⁴ the Trustees have emphasized the correlation between the program’s solvency and the worker-to-retiree ratio.¹⁰⁵ Although the 1941 report struck a cautiously optimistic tone regarding the solvency, the tone was tempered with a recognition of various outside factors that influence the program’s viability.¹⁰⁶ The third Trustees’ report, issued during World War II, explained how the financial solvency is impacted by outside forces.¹⁰⁷ In another example, economic conditions led the Trustees to report a deficit in 1973, as the country experienced double-digit inflation, significant unemployment, and slow job growth.¹⁰⁸

Although it seems that small population fluctuations may be foreseeable, it would be hard to imagine that Social Security could have anticipated the baby boom after World War II, at least until it happened. Surely, once the baby boom ended in 1964, the Social Security Trustees would have acted to shore up the Trust Fund in contemplation of what was going to happen to disbursements once the leading edge of baby boomers reached full retirement age. The 1955 Trustees’ report (which would be the report half-way through the boomer cohort), discussed the increase in population post-World War II.¹⁰⁹

The 1964 Trustees’ report, marking the last year of the boomers’ birth era, did not address the specific population issues presented by the boomers.¹¹⁰ Previous and subsequent Trustees’ reports discussed various changes and impacts,¹¹¹ but the baby boomers were here and headed to the workforce.

Today’s solvency issues are not solely because of the baby boomers, nor is it the first time this has happened, but what is important is that this problem—this shortfall—did not just occur overnight.¹¹² In fact, as previously discussed, issues with Social Security’s solvency have been identified for some time, with Congress previously addressing shortfalls on several occasions, resulting in changes to the program.¹¹³

¹⁰³ For example, the 2023 Trustees Report discussed some of these changes including the financing structure, birth rates, and wage growth. THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2023 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 118-21, at 172 (2023) [hereinafter 2023 SSA TRUSTEES]; THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & DISABILITY INS. TR. FUNDS, 1982 ANNUAL REPORT, FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 97-163, at 31 (1982) [hereinafter 1982 SSA TRUSTEES].

¹⁰⁴ Unlike subsequent Trustee’s Reports, the first Annual Report in 1941 was transmitted to Congress as a letter and unpublished. *Reports & Studies: Trust Fund Reports*, Soc. Sec. Admin., <https://www.ssa.gov/history/reports/trust/tf1941.html> (unpublished report) (last visited Mar. 24, 2026).

¹⁰⁵ *Id.* (discussing the correlation between contributions and the economy).

¹⁰⁶ *Id.* (“The primary consideration with respect to the size of the trust fund is its role in relation to the financial integrity of the social insurance program. In addition, the Board of Trustees must have regard for the relationship of the fund to the fiscal position of the Government and the economic position of the Nation.”). An example of outside influences is discussed in the 1943 Trustees Report referencing the influence of World War II on the Trust Fund. STAFF OF S. COMM. ON FIN., 78TH CONG., THIRD ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND 1–5 (Comm. Print 1943) [hereinafter 1943 SSA TRUSTEES].

¹⁰⁷ 1943 SSA TRUSTEES.

¹⁰⁸ ALTMAN, *supra* note 24, at 216.

¹⁰⁹ BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. TR. FUNDS, PURSUANT TO LAW THE FIFTEENTH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND, S. DOC. NO. 39, at 24–25 (1955) (rapid rise in birth rates starting in 1946).

¹¹⁰ BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. & DISABILITY INS. TR. FUNDS, THE 24TH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND AND THE FEDERAL DISABILITY INSURANCE TRUST FUND, PURSUANT TO THE PROVISIONS OF SECTION 201(C) OF THE SOCIAL SECURITY ACT, AS AMENDED, H.R. DOC. NO. 236 (1963).

¹¹¹ For example, the 1951 Trustees Report noted how changes in the laws regarding eligibility and outside forces (military) affect viability. BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. TR. FUND, PURSUANT TO LAW THE ELEVENTH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND, S. DOC. NO. 44, at 2 (1951). In fact, the Trustees in the 1951 report considered the 1950 changes to be the first significant revisions since the program was amended in 1939. *Id.* at 3.

¹¹² *See, e.g.*, BRESLAUER & MORTON, *supra* note 37, at 74 (noting program was “perennially [] in deficit”).

¹¹³ *Id.* at 40–46, 55–57. *See generally* Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977) (codified as 42 U.S.C. § 1305) (addressing significant financial issues emerging in the middle of the 1970s); Social Security Disability Amendments of 1980, Pub. L. No. 96-403, 94 Stat. 1709 (1980) (codified as 42 U.S.C. § 401) (transferring revenues from the Disability Trust Fund to the OASDI Trust Fund to keep sufficient reserves); Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) (codified as 42 U.S.C. § 1305) (gradually raising full retirement age to 67, among other things).

V. The 1983 Changes to Social Security

Perhaps the biggest changes to the Social Security program came in 1983, as a result of the issues identified in the previous year's report.¹¹⁴ The conclusion of the 1982 Trustees' report laid it all on the line: "The actuarial cost estimates presented in this report confirm the warning in last year's report that, without legislation, the OASI trust Fund would be exhausted in *the latter half of 1982.*"¹¹⁵ To underscore the dire situation, the Trustees declined to make any recommendations for change, given that President Reagan had created the National Commission on Social Security Reform.¹¹⁶ A summary of the law published in the Social Security Bulletin noted trouble had been brewing for some time, with payments exceeding contributions, and without Congressional change, the program would have significant financial problems.¹¹⁷

During President Reagan's administration, Congress responded to the Social Security solvency crisis by enacting Public Law 98-21.¹¹⁸ This law made important changes to the Social Security program by adding additional groups of workers to be covered, making some administrative changes, and increasing the age of eligibility by increments from 65 to 67.¹¹⁹ During the bill signing, President Reagan reiterated President Roosevelt's promise¹²⁰ and expanded on it, saying:

This bill demonstrates for all time our Nation's iron-clad commitment to Social Security. It assures the [older Americans] that America will always keep the promises made in troubled times a half a century ago. It assures those who are still working that they, too, have a pact with the future. From this day forward, they have our pledge that they will get their fair share of benefits when they retire. . . .

. . . .

[Older Americans] need no longer fear that the checks they depend on will be stopped or reduced. These amendments protect them. Americans of middle age need no longer worry whether their career-long investment will pay off. These amendments guarantee it. And younger people can feel confident that Social Security will still be around when they need it to cushion their retirement.

. . . .

[A]ll of us can look each other square in the eye and say, "We kept our promises." We promised that we would protect the financial integrity of social security. We have. We promised that we would protect beneficiaries against any loss in current benefits. We have.¹²¹

The National Commission on Social Security Reform (NCSSR), appointed by President Reagan, gave a nod to that promise by President Reagan, noting unanimously that the solution to the funding problem should not change Social Security's basic structure and preserving its principles.¹²² The 1983 law made changes, but the fact

¹¹⁴ 1982 SSA TRUSTEES, H.R. DOC. NO. 97-163 (1982).

¹¹⁵ *Id.* at 74 (emphasis added) (discussing insufficiency of prior congressional action).

¹¹⁶ *Id.* at 76 (report due by December 31, 1982).

¹¹⁷ *See, e.g.*, John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SEC. BULL., no. 7, July 1983, at 3.

¹¹⁸ Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (signed by President Reagan on April 20, 1983).

¹¹⁹ *Id.*; *see also* Svahn & Ross, *supra* note 117, at 3-5.

¹²⁰ *FDR's Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

¹²¹ *Remarks on Signing the Social Security Amendments of 1983*, RONALD REAGAN PRESIDENTIAL LIB. & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/remarks-signing-social-security-amendments-1983> (last visited Mar. 24, 2026); *see also* Svahn and Ross, *supra* note 117. The presidential commitment to the promise of Social Security President Reagan confirmed was echoed by his predecessors. *See* ALTMAN, *supra* note 24, at 271-72.

¹²² Svahn & Ross, *supra* note 117, at 6-7.

is that they did not have the longevity anticipated when enacted.¹²³ And 40-plus years later, Social Security is again at risk.

VI. Failing Aging?

A. An Optimistic or a Pessimistic View of the Future of the Program?

As emphasized repeatedly in this Essay, there is no doubt that Social Security and Medicare are in a precarious financial situation.¹²⁴ Although a vast majority of older Americans who are receiving Social Security are optimistic about their benefits,¹²⁵ some younger Americans are not convinced that Social Security will be there for them when they reach retirement age.¹²⁶ In one poll, current Social Security recipients were a bit more optimistic that their benefits will continue as is, compared to those not yet receiving benefits.¹²⁷ That same poll found that the optimism of younger Americans varies by cohort.¹²⁸ Yet, Social Security still has broad support both among citizens and elected officials.¹²⁹ Large majorities of Americans say they oppose cuts to Social Security because they value it for themselves, their families, and millions of others who rely on it.¹³⁰

Conditions, especially economic ones, are much different today than at the inception of the Social Security and Medicare programs.¹³¹ Torres-Gil noted in 2002 the generational differences and needs—what worked in the New Deal may not work for boomers and beyond.¹³² Generational differences have significant impact on shared views about the government and politics, and those views in turn impact social policy and the public’s support of programs for older adults.¹³³

Attitudes about older Americans,¹³⁴ as well as about the government’s social contract with Americans,

¹²³ AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98, at 1–3 (discussing insufficient buildup of the Trust fund due to economic factors, such as interest rates, wage growth, inflation, and productivity gains); *see also* 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63 (2025).

¹²⁴ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62; 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63.

¹²⁵ *See* Saad, *supra* note 8.

¹²⁶ *See, e.g.*, John A. Turner & David Rajnes, *Workers’ Expectations About Their Future Social Security Benefits: How Realistic Are They?*, 81 SOC. SEC. BULL., no. 4, 2021. The authors reviewed 18 different surveys concerning workers’ thoughts on receiving Social Security. *Id.* at 2. For example, an unpublished 2016 survey from the American Academy of Actuaries they examined notes workers’ optimism correlated to age. *Id.* at 6. They also cited to another survey from 2019 examining how the generations were counting on Social Security as part of their retirement income. *Id.* at 7. The authors concluded that optimism depends on age, race and ethnicity, and gender. *Id.* at 10. *But see* Jeffrey M. Jones, *Americans More Upbeat About Future Social Security Benefits*, GALLUP (Dec. 8, 2023), <https://news.gallup.com/poll/546890/americans-upbeat-future-social-security-benefits.aspx> (“Among U.S. nonretirees, 50% expect the Social Security system to pay them a benefit when they retire, while 47% do not. In three readings taken between 2005 and 2015, nonretirees were more inclined to predict they would not receive Social Security retirement benefits.”).

¹²⁷ *Id.* (“53% of current U.S. retirees believe they will continue to receive their full Social Security benefits, up from 37% in 2010 and 49% in 2015. 43% of retirees currently believe their benefits will eventually be cut.”).

¹²⁸ *Id.* The majority of the next cohort to reach retirement age believes they will get benefits, the majority of the middle cohort does not, and the youngest cohort splits 50-50 on their confidence in receiving benefits. *Id.*

¹²⁹ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42.

¹³⁰ *Id.*

¹³¹ *See, e.g.*, Josh Freedman & Michael Lind, *The Past and Future of America’s Social Contract*, THE ATLANTIC (Dec. 19, 2013), <https://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/>. The authors note, among other things, that significant changes to the social contract started to occur in the 1980s, fueled by “[d]eregulation of industry, increasing global competition, and the increasing cost and volatility of raw materials all led companies to move away from the New Deal era consensus. In its place grew what we term the ‘low-wage social contract’ that has dominated through the current day.” *Id.*; *see also, e.g.*, 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63 (2025).

¹³² Torres-Gil, *supra* note 18, at 105.

¹³³ *Id.* (“[T]he New Deal cohort includes today’s [older Americans] and the greatest proponents for Social Security and Medicare. The baby boomer cohort has greater antipathy toward big government, big business and big labor and has greatly influenced popular culture. Generation X (those currently in their twenties and thirties) and the baby boomlet cohort (those in kindergarten through twelfth grade) are today’s youth and tomorrow’s workers.”).

¹³⁴ *See, e.g.*, Raqota Berger, *Aging in America: Ageism and General Attitudes Toward Growing Old and the Elderly*, 5 OPEN J. SOC. SCIS. 183, 193 (2017); PEW RSCH. CTR., GROWING OLD IN AMERICA: EXPECTATIONS VS. REALITY 7 (2009); Kristen Weir, *A New Concept of Aging*, 54 MONITOR ON PSYCH., no. 2, Mar. 2023, at 36.

have also changed.¹³⁵ For example, in signing the 1983 Amendments, President Reagan remarked on the split of views regarding Social Security.¹³⁶ In speaking about the amendments, Reagan went on to lower expectations about the program's future:

[S]ocial [S]ecurity cannot do as much for us as we might have hoped Time and again, benefits were increased far beyond the taxes and wages that were supposed to support them. [W]e have struck the best possible balance between the taxes we pay and the benefits paid back. Any more . . . would be an unfair burden Any less would threaten the commitment already made to this generation of retirees¹³⁷

Reagan finished with a somber and perhaps prescient warning about the program's future and what beneficiaries can expect to receive when factoring in increased longevity and productivity balanced again the potential drain on future generations.¹³⁸

B. Can the Programs Be Changed?

The government previously reformed these programs to ensure longer term viability.¹³⁹ Congress absolutely has the power to amend the program and even repeal them,¹⁴⁰ within limits.¹⁴¹ Change is inevitable if the Social Security program is to continue paying 100% of benefits. The more important question is *how* Congress should reform these programs.¹⁴²

Congress has both moral and political obligations to the American people arising from this social contract and any changes to the programs should be in fulfillment of, not contrary to, that contract. One could argue that the 1983 Social Security Amendments, which incrementally raised the full retirement age from 65 to 67,¹⁴³ breached the government's contract with those affected recipients.¹⁴⁴ These beneficiaries had to work longer to

¹³⁵ See, e.g., Neera Tanden, *A New Social Contract for the 21st Century*, DEMOCRACY J. IDEAS (June 23, 2020, 11:30 AM EDT), <https://democracyjournal.org/magazine/a-new-social-contract-for-the-21st-century/> (discussing the New Deal, shared risk, and making recommendations for a new social contract); BRUCE STOKES, NEW AM. FOUND., PUBLIC ATTITUDES TOWARD THE NEXT SOCIAL CONTRACT 7–8 (2013) (discussing skepticism about government fulfilling its part of the social contract); see also, e.g., ARNOLD, *supra* note 24, at 197–223 (discussing President George W. Bush's plans to privatize Social Security).

¹³⁶ *Remarks on Signing the Social Security Amendments of 1983*, *supra* note 121. Reagan continued by noting that President Roosevelt “[believed] that the system can furnish only a base upon which each one of our citizens may build [their] individual security through [their] own individual efforts.” *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ In fact, Congress twice thought it had made changes to ensure long-term solvency. ARNOLD, *supra* note 24, at 225. See BRESLAUER & MORTON, *supra* note 37, at 40, 55; see also *Keeping Our Promise to Older Adults and People with Disabilities*, *supra* note 42, at 19 (statement of Martin O'Malley, Comm'r, Soc. Sec. Admin.) (discussing long-term solvency is within the purview of Congress).

¹⁴⁰ 42 U.S.C. § 1304 (“The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.”); see also *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

¹⁴¹ See *Flemming*, 363 U.S. at 611 (“This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. . . . ‘Our concern here, as often, is with power, not with wisdom.’ Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.” (citation omitted)).

¹⁴² See, e.g., NAT'L ACAD. OF SOC. INS., *supra* note 77, ch. 3 (opposition to raising eligibility age); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106778, SOCIAL SECURITY SERIES PART 2: CRITERIA FOR EVALUATING REFORM PROPOSALS 1 (2023). The GAO offered a framework for evaluating reform options, including “Financing Sustainability Solvency,” “Considering Adequacy and Equity,” “Modernizing the Program to Respond to Societal Changes,” and “Implementing and Administering Proposed Changes.” *Id.* at 2–6.

¹⁴³ Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 65, 108 (1983) (codified as 42 U.S.C. § 416).

¹⁴⁴ See, e.g., Alicia H. Munnell, *There Are Only Two Ways to Fix Social Security: Cut Benefits or Increase Revenues*, CTR. RETIREMENT RSCH. BOS. COLL. (Feb. 22, 2023), <https://crr.bc.edu/there-are-only-two-ways-to-fix-social-security-cut-benefits-or-increase-revenues/>.

From 1980-2008, it was the goal of the Republican Party and its conservative wing to dismantle the social contract formed by Roosevelt with the people during the Great Depression and the implementation of the New Deal.

reach their full retirement age compared to what was promised when they first entered the workforce. Congress would be well advised to consider the purpose and core principles of these programs when making changes, rather than being guided by political pressures or zero-sum actions between the political parties.

VII. Social Security and Medicare Taxes

President’s Roosevelt was committed to basing Social Security on an insurance model.¹⁴⁵ Social Security and Medicare are funded by taxes,¹⁴⁶ even though there are references to it as social insurance.¹⁴⁷ Because these payments into the system are taxes, the Government has a far easier time making changes to the program whether by raising taxes or cutting benefits.

The promises and representations made by President Roosevelt and others may give older Americans a false sense of security regarding their benefits when considering the power of Congress over the structure, terms, and existence of the program.¹⁴⁸ Although older Americans have a property interest in their benefits once lawfully *paid*, there is very little recourse for recipients with respect to actions Congress may take concerning the program. As the Court in *Flemming v. Nestor* held, “the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.”¹⁴⁹

What it boils down to is this: Social Security retirement benefits “are not contractual and may be altered or even eliminated at any time.”¹⁵⁰ Further, “[s]ocial security benefits are not property rights or contractual rights, and Congress may ‘alter, amend, or repeal any provision’ of the Social Security Act.”¹⁵¹ The Court in *Richardson*

Nearly three decades have led to this moment where a social contract is under reconstruction, and President Barack Obama is the person who will do the rebuilding, if it is to be done. However, before understanding what is being attempted, it is appropriate to understand what happened since the rise of conservatism and the assault upon Roosevelt’s covenant.

Brian Gilmore, *American Rousseau: Barack Obama and the Social Contract*, 35 T. MARSHALL L. REV. 9, 30–31 (2009) (citations omitted).

¹⁴⁵ *FDR’s Statements*, *supra* note 19 (Address to Advisory Council of the Committee on Economic Security on the Problems of Economic and Social Security).

¹⁴⁶ *See, e.g.*, *Helvering v. Davis*, 301 U.S. 619, 641, 645 (1937) (determining Social Security constitutional and Congress was correct that the “award of [Social Security retirement] benefits would be conducive to the general welfare”); *see also*, CHARLES E. ROUNDS JR., PROPERTY RIGHTS: THE HIDDEN ISSUE OF SOCIAL SECURITY REFORM 6 (Cato Inst., Project on Soc. Sec. Privatization No. 19, 2000). Rounds describes the Social Security program as a welfare program. *Id.* at 4.

¹⁴⁷ “Title II of the Social Security Act . . . ‘is an insurance program’ that ‘provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need.’” *Culbertson v. Berryhill*, 586 U.S. 53, 55 (2019) (citations omitted). For a discussion of the misnomer that is “social insurance,” *see* ROUNDS, *supra* note 146, at 2 (“In reality, however, all those terms are misleading to the point of dishonesty. The U.S. Supreme Court has ruled that payroll taxes are not ‘contributions’ but are taxes like any others. Social Security has nothing to do with ‘insurance’ contracts or any other type of contract, and nothing to do with segregated ‘accounts.’ Paying Social Security taxes does not give rise to any contractual right to Social Security benefits. In the Social Security Trust Fund, no property is held in trust for any worker or collection of workers.”); *see also* *Flemming v. Nestor*, 363 U.S. 603, 623 (1960) (Black, J., dissenting) (“Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.”) (quoting *Social Security Act Amendments of 1956—Conference Report*, 102 CONG. REC. 15110 (1956) (statement of Sen. George). Justice Black continued:

The Court consoles those whose insurance is taken away today, and others who may suffer the same fate in the future, by saying that a decision requiring the Social Security system to keep faith ‘would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.’ People who pay premiums for insurance usually think they are paying for insurance, not for ‘flexibility and boldness.’ I cannot believe that any private insurance company in America would be permitted to repudiate its matured contracts with its policyholders who have regularly paid all their premiums in reliance upon the good faith of the company.

Id. at 624. *But see Helvering*, 301 U.S. at 634–35 (discussing Social Security withholding as a tax).

¹⁴⁸ *Supreme Court Case: Fleming v. Nestor*, *supra* note 23 (noting some believe that paying taxes means they have “earned” those benefits and Congress can’t take them away).

¹⁴⁹ *Flemming*, 363 U.S. at 610–11 (discussing the program’s need for flexibility and complex structure).

¹⁵⁰ *U.S. R.R. Ret. Bd. v. Fritz*, 499 U.S. 166, 174 (1980).

¹⁵¹ *Bowman v. Barnhart*, 218 F. Supp. 2d 960, 964 (N.D. Ill. 2002) (citations omitted).

v. Belcher also noted that although Social Security benefits come from taxes on their earnings, Congress can still change criteria and eligibility for the program.¹⁵² Workers have little recourse as far as not paying these taxes. There is no contract; there is no property right; there is only an obligation to pay their taxes.¹⁵³

VIII. The Future of Benefits: How Does Congress “Save” the Programs?

Americans not yet receiving Social Security are worried regarding receipt of their Social Security benefits once they reach retirement age.¹⁵⁴ Yet, as noted earlier, they have little recourse to enforce the social contract. Compared to the 1983 congressional actions¹⁵⁵ there is time for Congress to act, since it is estimated that SSA can pay 100% of benefits until 2034.¹⁵⁶ It would be prudent for Congress to act sooner rather than later.¹⁵⁷

Acting earlier is more fair to beneficiaries and gives them time to plan their retirement strategies around the changes.¹⁵⁸ It also gives Congress more maneuverability with options to make Social Security solvent for the long-term.¹⁵⁹ The closer to insolvency, the fewer the options.¹⁶⁰ The longer Congress waits to act, the less opportunity they will have to choose the option of slowly increasing the full retirement age, as was done in 1983, and even raising the tax rate will have limitations.¹⁶¹ Not only is there an advantage to Congress in acting now rather than later, but acting now provides beneficiaries some comfort regarding their benefits.¹⁶² It would provide beneficiaries with more predictability and certainty, and maybe even peace of mind. Of course, waiting until the last minute has some advantages politically, perhaps giving one party more leverage over the other to pass their proposals.¹⁶³ And given the politicization of the issue, acting later, rather than sooner, unfortunately seems more likely.¹⁶⁴ Although the politicization of the future of these programs is antithetical to their purpose and core functions, political parties have used them to gain political advantage.¹⁶⁵

¹⁵² 404 U.S. 78, 80 (1971).

¹⁵³ *Flemming*, 363 U.S. at 610 (no contractual rights); see, e.g., *Supreme Court Case: Fleming v. Nestor*, *supra* note 23; *Must I Pay Social Security Taxes on My Earnings After Full Retirement Age?*, SOC. SEC. ADMIN. (June 30, 2025), <https://www.ssa.gov/faqs/en/questions/KA-02525.html>.

¹⁵⁴ Aliss Higham, *Social Security Cuts Worry Most Americans*, NEWSWEEK (Feb. 16, 2024, 11:17 AM EST), <https://www.newsweek.com/social-security-cuts-poll-1870732> (“When asked ‘to what extent, if at all, are you concerned that Social Security payments will be reduced before you retire?’, 50 percent of those surveyed said they were ‘very concerned.’ The poll found that 28 percent were ‘fairly concerned’ and that 14 percent were ‘slightly concerned.’ Only eight percent of those queried said they were ‘not at all concerned’ about a drop in benefit amounts when they retire.”); see also Sommer, *supra* note 3.

¹⁵⁵ See DeWitt, *supra* note 25, at 16 (trust fund depletion in four months).

¹⁵⁶ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 26 (2025).

¹⁵⁷ See *id.* at 28; see also Higham, *supra* note 154 (citing AM. ACAD. ACTUARIES, ISSUE BRIEF: REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER 1 (2023)).

¹⁵⁸ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 29 (discussing advantages of earlier action); see also, e.g., REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 1–2; ARNOLD, *supra* note 24, at 12 (noting costs for fixing the program spreads the costs of doing so amongst more beneficiaries); 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 12 (2023) (“The sooner solutions are enacted, the more flexible and gradual they can be. The early introduction of reforms increases the time available for affected individuals and organizations—including health care providers, beneficiaries, and taxpayers—to adjust their expectations and behavior. The Trustees recommend that Congress and the executive branch work closely together to expeditiously address these challenges.”).

¹⁵⁹ REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157; see also 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 12; Sprick, *supra* note 21 (passage of time reduces options).

¹⁶⁰ ARNOLD, *supra* note 24, at 12.

¹⁶¹ *Id.*

¹⁶² REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 2. In addition, any benefit cuts would be smaller compared to cuts enacted closer to the insolvency date.

¹⁶³ See, e.g., ARNOLD, *supra* note 24, at 12.

¹⁶⁴ See *id.* at 13–14. Arnold discusses five options available to Congress including incremental steps, some type of privatization, applying general funds to cover benefits, passing a “short-term” solution, and doing nothing. *Id.* at 224–225; see also ROUNDS, *supra* note 146, at 2 (“As a result, a worker’s retirement security is entirely dependent on political decisions made by the president and Congress. Benefits may be reduced or even eliminated at any time. Indeed, Congress has already arbitrarily reduced the benefits of some groups of workers.”).

¹⁶⁵ See *supra* notes 44–45; *infra* notes 180–84.

As discussed earlier, there are many outside variables that impact the viability of Social Security.¹⁶⁶ Because Social Security is such a significant part of retirement security,¹⁶⁷ beneficiaries’ planning decisions will be impacted by Congress’ actions.¹⁶⁸

Interestingly, one recent poll found that Americans would prefer “raising payroll taxes” as an answer to the solvency issue.¹⁶⁹ The options could be divided into two categories, raising taxes or changing benefits.¹⁷⁰ Within those two categories are various options, some of which will affect a smaller group of people, while others affect a larger one.¹⁷¹ If the social contract is going to be changed, Congress has to consider who is affected by the changes, and the number of those affected.

Congress must act before the solvency issue becomes a solvency crisis. Although Congress can take various actions,¹⁷² reform efforts will likely be met with mixed views.¹⁷³ Benefits can be cut, or revenues can be raised through changes to taxes.¹⁷⁴ Cutting benefits carries the risk of older Americans’ retaliation at the ballot box.¹⁷⁵ Raising the retirement age, as was done when President Reagan was in office,¹⁷⁶ is a cut in benefits for those affected by the increase in the full retirement age.¹⁷⁷ As one expert explains it, raising the age is not just delaying the receipt of benefits. Instead, it is fewer years of benefits or a decrease in benefits for those who cannot delay until the new full retirement age.¹⁷⁸ And will a twenty-eight-year-old worker understand the implications when learning that their full retirement age has been increased to age seventy?¹⁷⁹

As the proposals emerge to save Social Security and Medicare this time, expect partisan politics for various proposals.¹⁸⁰ For example, the Republican Study Commission report on the Fiscal Year 2025 Budget, released March 24, 2024, made two points relevant to this Essay: specifically, changing Medicare¹⁸¹ and reforming Social

¹⁶⁶ Jeffrey Brown et al., *Social Security and Financial Security at Older Ages*, 80 SOC. SEC. BULL., no. 1, 2020, at 31. Additional factors include that the “economic and demographic environment surrounding Social Security has changed considerably in ways that influence people’s broader financial well-being. The growth of defined contribution 401(k)-type savings plans, and the associated decline in traditional defined benefit pension income, is one important trend.” *Id.* at 34; *see also* SOCIAL SECURITY SERIES PART 2: CRITERIA FOR EVALUATING REFORM PROPOSALS, *supra* note 142, at 5; BARNES ET AL., *supra* note 32, at 6–7 (discussing demographic changes, health cost increases, and changes made by Congress). For information about life expectancy in the United States, *see U.S. Life Expectancy (1950-2025)*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/countries/usa/united-states/life-expectancy> (last visited Mar. 24, 2026).

¹⁶⁷ *See, e.g.*, TERESA GHILARDUCCI, WORK, RETIRE, AND REPEAT ch.1 (2024) (discussing living arrangements for older people prior to Social Security).

¹⁶⁸ Brown et al., *supra* note 166, at 38 (“First, Social Security policy and the way it is communicated to covered workers strongly influences work, retirement, and claiming behavior. Second, the relationships between socioeconomic status, health, and financial well-being in retirement are strong and persistent, making them important considerations in informing Social Security policy. And third, the extent to which people prepare for their financial needs in later life, beyond Social Security, is strongly influenced by the psychological paths of least resistance that powerfully influence saving and other decisions over the life course.”).

¹⁶⁹ Jones, *supra* note 126 (noting that a majority of respondents indicated support for an increase in taxes for Social Security while others preferred a restriction on benefits). The poll did show a breakdown by political party, with more Democrats favoring the increase in payroll taxes while more Republicans favored “curbing” benefits. *Id.*; *see also* Sommer, *supra* note 3.

¹⁷⁰ The Republican Study Committee offered three categories for change: taxes, benefits, and program costs. REPUBLICAN STUDY COMM., FISCAL SANITY TO SAVE AMERICAN: REPUBLICAN STUDY COMMITTEE FY 2025 BUDGET PROPOSAL 106 (2024).

¹⁷¹ *See, e.g.*, REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 3 (noting how different approaches to tax increases impact different segments of the population).

¹⁷² 42 U.S.C. § 1304.

¹⁷³ Giulia Carbonaro, *Social Security Reform Splits Young Americans and Boomers*, NEWSWEEK (Feb. 28, 2024, 6:24 AM EST), <https://www.newsweek.com/young-americans-boomers-clash-social-security-reform-1873646> (expressing differences of opinions by age on reform options).

¹⁷⁴ Munnell, *supra* note 144.

¹⁷⁵ Sommer, *supra* note 3 (“The benefits for people who are already retired—or about to be—aren’t likely to be cut, because older people vote in large numbers. Taking away money that they have been promised would be political dynamite . . .”).

¹⁷⁶ Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 65 108 (1983) (codified as 42 U.S.C. § 416).

¹⁷⁷ Munnell, *supra* note 144. Munnell notes that “progressive pricing” would also result in benefits cut. *Id.*

¹⁷⁸ *Id.*; *see also* ZHE LI, CONG. RSCH. SERV., R44670, THE SOCIAL SECURITY RETIREMENT AGE (2022) (Summary) (noting that, while some elected officials support raising the retirement age, others point to a disparate impact on specific individuals based on finances, or those who perform manual labor and may be physically unable to work longer to reach the full retirement age).

¹⁷⁹ Munnell, *supra* note 144 (“[W]e at least have to label the proposed changes to Social Security correctly. Trying to trick people into thinking that they are not being hurt by an increase in the FRA is not a legitimate way to make policy.”).

¹⁸⁰ *See, e.g.*, ROUNDS, *supra* note 146, at 1 (retirement security relies on “political decisions of the president and Congress”); ARNOLD, *supra* note 24, ch. 6. Arnold also notes that since 2016, no Republican legislator presented a bill to address Social Security’s insolvency issue. *Id.* at 185.

¹⁸¹ REPUBLICAN STUDY COMM., *supra* note 170, at 98–101; *see also, e.g.*, Sprick, *supra* note 21 (calling for political “courage” and “bipartisan leadership”).

Security.¹⁸² The President's proposal does not reduce benefits but would raise taxes for certain wealthy individuals.¹⁸³ The Project 2025¹⁸⁴ proposal addresses changes to Medicare¹⁸⁵ which would shift the focus and design of the program. Political rhetoric is infused in the documents, with little attention given to the promises and principles of these programs.

The American Academy of Actuaries¹⁸⁶ analyzed the 2023 Social Security Trustees Report¹⁸⁷ and looked at raising retirement age as a solvency assist.¹⁸⁸ The Actuaries report makes some excellent points regarding increasing the full retirement age. For example, the solvency issues for Social Security reflect several underlying causes including the increasing longevity of older Americans, who concomitantly receive retirement benefits for a longer time.¹⁸⁹ One might consider this a design issue, or a lack of foresight, but the reality is that this longevity development is expected to continue for some time.¹⁹⁰ The full retirement age phase-in as a result of the Social Security Amendments of 1983 took 20 years to complete.¹⁹¹ If Congress chooses to again increase the full retirement age, it is important to realize that an increase in the age is tantamount to a reduction in benefits.¹⁹² But more importantly, Congress must realize that increasing the full retirement age results in inequities amongst older workers.¹⁹³ For example, asking a professional who mainly works at a desk to work until age 70 may be a completely different ask than for someone who works in manual labor to do the same.¹⁹⁴ Further, not all older Americans have benefited from longevity gains.¹⁹⁵ And the worker-to-retiree ratio will not change in the near term, since birth rates fell after the boomer cohort.¹⁹⁶ If Congress were to address the solvency issue by adjusting the retirement age, it should explore not applying any increase to the full retirement age to certain groups that would be more adversely affected by such action.¹⁹⁷

¹⁸² REPUBLICAN STUDY COMM., *supra* note 170, at 103–08. The study committee recommends changes to Medicare such as moving to a “Premium Support Model,” “Reform[ing] Graduate Medical Education (GME) Payments,” and “Implement[ing] Site Neutral Payment Policies.” *Id.* at 100–01. As far as Social Security, the proposals focus on “General Fund Transfers,” “Tax Hikes,” and “Program Savings.” *Id.* at 106–07.

¹⁸³ *Fact Sheet: The President's Budget Protects and Strengthens Social Security and Medicare*, THE AM. PRESIDENCY PROJECT (Mar. 11, 2024), <https://www.presidency.ucsb.edu/documents/fact-sheet-the-presidents-budget-protects-and-strengthens-social-security-and-medicare>; *see also* Sommer, *supra* note 3.

¹⁸⁴ While no longer operational, the “about” page of the Project 2025 website described it in part by setting out “four pillars that will, collectively, pave the way for an effective conservative administration: a policy agenda, personnel, training, and a 180-day playbook.” *About Project 2025*, PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, <https://www.project2025.org/about/about-project-2025/> [<https://web.archive.org/web/20240408042320/https://www.project2025.org/about/about-project-2025/>] (last updated Feb. 11, 2026).

¹⁸⁵ Roger Severino, *Department of Health and Human Services*, in THE HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 449–501 (Paul Dans & Steven Groves eds. 2023). The proposed changes to Medicare are to be guided by “four goals and principles: Increase Medicare beneficiaries’ control of their health care. . . . Reduce regulatory burdens on doctors. . . . Ensure sustainability and value for beneficiaries and taxpayers. . . . [and] Reduce waste, fraud, and abuse” *Id.* at 463.

¹⁸⁶ AM. ACAD. ACTUARIES, <https://www.actuary.org/homepage> (last visited Mar. 24, 2026).

¹⁸⁷ AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98.

¹⁸⁸ AM. ACAD. ACTUARIES, ISSUE BRIEF: RAISING THE SOCIAL SECURITY RETIREMENT AGE 1 (2022).

¹⁸⁹ *Id.* at 1–2. Table 2 compares expected life span after age 65 starting in 1940 (when male was 11.9 and female was 13.4) through several time frames. *Id.* at 3. In 2019 the expected life span after age 65 was 18.1 for male and 20.7 for female, and by 2035 is projected to be 19.1/21.6 respectively. *Id.*; *see also* ARNOLD, *supra* note 24, at 2.

¹⁹⁰ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 4 (as to the increase in longevity).

¹⁹¹ *Id.* at 2.

¹⁹² *Id.* at 4; *see also* Munnell, *supra* note 144; ROMIG, *supra* note 58, at 1 (“Raising the retirement age cuts benefits for all new retirees—that is, those claiming Social Security benefits for the first time. These cuts could be deep, and they would fall hardest on lower- and middle-income beneficiaries because they rely most heavily on Social Security benefits. Moreover, they have not seen the life expectancy gains that higher-income people have experienced and that are often used as the rationale for raising the retirement age.”).

¹⁹³ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 4–5. “[I]mplementation of Social Security program change based upon a presumption of longer work is complicated by the fact that work demands differ across types of occupations, and health status and life expectancies vary across socioeconomic groups.” *Id.* at 5; *see also, e.g.*, GHILARDUCCI, *supra* note 167, at 14–15 (discussing how full retirement age affects benefits).

¹⁹⁴ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 5.

¹⁹⁵ ARNOLD, *supra* note 24, at 91 (discussing disparities in longevity increases).

¹⁹⁶ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 7 (pointing out the worker-to-retiree ratio started falling in the 2000s); AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98, at 4 (discussing the drop in fertility rates post-boomers, thus the smaller number of workers).

¹⁹⁷ *See* LI, *supra* note 178, at 16–17.

Given the purpose of and statements about Social Security and, to some extent, Medicare, and the importance they play to the economy, social policy, and income security,¹⁹⁸ they should be considered to be more than just garden variety statutory programs;¹⁹⁹ they are so ingrained in our culture and so important to individuals,²⁰⁰ as well as the economy and the government, they are not “average” statutes, and instead it can be argued that they more, that they are “super statutes.”²⁰¹ They are considered the third rail in American politics, and cuts to benefits will likely see a backlash in the next election.²⁰² There are not that many statutes that would cause that kind of reaction in American society. Unlike other statutes, these apply to everyone at some point—they are all-inclusive. Taken together, the impact of these programs and their inclusive scope requires Congress and the courts not to just consider the words in the statutes, but read those words through the focus of the promises, principles, and the purposes of the programs.

As an example, the United Nations has discussed Social Security in terms of a human right.²⁰³ The Social Security Administration echoed the human rights aspect, in considering how to address the projected shortfall.²⁰⁴ “Economic security is a universal human problem, encompassing the ways in which an individual or a family provides for some assurance of income” due to inability to work or death.²⁰⁵ Just automatically opting to raise the retirement age, an option opposed by the vast majority of citizens,²⁰⁶ will not have the same impact on each beneficiary, suggesting that the better solution would be to raising taxes or developing additional revenues sources, such as those wealthy Americans.²⁰⁷ There have been many proposals to save the program, and there will be more.²⁰⁸

IX. Conclusion

So where does this leave the promises made to older Americans? “As the only official who owes his mandate to the entire American electorate, a President uniquely embodies the will of the people. He, more than anyone else, is obligated to speak and act for the Nation as a whole.”²⁰⁹ The presidential promises quoted in this Essay, made during the creation of these programs, and periodically thereafter, should not be seen as not hollow promises made during an election. It could be said that those who are paying into the system or who are receiving the benefits of these programs do not view these promises as political rhetoric, but instead as moral and political

¹⁹⁸ See, e.g., ROMIG, *supra* note 58, at 2 (discussing Social Security importance for retirement security and economy).

¹⁹⁹ See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001).

²⁰⁰ See, e.g., Laura D. Quinby et al., *Does Social Security Serve as an Economic Stabilizer?*, at 2–3 (Ctr. Retirement Rsch. Bos. Coll., Working Paper No. 2021-9, July 2021) (discussing, among other things, Social Security’s impact on economy).

²⁰¹ Eskridge and Ferejohn describe a “super statute” as:

A law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem, but a lengthy struggle does not assure a law super-statute status. The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture. Sometimes, a law just gets lucky, catching a wave that makes it a super-statute. Other times, a thoughtful law is unlucky, appearing at the time to be a bright solution but losing its luster due to circumstances beyond the foresight of its drafters.

Eskridge & Ferejohn, *supra* note 199, at 1216. The authors note that super statutes developed importance as a result of the New Deal. *Id.* at 1218, 1227.

²⁰² Sommer, *supra* note 3.

²⁰³ Off. High Comm. Hum. Rts., *About the Rights to Social Security and Human Rights*, UNITED NATIONS, <https://www.ohchr.org/en/social-security/about-right-social-security-and-human-rights> (last visited Mar. 24, 2026).

²⁰⁴ DeWitt, *supra* note 25, at 1.

²⁰⁵ *Id.* (alteration in original).

²⁰⁶ ROMIG, *supra* note 58, at 8 (citations omitted).

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Mark Miller, *Fixing Social Security and Medicare: Where the Parties Stand*, N.Y. TIMES (Feb. 18, 2023), <https://www.nytimes.com/2023/02/18/business/fixing-social-security-and-medicare-where-the-parties-stand.html>.

²⁰⁹ CORNING, *supra* note 70, ch. 5 (discussing the various Presidents’ roles in passing Medicare). “But perhaps the most important contributors were the four Presidents of the United States who had made health insurance under social security one of their goals.” *Id.* at 120.

obligations to all Americans. Although a social contract may be revised over time to respond to changes in society and needs of people, this social contract is not only still relevant, it is *the* critical, stable component in providing retirement security.

The significance of, reliance on, and acceptance of Social Security and Medicare, both socially and economically, to individuals as well as the government, is an example of a successful social contract at work. Americans have accepted, supported, and relied upon the promises and principles of these programs. To not fulfill the social contract now would have disastrous consequences to older Americans, the American economy, and Congress. It is possible that President Roosevelt foresaw the size the program would become, but it is unlikely that at Social Security's passage, anyone could have foreseen the consequential nature of the program to the Nation's economy and to millions of people's retirement security.

In conclusion, the best way to view these social contracts is that they create a moral and a political obligation to Americans from Congress and the administration. Congress thus should commit to honoring these obligations by considering the promises made almost 95 years ago. When Congress acts to "save" these programs, Congress should implement changes that affirm, rather than gut, those promises. To paraphrase President Reagan from 1983, promises have been made, and now, promises should be kept.