

## Chapter 18A

### **The Status of Social Security**

*An outline, not an argument*

*by Dennis J. Wall, Esquire*

§ 18A:1 Social Security: What purposes did the people who wrote it think they were serving

#### **§ 18A:1 Social Security: What purposes did the people who wrote it think they were serving**

This is not a legislative history as lawyers understand the term. The legislative history of the Social Security Act has been addressed in many United States Supreme Court decisions, some of which will be recounted here.<sup>1</sup>

“Social Security is the most successful retirement plan the

---

#### **[Section 18A:1]**

<sup>1</sup>*E.g., Helvering v. Davis*, 301 U.S. 619, 641-43, 57 S. Ct. 904, 909 (1937); *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 588, 596-97 & n.13, 57 S. Ct. 883, 891, 895 & n.13 (1937).

“The most significant 2018 additions are the two chapters devoted to our 83-year-old Social Security Old-Age Insurance and Disability Insurance programs with the reminder that Social Security is insurance.” Claramargaret H. Groover, *Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters*, 7 Insurance Matters! 1, 2 (2018-2019; newsletter of the Insurance and Surety Committee of the Florida Bar Real Property Probate and Trust Law Section) (book review).

United States has ever had.”<sup>2</sup> The history addressed here might be called the “social history” of social insurance, in this case, of Social Security. Our social history of the Social Security Act begins with its name: the federal Old Age, Survivors, Disability and Health Insurance program.<sup>3</sup>

***A national program.*** Social Security was designed from the beginning as a ***national*** program.<sup>4</sup> This feature too has been held constitutional. The nation as a whole was facing a national crisis during the Great Depression, and the Supreme Court thought it was a good fit with the U.S. Constitution for Congress

---

<sup>2</sup>Ian Ayres and Jacob Hacker, *Social Security Plus*, 26 *Elder L.J.* 261, 266-67 (2019).

<sup>3</sup>Overall, the Social Security Act was held constitutional within two years after it took effect, in a majority opinion written by *Justice Cardozo*. *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937). Then Assistant Attorney General Robert Jackson was on the federal government’s team arguing for a holding of constitutionality.

*Steward* has continuing vitality today. Justice Roberts repeatedly cited this case with approval in his opinion for the Court upholding the Affordable Care Act’s individual mandate in *National Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-85, 132 S. Ct. 2566, 2602-06 (2012). The *NFIB* case is discussed in § 18E:2, *infra*. The *Steward* case has continuously been cited in other cases as well. In *City of Seattle v. Trump*, No. 17-497-BAJ, 2017 WL 4700144, at \*9 (W.D. Wash. Oct. 19, 2017), the *Steward* case was cited in support of a holding that the plaintiffs in that case “successfully pled their Spending Clause claim” of unconstitutionality of an Executive Order, held “inconsistent with the Tenth Amendment” and “unconstitutionally coercive” because the Executive Order conditioned receipt of federal grants upon compliance with its “ambiguous.. immigration-related enforcement conditions[.]”

<sup>4</sup>As one of the architects of Social Security old-age insurance, Dean J. Douglas Brown, put it in “The Genesis of Social Security in America” (1969), available online at <https://www.ssa.gov/history/jdb5.html>:

Our insistence that there was need for a national contributory social insurance program to meet the need of the aged grew out of our study of the steadily rising balance of old people, compared to the working population, in the years ahead. America had become accustomed to thinking of itself as a young nation, but already the combined factors of longevity, industrialization, and urbanization were making inevitable a serious problem of support for increasing millions of people beyond 65. To attempt to meet the problem by state old age assistance programs alone offered little hope. A more constructive mechanism which would *prevent* a vast load of dependency among the aged was vitally necessary. The only such mechanism available was compulsory contributory old age insurance.

Dean Brown was, as they say, present at the creation of the Social Security old-age insurance program. During his lifetime he was, among many other things, the head of the Industrial Relations Section at Princeton University, a member of all four Advisory Councils on Social Security, Provost and Dean of the Faculty at Princeton, a member of the Emergency Committee for Employment in 1930-31 appointed by President Hoover, and a member of the old age staff of the Cabinet Committee on Economic Security appointed by President Roosevelt.

The need for a national system is mentioned repeatedly in histories of the Social Security old-age insurance program.

to enact a *national* solution.<sup>5</sup>

**Compulsory.** Social Security was made compulsory, not voluntary, from the beginning.<sup>6</sup> As the Supreme Court has clearly pointed out, then as now “[t]he program is financed through a payroll tax levied on employees in covered employment, and on their employers.”<sup>7</sup>

**Prevention, not a cure.** The aim of Social Security was to prevent the future experience of financial ruin in old age on the part of people in the United States. Most of the elderly people in the United States were experiencing financial ruin at the time the Social Security Act was written into law during the Great Depression. Social Security was written in order to prevent anyone else from having a similar experience in a future United States. The “plea” of the people writing the old-age insurance Social Security program “was to prevent dependency in old age, rather than just to relieve it after it had occurred.”<sup>8</sup> In upholding the constitutionality of the Social Security Act, the Supreme Court has taken note that Social Security is a measure to prevent financial hardship from occurring, not a cure for financial hardship that has already taken place.<sup>9</sup>

**Old age.** The evidence supports the prevailing view that the people who wrote Social Security into existence were focused on the elderly.<sup>10</sup> The evidence includes not only the historical sources, but the fact of the framework of the Social Security Act

---

<sup>5</sup>*Helvering v. Davis*, 301 U.S. 619, 644, 57 S. Ct. 904, 909-10 (1937), another majority opinion authored by Mr. Justice Cardozo.

<sup>6</sup>“From the very first,” said Dean Brown, “it was our conviction that any old age insurance plan in the United States should be *national, compulsory, and contributory* and provide benefits *as a matter of right*. To us, these necessary elements were obvious[.]” J. Douglas Brown, “The Genesis of Social Security in America” (1969), available online at <https://www.ssa.gov/history/jdb5.html> (italics in original).

<sup>7</sup>*Flemming v. Nestor*, 363 U.S. 603, 609, 80 S. Ct. 1367, 1372 (1960).

<sup>8</sup>Speech by J. Douglas Brown, titled “The Birth of Old-Age Insurance, 1934-35,” to the Social Security District Office Managers conference at Yonkers, New York on May 17, 1963, available online at <https://ssa.gov/history/jdb4.html>.

<sup>9</sup>See *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 909 (1937):

The hope behind this statute is to save men and women 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.

See, in addition, Bernard, “Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy,” 3 Health Matrix 339, 362 (Summer, 1993): “This benign leviathan, the Social Security program, did not begin as a charity nor as a giant. As Roosevelt had signed the Social Security Act of 1935 he envisioned, with the Congress, that Pub.L.74-271 created a new version of an insurance plan—not welfare.”

<sup>10</sup>In addition to the many other social history sources and the Supreme Court decisions cited in this Chapter, see J. Douglas Brown, “The Genesis of

itself. There is no means test in it, for example, by which a person could qualify for some form of “assistance” under the Social Security Act by being poor even if they were also young. The reason is that the people of the time demanded insurance, not another dole:

Now, it would be satisfying, looking back in history, if one could say—especially an economist—that it was the academic economist, the specialist group in the universities or Government, that brought about the change. But it wasn’t. It was the people. It was the people who rebelled in the time of the Great Depression and who felt that individual personal dignity was not being taken care of under the concept of means-test relief; that rights were involved; that a man had a right not to have to be in that situation; and that with the universal franchise, he had a right to do something about it. It was the belated recognition that this was a poor way of taking care of individual dignity, and especially when one had a vote to bring it about.

\* \* \*

It was, then, this resurgence of recognition of individual rights that sparked the American approach to social insurance. That’s where it got its start.<sup>11</sup>

Social Security has always been a system for the elderly, although elderly workers began contributing to it when they were younger workers themselves. Nonetheless, Social Security was and remains at all times a system focused on workers who have reached old age. “In 1934, the American people greatly needed a constructive program for the prevention of poverty in old age. The experience of the depression prepared the way for a drastic new step.”<sup>12</sup>

There is a contrary view, that the “real,” the “hidden” purpose of Social Security was to remove older persons from the workforce who might be inclined to continue working if they had no alternative to an income in their old age than from their jobs. This view seems to be the product of a small record of evidence. It does not represent the truth, and in particular it does not accurately represent the conditions which actually existed when the Social Se-

---

Social Security in America” (1969), available online at <https://www.ssa.gov/history/jdb5.html>:

[T]he benefits then proposed were far less important strategically, we were convinced, than the establishment of the principle of **old age benefits** as a *matter of right*, related to past contributions to a national system.

(Boldface added; italics in original.)

<sup>11</sup>J. Douglas Brown, “The Idea of Social Security,” speech at the Meeting of the Bureau of Old-Age and Survivors Insurance in Baltimore, Maryland on November 7, 1957, accessible online as the “original version” of this 1957 speech, at <https://www.ssa.gov/history/brown3.html>.

<sup>12</sup>J. Douglas Brown, “The Genesis of Social Security in America” (1969), accessible online at <https://www.ssa.gov/history/jdb5.html>.

curity program was designed in 1934-1935:

The problem of the “superannuated worker” is a traditional one in industrial policy and pension theory. Since the onset of the Industrial Age, older workers began to find themselves at the end of their productive working lives, often without means of support. Such older workers often tried to remain employed and employers sometimes tried to find ways to move them out of the workforce. So the idea that this industrial policy objective underlies the RET [Retirement Earnings Test], has an initial plausibility. But it is, as we will see, largely a historical myth which has grown over time and assumed the status of “common knowledge.”

\* \* \*

In the first place, *the aged had already been forced out of the workforce in disproportionate numbers by the economics of the Depression*. Since older workers are generally the highest-paid workers in a business and often are thought to be less productive than younger workers, in many industries they were the first ones laid-off in the Depression. They were also the least likely to be re-hired for the same reasons. *As a consequence, workforce participation for older workers was much lower than for younger workers*.

\* \* \*

So older workers were *not* a major factor in *blocking opportunities for younger workers or in competing with them for the job openings which did occur*. So while we can perhaps conceive of circumstances in which large numbers of entrenched older workers are blocking workforce entry to younger workers, this was not in fact the situation in the 1930s, as far as the data available to program planners in 1935 indicated.<sup>13</sup>

Another contrary view is closely connected with the “superannuated worker urban myth.” It is something of a red herring, it turns out: “In other words, Social Security, was not a system founded upon humanitarian principles or feelings of beneficence toward the elderly.”<sup>14</sup> There is little evidence that Social Security was “founded upon humanitarian principles or feelings of beneficence toward the elderly,” for the simple reason that it wasn’t.

The people who were writing and enacting a framework of social insurance during the Great Depression had as their purpose the protection of workers without income who were aged at that time *and for the protection of workers who would*

<sup>13</sup>Larry DeWitt, SSA [Social Security Administration] Historian, “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www.ssa.gov/history/ret2.html> (Emphasis added.)

<sup>14</sup>Hawes, So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits, 65 U. Pitt. L. Rev. 865, 875-76 (2004).

*become elderly in the future.*<sup>15</sup> Like the actress Mae West intoned, also during the Great Depression, “Goodness had nothing to do with it.” “In particular, Social Security was not designed to alleviate the suffering of people caught in the immediate distress of the Great Depression, nor to get people to quit their jobs. Rather, it was set up as wage insurance that people earned.”<sup>16</sup>

**Contributory.** It was never a coincidence that Social Security has required contributions from workers since the beginning. **Contribution** was planned. It was planned for the purpose of evidencing a **right**. The architects and authors of the Social Security old-age insurance program, and the Members of Congress who voted it into existence, knew this from the inception.<sup>17</sup>

<sup>15</sup>William Graebner’s contrarian views of the origins and purposes of Social Security have attracted a small following, such as in the article cited immediately above. While provocative, Mr. Graebner’s views do not find much support in the history of and about the Social Security old-age insurance program. One article was found by the author of the present Chapter in the course of researching the social history of Social Security, in which Mr. Graebner’s research was addressed. In it, Mr. Graebner’s citation of what lawyers call legislative history was left open to question by the author of that article, inasmuch as the author of that article “can find no such indications” in the legislative history of Social Security for an “industrial policy thesis,” i.e., that the reason that Social Security old-age insurance was enacted was not to provide insurance to the elderly, but was really enacted in order to remove workers from the work force to benefit younger workers seeking jobs. Larry DeWitt, “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www.ssa.gov/history/re t2.html>. The author of that article, Mr. DeWitt, is identified as the SSA [Social Security Administration] Historian at the time he wrote it.

<sup>16</sup>Nancy J. Altman, *The Truth About Social Security: Setting the Record Straight*, Common Dreams (August 14, 2018), accessible at <https://www.common dreams.org/views/2018/08/14/truth-about-social-security-setting-record-straight>.

<sup>17</sup>The soundness of *the concept of joint contributions* in an American system of social insurance does not arise out of economics. It *stems from our political and social traditions*. Of course, arguments can be made about shifting and incidence, as with all taxes or costs, but the fact remains that the first incidence of any contribution to government or to any other recipient, church, family or trade union, is of great psychological importance. Out of such incidence political influence arises, loyalty and responsibility are encouraged, and personal satisfaction and dignity are gained.

\* \* \*

In America we have a wholesome suspicion of big government. And now we have given government the tremendous task of providing a floor for our individual security. I for one would feel more certain that our leaders in government would continue to respect the sanctity of the trust we have imposed upon them if every potential beneficiary who is gainfully employed were both a voter and a contributor to all social insurance systems.

J. Douglas Brown, Sidney Hillman memorial lecture at the University of Wisconsin delivered on November 18, 1955, combined in part with a lecture delivered at Social Security Headquarters in Baltimore, Maryland on November 7, 1957, “published in 1972,” titled, “The American Philosophy of Social Insur-

“Benefits are a matter of right.”<sup>18</sup> I will return to this subject later.

**Insurance.** The final feature of Social Security to be addressed here is its most important feature. Social Security was established as insurance.<sup>19</sup> It was not the dole in the Great Depression, and it is not an unearned benefit now.

“Wage insurance such as Social Security, where the benefit is explicitly designed to replace wages, is precisely geared to this goal and, in the case of Social Security, provides protection in the event of death or disability before reaching retirement.”<sup>20</sup> Social Security insures each member of a group for loss of wages.<sup>21</sup>

Social Security does not resemble established notions of property and casualty insurance. Social Security is more like an annuity, payable at fixed times. The contributions workers make out of their paychecks are the equivalent of paying the insurance premiums.<sup>22</sup>

As has always been the case with private insurance, the first question to ask before issuing an insurance policy is the nature of the risk to be assumed by the insurance company. The risk assumed under Social Security old-age insurance was clear from the beginning. “*Risks insured against: . . . Loss of earning capacity through old age, old age being defined [at the outset of the program] as the age of 65 years or over.*”<sup>23</sup>

Another, more recent description of the risks to be insured

---

ance,” accessible online at <https://www.ssa.gov/history/brown2.html>. (Emphasis added.)

<sup>18</sup>J. Douglas Brown, “The Genesis of Social Security in America” (1969), accessible online at <https://www.ssa.gov/history/jdb5.html>.

<sup>19</sup>As just one example, the Social Security Act provides for a “National Commission on Social Security.” The Act designates the first duty of the Commission “to conduct a continuing study, investigation, and review of—(A) the Federal old-age, survivors, and disability **insurance program** established by subchapter II of this chapter,” in other words, the Social Security program. 42 U.S.C.A. § 907a(b)(1)(A) (emphasis added). Cf. Ian Ayres and Jacob Hacker, *Social Security Plus*, 26 *Elder L.J.* 261, 279 (2019): “Nonetheless, *as with any kind of insurance*” (emphasis added), various factors come into play including, as noted in the article, adverse selection.

<sup>20</sup>Nancy J. Altman & Eric R. Kingson, *Social Security Works!* 25 (2015).

<sup>21</sup>See Altman & Drew, *Social Security Works!*, *supra*, at 24-25.

<sup>22</sup>In this sense, the persistent myth that Social Security old-age insurance was put into place in order to move older workers out of the workforce, denies the “risk-sharing inherent in insurance schemes.” In the case of Social Security old-age insurance, the shared risk is that “one must retire in order to receive a retirement benefit because loss of earnings is the insured condition.” Larry DeWitt, SSA Historian, “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www.ssa.gov/history/ret2.html>.

<sup>23</sup>Barbara Armstrong, “Invalidity and Old Age Insurance” (unpublished

against is that “the general purpose of the old-age, survivors,’ and disability insurance provisions of the statute is to protect workers and their dependents from the risk of loss of income due to the insured’s old age, death, or disability.”<sup>24</sup>

Parenthetically, risk of loss of income from old age was precisely focused on loss of income from work by workers, because labor is interrupted by old age, death, or disability, whereas “the receipt of income from the investment of capital” is not affected nearly as much, if at all, by these events.<sup>25</sup>

In this regard, Social Security old-age insurance was designed to share a significant feature of private annuities, which is that payment would begin when a condition in the insurance contract was fulfilled by the holder of the annuity, or in the case of Social Security old-age insurance, by the employee. “The old-age insurance program required *retirement from gainful employment as a condition of benefit receipt*.”<sup>26</sup>

In the Social Security old-age insurance framework, national scope is a manifestation of all insurance underwriting, namely, spreading the risk:

In economic and actuarial terms, a social insurance system would be most efficient if it covered the area of a national economy. Insurance administration is basically a routine operation for which unit costs decline with increasing size. Even in the more complex field of private life insurance, companies of great size have been outstandingly successful. The risks of old age, death, survivorship, disability and unemployment can be better averaged over a wider area. In a limited reserve system in which mutually offsetting flows of contributions and benefit payments are depended upon heavily in

---

paper, written in August, 1934) (emphasis in original), quoted by Larry DeWitt, SSA Historian, in “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www.ssa.gov/history/ret2.html>.

Professor Barbara Armstrong was a Professor of Law and Economics at the University of California School of Law at the time. Like many other persons involved in designing the Social Security old-age insurance program, she had previously written a book on the subject of social insurance. Her concentration was on designing old-age insurance in the then-to-be-developed Social Security program.

Professor Armstrong brought her expertise in that area to bear as one of three consultants on old-age insurance on the Technical Committee attached to the Committee on Economic Security (CES) beginning in 1934. The CES was appointed by President Roosevelt to design the Social Security program.

<sup>24</sup>1 Soc. Sec. L. & Prac. § 1:1, “Nature of Social Security Act” (Thomson Reuters, December 2016 Update).

<sup>25</sup>1 Soc. Sec. L. & Prac. § 1:1, “Nature of Social Security Act” (Thomson Reuters, December 2016 Update).

<sup>26</sup>Larry DeWitt, SSA Historian, in “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www.ssa.gov/history/ret2.html>. (Emphasis added.).

current financing, a wider averaging of risks is very important.<sup>27</sup>

The chief difference between private insurance and social insurance like Social Security lies in how they respectively handle the requirements of reserves. Private insurance in general terms requires that insurance companies post reserves, meaning amounts of money sufficient to pay an amount of claims established by a regulator according to actuarial and other guidelines generally based on experience.

Social Security reserves, i.e., the monies received from worker and employer contributions placed in the “social security fund,” were intentionally made low enough that Congress could pass a bill. To say again, the question of reserves is answered differently in the old-age insurance Social Security framework, than it is in the area of private insurance:

In private individual insurance, a full reserve would be considered essential. Even in group annuity programs set up by private firms, accrued liability [had] to be funded over time. In social insurance, however, we were convinced, such a full reserve was not only unnecessary, but an impossible incubus on the national economy.<sup>28</sup>

The Social Security bill would have been politically unpalatable if Social Security old-age insurance reserves were set too high. The level of contributions required from employees and employers would be so high that no-one, employee or employer, could afford to advance the funds Social Security would require. Further, the participation of the general treasury was doubtful at best looking at the question realistically.<sup>29</sup> Even today, there are

---

<sup>27</sup>J. Douglas Brown, Sidney Hillman memorial lecture at the University of Wisconsin delivered on November 18, 1955, combined in part with a lecture delivered at Social Security Headquarters in Baltimore, Maryland on November 7, 1957, “published in 1972,” titled, “The American Philosophy of Social Insurance,” accessible online at <https://www.ssa.gov/history/brown2.html>. (Emphasis added.)

<sup>28</sup>J. Douglas Brown, “The Genesis of Social Security in America” (1969), available online at <https://www.ssa.gov/history/jdb5.html>.

<sup>29</sup>While recognizing that government contributions to the Social Security system have not happened, the authors of Social Security old-age insurance “were convinced,” Dean Brown once observed, that the place of a large reserve would be taken by “an eventual government contribution to the system[.]” J. Douglas Brown, “The Genesis of Social Security in America” (1969), available online at <https://www.ssa.gov/history/jdb5.html>.

Upon further reflection, or at any rate at a later date, Dean Brown added to this statement:

The question of eventual governmental contributions to the system to compensate for these low rates during the early years of the system has been shelved for our children and grandchildren to answer.

J. Douglas Brown, Sidney Hillman memorial lecture at the University of Wisconsin delivered on November 18, 1955, combined in part with a lecture

grave doubts whether there is in reality an impending crisis over the future funding of benefits under the Social Security Act including not only old-age insurance benefits, but also Medicaid, Medicare, and Disability.<sup>30</sup>

If reserves were set too low on the other hand, participation would again be in doubt since returns on the investments, as it were, would not be worth the sacrifice. Social Security reserves were intentionally left open to calculation from formulas that provided a result somewhere in the middle. The formulas were based on the individual's level of contribution to the U.S. economy, accumulated over time:

Our approach is that, *within limits, the individual worker establishes the level to his protection by his individual contribution to our economy.* I want to emphasize the distinction, “to our economy,” not “to the system.” Not to the Treasury of the United States but to our economy.

The limits to this principle are important, but the concept is simple; benefits by and large in the American system are firmly related to the wage system. Differentials in wages resulting from the efforts of the worker are reflected to a degree in differentials in benefits. The relative continuity of earnings under the wage system is also reflected to some degree in the level of protection.

---

delivered at Social Security Headquarters in Baltimore, Maryland on November 7, 1957, “published in 1972,” titled, “The American Philosophy of Social Insurance,” accessible online at <https://www.ssa.gov/history/brown2.html> (Emphasis added.)

<sup>30</sup>Hawes, So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits, 65 U. Pitt. L. Rev. 865, 908 n.270 (2004) (“Of course whether or not avoiding the impending [*sic*] Social Security crisis constitutes a public purpose, let alone whether there is an imminent crisis, is a matter of debate.”). The “So No Damn Politician Can Ever Scrap It” article which has just been cited, offers one source to support the claim that Social Security is ‘incontestably’ running out of money. The one source is a “*see*” cite to one newspaper column, Richard W. Stevenson, “U.S./The 2004 Campaign: Social Security; The Hot Potato of Issues is Dropped Anew,” N.Y. Times, February 27, 2004, at A21. I downloaded the newspaper article from the New York Times archives, but although I found that it repeated many opinions expressed by politicians in Washington, I could not find any research in it to actually evidence that any Social Security program, including the old-age insurance Social Security program, is running out of money.

In any case, it does not appear at all clear, especially to insurance practitioners, that the only option to maintain insurance is to cut insurance benefits. *See, e.g.*, Nancy Altman, Op-Ed: Social Security Isn’t in Crisis. It Just Needs a Tune-up, Los Angeles Times Online, Aug. 13, 2019, available at <https://www.latimes.com/opinion/story/2019-08-13/>; Jon Walker, Dispelling the Myths Surrounding Social Security, 30 DCBA [DuPage County (Illinois) Bar Association] Brief 8, 10 (Oct. 2017). The solvency of the Social Security Program is discussed at greater length in § 18A:4, *infra*, but at this time the author would like to express his gratitude to Jon Walker, Esquire, for his achievement in producing the *Myths* article which has just been cited here and which has served as an excellent research aid in the 2019 research and drafting of this chapter.

The simple device of averaging wages over a period in the determination of benefits has important significance in adding a factor related to contribution *through time* to that of the economic worth of such contribution in a single period of time.<sup>31</sup>

If the individual receiving Social Security payments under the old-age insurance program has received “more than the correct amount of payment,” moreover, then “proper adjustment or recovery *shall* be made” *unless* that person is “without fault.”<sup>32</sup> Even when a person is without fault for overpayment of Federal Old-Age, Survivors, and Disability Insurance Benefits, still she or he must return the overpayment either through adjustment of her or his future such insurance benefits, or as the result of a recovery action brought by the United States against her or him, with two exceptions.<sup>33</sup>

The first exception is if the “adjustment or recovery would defeat the purpose” of the Federal Old-Age, Survivors, and Disability Insurance Benefits program. The second exception is a voice from the courts of equity of centuries ago, heard in the 21st Century: If it “would be against equity and good conscience,”<sup>34</sup> then no such adjustment or recovery of an overpayment is allowable as against “any person who is without fault.”<sup>35</sup>

In sum, the social history of Social Security<sup>36</sup> provides the background of the Social Security Method, which is the subject of

---

<sup>31</sup>J. Douglas Brown, “The Idea of Social Security,” speech at the Meeting of the Bureau of Old-Age and Survivors Insurance in Baltimore, Maryland on November 7, 1957, accessible online as the “original version” of this 1957 speech, at <https://www.ssa.gov/history/brown3.html>.

<sup>32</sup>42 U.S.C.A. § 404(a)(1), current through P.L. 116-21, and also P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333 (emphasis added). The title of Section 404 is “Overpayments and underpayments.”

<sup>33</sup>42 U.S.C.A. § 404(b)(1), current through P.L. 116-21, and also P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333.

<sup>34</sup>This is a modern application of the main principle which has guided Equity Courts for many centuries, which is “ex aequo et bono,” or “out of what is equal and good.”

<sup>35</sup>42 U.S.C.A. § 404(b)(1), current through P.L. 116-21, and also P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333. To say again, the title of Section 404 is “Overpayments and underpayments.”

<sup>36</sup>What I am referring to here as the social history of Social Security consists of all the writings, speeches, and lectures given on the history of Social Security, and of Social Security old-age insurance in particular, by those who participated in designing it. The “core” documents, or what the Social Security Administration Historian has termed “the primary source documentation of the intentions of the program’s designers on the CES [Committee on Economic Security],” are “the unpublished 10-volumes of studies, the 74-page report, the draft administration bill, the President’s cover message to Congress and the 1937 book,” all of which resulted from the work of the CES. Larry DeWitt, SSA Historian, in “Special Study #7: The History and Development of the Social Security Retirement Earnings Test” (August 1999), available online at <https://www>

§ 18A:1

CATASTROPHE CLAIMS

the next section.

[w.ssa.gov/history/ret2.html](http://w.ssa.gov/history/ret2.html).

Given that perspective, I can provide in this limited space only that amount of social history of Social Security which, it is hoped, is sufficient to understand the true purposes of those who wrote the program.

For another view of the history of Social Security, *see also* Luke Norris, *The Workers' Constitution*, 87 Fordham L. Rev. 1459, 1481-91 (2019).