

Comments on Blackburn's Paper

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Introduction

In the following essay, I offer critical comments on Robin Blackburn's proposal for a government-created and -run secondary pension scheme. It is one aimed at complementing current primary pension schemes. It would use resources gained by the government by diverse means. Most importantly, would be managed not only for the ultimate financial benefit of retirees, but also, through management of the resources accumulated, as a powerful means for social control of capital investment. In the first section of the essay, I describe in greater detail the kinds of goals that Blackburn seeks to achieve. In the second, we outline key elements of the scheme by which Blackburn would hope it would operate to ensure it meets those goals. In the next two sections, I consider draw upon the history of various policies enacted or advanced in the United States to gain insights into the political challenges that the funding and governance aspects of Blackburn's proposals might face in this country. With this as background and accepting for the purpose of discussion the institutional structure of Blackburn's scheme and the challenges, both as a matter of design and politics, that it might face. Finally, we describe at length the modest, but creative and promising work in the community development field that offers encouragement, though not a model, for parallel efforts at how to craft an alternative scheme that has practical merit and political purchase.

1. Blackburn's Goals

Blackburn's paper, "The Great Pension Crisis: From Grey Capitalism to Responsible Accumulation,"² is challenging for several reasons. First, it is animated by the achievement of large-scale, long-term and significant goals. Second, the achievement of any one of those goals poses thorny questions involving multiple and interrelated economic, political, and other considerations. Third, the goals potentially conflict with one another. Fourth, while the ideas are "big," limited attention is given to major aspects of the scheme that could have a significant bearing on how one assesses it.

One key goal is to best ensure that people have reasonable choices and chances for enjoying at least basic economic security and, perhaps, a measure of comfort in "retirement," should they elect to retire, in whole or in part.³ How to achieve that goal, in turn and of necessity, requires considering the ways in which people in retirement secure claims to current or recent production of goods and services that undergird the relevant standard of living.⁴

People may, of course, accumulate their own claims, ones embodied in a wide range of financial assets or other possessions that have cash value (that is, can be converted to cash).⁵ The government may play a role in compelling or providing incentives for individuals to accumulate such assets, managing those assets, and regulating their

distribution or use. However, the claims may also take the form of government-generated “entitlements,” promises for the fulfillment of which will depend on the exercise of the government’s taxing power or use of resources or investments over which the government already has control.⁶

This first goal is linked to what is arguably Blackburn’s most important goal, to establish a significant and direct public role in the control of the process by which capital is accumulated and exercise power over the uses of accumulated capital. For him, “public role” means the exercise of ostensible state power as such. But it is equally critical to his scheme that such power be both manifested and constrained by certain democratic and egalitarian institutions and practices, and a desire and expectation that it will result in socially as well as financially beneficial outcomes.⁷ Blackburn focuses especially on the resources associated with (primarily corporate) enterprises, though “capital accumulation” can refer more broadly to other forms of financial asset accumulation.

In addition, a critical goal (and context for the discussion) is to successfully navigate the ongoing and dramatic demographic change by which the proportion of the older population to the younger population continues its dramatic shift in favor of the former (and bears significantly on the absolute and relative economic well-being of both).⁸ In this regard, it is important to note that Blackburn appears to treat this phenomenon as giving rise to the parallel one of an increasing proportion of “retired” persons to those who are working. If so, he precludes the possibility that older persons may work beyond what is a current, typical retirement age, whether on a full- or part-time basis.⁹ Indeed, that is already occurring in the United States, driven in part by economic necessity (especially for single older women) as well as changing lifestyles.¹⁰ Clearly, though, for the former, a secondary pension scheme would be essential; for the latter, at least welcome.

Correspondingly, Blackburn’s premise is that while current “primary” pension schemes funded on a pay-as-you-go basis (generally from taxes) are very important and must be retained, there are significant political, fiscal, and other limits to expanding or strengthening them. For that reason, he argues that the focus must be on “secondary” ones sustained in other ways, primarily from income generated through asset ownership.¹¹ It should also be noted, in this context, that while the central public pension scheme in the United States is that afforded by the Social Security system, essential to that system are not only conventional retirement benefits but also those provided in the event of the death or disability of the covered person to his or her surviving spouse and children. Many people are reliant on the latter benefits. Discussions about the “reform” of Social Security often fail to take into account the need to provide these very important benefits.

To better assess the merits of Blackburn’s scheme, we first recapitulate what appear to its key elements.

2. Key Elements of Blackburn’s Proposals

At the core of Blackburn’s proposal for a universal, pre-funded secondary pension and “non-commercial fund management” is the establishment of a national fund (hereinafter, “National Fund”). Blackburn speaks of such a fund primarily in the context of its being supported by a “corporate share levy.” However, he appears to contemplate the fund being sustained by other revenues, e.g., those produced by a wealth tax; monies from

the sale or income from the use of “public assets,” such as the airwaves; or property taxes generated by increases in commercial site values. Blackburn would, under specified circumstances, have the resources be allocated to “registered pension funds” (hereinafter, “RPFs”) that would manage those resources and make payment to beneficiaries.

While Blackburn is clear that the accumulated resources are the financial basis for the secondary pension, he is not entirely clear about who “owns” those resources. The pensions appear to have hybrid, defined benefit and defined contribution aspects. They are like the latter in that each person is allotted (at least in a bookkeeping sense) a certain amount of the resources that are transferred from the National Fund to the RPFs in which pensioners would be participants. The scheme is somewhat like the former in that the aim seems to be to supply an income within a predetermined range. But again, it would be like the latter in that there would appear to be no guarantee of receipt of that level of income.¹² Still, again, the pensions are unlike the latter in that it appears that participants would not have individual ownership rights over the pension resources allotted to them. Rather, they would enjoy only the income generated by those resources. However, it is also evident that Blackburn envisions that people will make individual contributions. And he also anticipates crediting people who are caregivers or unemployed with having made contributions or according credits, progressively on the basis of income, for amounts actually contributed. Moreover, while he appears to envision a federally imposed share levy as ensuring employer contributions, it is not clear whether he excludes additional, voluntary ones from employers. And if the share levy is not relied upon, then it would seem that Blackburn would anticipate different – almost certainly cash – contributions to the National Fund from employers. It is not clear whether Blackburn would treat these voluntary contributions (or their equivalent) as resources that are “owned” by the contributors. Whether they are or not and the interplay among them and the other potential funding resources bears in significant ways upon the efficacy, legitimacy, and political viability of the system Blackburn proposes.

Blackburn tells us about the general mandate of the National Fund, but offers little detail about its internal structure and/or that of the RPFs. Positing implementation of his share levy idea, he states that the National Fund “would channel a flow of new shares to RPFs based on their membership.” However, Blackburn would have it do so only if RPFs “achieve a publicly-audited social investment grade.” Yet, he suggests criteria for determining whether a fund is eligible for receipt of the shares that sweep more broadly. More particularly, they include that the fund

- (1) be “egalitarian in its internal structuring,”
- (2) give “democratic representation to its members,”
- (3) accept “a code of practice based on social priorities,”
- (4) commit “to holding most of its assets for, say, five years,” and
- (5) accept “fair rules of distribution of benefits.”¹³

Blackburn appears to link satisfaction of most, if not all, of these criteria not only to qualifications for registered fund status but also to eligibility for tax incentives. For example, he contends that the “[f]unds...would...have to establish their bona fides - not only as retirement organizations but also as responsible and alert custodians of all the shares they held. Different social investment grade ratings might be linked to different tax concessions, with the possibility that some might be denied registration altogether.”¹⁴

He adds that “[t]he most generous tax concessions would be available only to socially or mutually-owned funds” that

- (1) “give some direct representation to benefit holders,”
- (2) “qualify as socially-responsible funds,” and
- (3) “allow for a modicum of re-distribution from those with higher lifetime earnings to those with lower lifetime earnings.”¹⁵

Actually, eligibility of funds for tax incentives would appear to be a bit more stringent. Blackburn would subject all companies to an annual “social audit, to establish their adherence to acceptable and sustainable working methods, and their commitment to appropriate levels of investment in research and development.” Apparently, only if funds “invest[] in such companies would [they] be rewarded with tax exemption on the consequent earnings.”

At another point, Blackburn adds several additional criteria, though ones that would overlap with what he has already recommended. For example, he would require that “members of a fund – whether beneficiaries or contributors – would have an equal voice and vote on its policy. However the audit process [established to ensure compliance with established criteria] would ensure that funds be kept to actuarially-fair pay-out rates, so that the goal of paying future pensions was not jeopardized by excessive payments in the present...and seek to ensure that pension money was invested in deserving projects and not exposed to undue risk.”¹⁶

Blackburn offers only a gloss on the meaning of internal RPF structuring that is egalitarian and democratic. He states that “[o]bviously a new statute for pension funds should allow members to elect the trustees and to have a role in formulating general investment policy.” And, again, he opines that “the various trust funds could be made democratically accountable, with actuarial safeguards for generational equity.” And he also adds that “[m]embership in a fund would carry with it the right to regular information and consultation on the fund’s policies.”

3. Questions Posed: Funding and Governance

Broadly speaking, I look at Blackburn’s scheme in primarily two kinds of ways. The first relate to the prospects for ensuring that the resources are available to fund whatever version of it seems appropriate. The second concerns the prospects for translating his broad gauge proposals into practical, detailed, working ones, issues of what we term “governance.” With respect to both, I consider the political context in the United States and how it might shape both and consider, as well, the links it establishes between choices about funding and governance

a. Funding

Political considerations relate to where the resources come from to sustain the scheme in general and the National Fund, in particular. They also concern how those resources are managed and used. Let us start with the former. As noted, Blackburn suggests that they could be derived from (1) property tax revenues generated by increases in commercial site values; (2) revenues produced by a wealth tax; (3) monies from the sale or income from the use of “public assets”; and (4) a share levy.

Property Taxes

In the American context, one can pretty much dismiss out of hand the first as a source of federal revenue. Property taxes are essentially a matter for state, county, and local government, particularly the latter. There would be no ready mechanism for generating such revenues. In any event, it would be of dubious political legitimacy. Almost certainly any serious effort to raise them would generate fierce opposition on tax, federalism, and other grounds.

Wealth Taxes

If by a “wealth tax,” Blackburn means an annual, during-a-lifetime tax levied on the basis of some general measure of a person’s wealth, such a tax has not loomed large in United States history.¹⁷ (Of course, property taxes are a tax levied according to a particular measure of wealth – the assessed value of a house – and other federal and taxes have been levied on the value of other kinds of property.) To be sure, in recent years Bruce Ackerman and Anne Alstott proposed an annual 2% annual tax on wealth to support an “equal opportunity” stakeholding scheme for funding stakeholder accounts at birth for all newborns.¹⁸ The latter idea has gained some purchase in both liberal and conservative circles.¹⁹ The form has not, at least as of yet.

Instead, by a wealth tax, Blackburn may mean either a tax levied on the privilege of receiving property (an “inheritance” tax) or on the privilege of transferring it (an “estate tax”) triggered upon the death of the transferor or, arguably, a related tax, triggered by a transfer during the life of the transferor (a “gift tax”). The history of these taxes at the federal level, beginning in 1797, has been a roller coaster one. One scholar notes that it “reveals a pattern of enactment and repeal. Enactment often occurred with the goal for raising revenue for a specific purpose, primarily military spending. Repeal often occurred in times of economic prosperity and when the specific revenue need decreased. In the 1920s, the goal of the estate tax expanded from merely increasing revenue to breaking up concentrations of wealth.”²⁰

At the present time, the political tide pulls strongly against the estate tax. As of this writing, legislation successfully pushed through Congress in 2001 by the Bush administration provides for a gradual increase in the amount of estates that can pass free of the estate tax. It also reduces the estate tax rate slightly, leading to ultimate repeal in 2010. In principle, one artifact of the political gimmickry required to enact the legislation was the automatic reinstatement in 2011 of the estate tax rules as they existed in 2001.²¹ Clearly, though, conservatives are making vigorous efforts to ensure permanent repeal of the estate tax.²² Contrary to what one might anticipate from the fact that the overwhelming number of individuals had or were likely to have no taxable estates under the previous law, there has been broad and fairly deep support for repeal.²³ Indeed, recent surveys and analyses offer sobering insights about how informed and grounded public perceptions about estate and other taxes are.²⁴ Of course, there are vigorous and articulate advocates for wealth taxes, who would retain the estate tax or institute some form of net worth tax, who seek to strengthen its political appeal by linking taxing (very large) wealth (of the relatively few) to specific policies to enable wealth building (for many of the rest of us).²⁵ This approach is apposite with the one articulated by Ackerman and Alstott, noted above.

“Public” Assets

There is a long and in a number respects, sad history in America about the sale or generation of income from the use of “public assets,” variously defined.²⁶ Whether we limit our attention, as here, to renewable or non-renewable natural assets/resources, or to other kinds of public assets, that history affords little evidence of application of the revenues gained from their use or consumption to broad-based public purposes. We are more likely to have seen private appropriation or, at best, the proceeds being directed into general revenues, rather than into a specific scheme with a well-defined goal like Blackburn’s.

One could argue that the “right kind” of private appropriation has not necessarily been bad. The most significant and suggestive example is found in the Homestead Act by which an estimated “1.5 million households were given title to 246 million acres of [federal] land.”²⁷ On one hand, one could, accordingly, maintain that the benefits were relatively broadly distributed. Moreover, one could argue in political terms that still resonate strongly today (and, hence, are relevant to our discussion), that the benefits were “earned.” This is because people gained rights to up to 160-acre plots of land only if they made improvements to and occupied the land for five years.²⁸ On the other hand, one could contend that the public wealth in land was appropriated by a fraction of the people who lived during the period the Act was in effect. Over time, the benefit has been diffused: according to one estimate, “a quarter of the adult population potentially has a legacy of property ownership and assets in their background that can be directly linked to [that] policy.”²⁹ Yet, that very fact can be cited as a stark example of inequality in the inter-generational transfer of wealth. The disparate outcomes are, not surprisingly, especially stark for African-Americans, who had little opportunity to gain access to the benefit of the Act or similar, subsequent legislation.³⁰ (There were, of course, larger injustices implicit in the scheme and related ones for distributing such “federal land,” i.e., it was Native Americans who lost the land by virtue of the European colonization.)

The struggle over the appropriation and use of public assets continues in many forms today. One of the more intriguing ones relates to a nominally renewable public asset (an unpolluted atmosphere). It involves an ostensibly progressive idea for establishment of a so-called “Sky Trust.” The income for the Sky Trust “would come from selling carbon emission permits to fossil fuel companies.” Not surprisingly, there has been a less-than-progressive take on that idea. For example, in 2003, Senators Joe Lieberman (D-CT) and John McCain (R-AZ) filed the Climate Stewardship Act (CSA) “that [would] establish greenhouse emission limits in tandem with both free pollution allowances and others that would be sold to a fiduciary.”³¹ This particular scheme has been characterized as a “giveaway” of what could generate over \$40 billion in revenue annually.³² However, it is interesting to note that one of the most prominent, progressive proponents of proposals along these lines stresses that the income generated should be individually appropriated, i.e., that it should “be distributed to all U.S. citizens in the form of equal dividends.”³³ Indeed, this aspect of the idea is modeled on a scheme relating to a non-renewable resource, oil), the Alaska Permanent Fund, which has been a practical operating reality for well over twenty years. An understanding of the nature and genesis of that Fund is illuminating for the present discussion.

The Alaska Permanent Fund was created, with broad-based political support, by a state constitutional amendment in 1976. It has been characterized as a “public savings account [that] receives at least 25 percent of all mineral royalties, royalty sale proceeds,

mineral lease rentals, federal mineral revenue sharing payments, and bonuses.”³⁴ “This mandatory contribution to the Permanent Fund works out to approximately 10-15 percent of the state’s oil revenue in an average year.”³⁵

The final choice of objectives for the Fund, set by legislation enacted in 1980, were to “provide a means of conserving a portion of the ...revenues...to benefit all generations of Alaskans,” “maintain safety of principal while maximizing total return,” and “to allow maximum use of disposable income from [the Alaska Permanent Fund] Corporation for purposes designated by law.”³⁶

As such, “social” and “economic objectives” for the Fund were ostensibly rejected. Advocates for social objectives focused on “disposition of the earnings of the Permanent Fund as opposed to the principal,” but “also advanced an investment strategy to eliminate or balance specific inequities in economic social, physical or political parameters of the state.”³⁷ For example, they aimed “to promote programs with an emphasis on changing social conditions such as the redistribution of wealth through the negative income tax, to subsidize low-income families, to correct regional economic differences, or to support educational programs.”³⁸ Economic objectives were to “promote economic diversification and development” and included “[p]roposals for subsidized loan programs, large infrastructure programs to build hydroelectric dams, railroads, and ports, or the development of industrial parks...”³⁹ By contrast, “fiscal objectives centered upon the idea of the Fund as a savings account which would be managed very conservatively, [with] primarily investments in high-grade low-risk securities, or would be used to reduce state debt.”⁴⁰ “

Although, in the mid-1970s, “[m]embers of the public initially perceived the Permanent Fund as an economic development tool by a margin of 4-1,⁴¹ the economic development objective was not chosen because “the consensus was reached that...[(1)] lack of available capital was not the reason for limited economic development in Alaska; [(2)] ...soft loans were very risky; and [(3)] loans were a subsidy to a select few people.”⁴² Even though there also appears to have been public support for social welfare objectives, they were ultimately rejected as well. Indeed, then Governor Jay Hammond initially pressed for social welfare goals, but ultimately argued vigorously for broad dispersal of Fund benefits among all Alaskans as beneficiaries. He did so, in part, on the ground that there were already other programs for dispersing part of the state’s oil wealth for social objectives.⁴³ Moreover, “[c]onsultants [who] were very influential in the formulation of objectives for the Permanent Fund” argued against social objectives because of “the inability to account for or measure the social performance of the Fund as succinctly as through financial criteria.”⁴⁴ Further, that view reflected the notion that the Fund should be kept “relatively pure in objectives and to allow the earnings to go back to the General Fund where the legislative process could respond to social needs and allocate funds more effectively”⁴⁵

The success of purely financial criteria meshed well with the next decision, one for “direct distribution,” that is, to pay an “annual Dividend to all qualifying Alaska residents in equal shares.”⁴⁶ The method of annual cash payments prevailed over a “once-and-for-all transfer of ownership shares...to individual Alaskans.”⁴⁷

Proponents of per capita dividends argued that they would “(1) build a political constituency for the Permanent Fund; (2) hold down government growth; (3) deliver benefits to residents more efficiently than other ways of using the old wealth; (4)

stimulate the economy more effectively than other methods of using the oil wealth; (5) distribute a portion of the wealth owned by all Alaskans more equitably than other ways of using that money do ; (6) allow individual Alaskans to decide how to use a portion of the oil wealth they own; and (7) provide a safety net for Alaskans facing the prospect of a recession.”⁴⁸ Opponents contended that per capita dividends “(1) are immoral; (2) are too expensive in the face of declining oil revenues; (3) are likely to be wasted by recipients; (4) increase the population; (5) anger powerful forces outside Alaska; (6) are taxable under the federal income tax; and (7) take money better used to build the economy through construction of infrastructure and subsidized financing of industry.”⁴⁹ The former arguments obviously prevailed. What is perhaps most striking about their success for our purposes is “[t]he uniqueness of the Dividend legislation [which] made nonsense of traditional political alignments[:]. . . supporters had a tripartisan coalition, [but] opponents included both conservative Republicans . . . and progressive Democrats.”⁵⁰

A Share Levy

It may state the obvious to say that any effort in the United States to advance Blackburn’s idea for a share levy would face very tough sledding. Recall that Blackburn would “require[] all corporations to issue new shares to a public pension trust fund each year equivalent to 10 per cent of their profits.” Private corporations and large partnerships, would, perhaps, be “allowed to issue profits-related bonds instead while concerns employing fewer than ten people would be exempt.” And he believes it would be attractive in comparison to a “corporation tax” because it would “not subtract from companies’ cash flow,” “swell labor costs,” “act as a tax on jobs,” and “could not be passed on to consumers in higher prices.”⁵¹

Before we turn to the political dimensions of the share levy idea, a few comments on this argument seem merited. Something of a “free lunch” seems implicit in the idea. Whatever the gain for the National Fund, there would be for all other shareholders a corresponding loss, in at least equity and, nominally, of market value. Over successive years these equity and possible market value losses would be compounded. Also, of necessity (given the nature and intent of Blackburn’s scheme) those shareholders’ voting power would be increasingly eroded. Certainly the scheme would engender the active opposition of large individual and institutional investors, who probably would hold significant portions of the company stock. In addition, though, there may be a large number of very small stockholders who would experience the losses, however small in monetary terms, as great in symbolic terms. Moreover, to the extent that public and pension funds are currently (and increasingly) shareholders in those very corporations, the levy would have the effect of robbing Peter to pay Paul.

Legal arguments may interestingly enough, best evoke the political ones. This is not the place to canvas in detail legal challenges that the compelled issuance and transfer of issues could face. But if one is serious about advancing them in the United States, there is at least one of which we should take notice. We are compelled to do so for obvious individual constitutional rights (here “property” rights) reasons. But I am also spurred to it because arguments on that plane are typically rooted in strongly held and historically sustained value commitments that stir up powerful political sentiments as well.

Most immediately, a challenge under the Fifth Amendment of the U.S. Constitution comes to mind. That provision establishes as an individual right that “private property [not] be taken [by the federal government] for public use, without just compensation.”⁵²

The protection of this so-called “Takings Clause” applies to direct government seizure of physical property – by an exercise of the power of eminent domain. But it also applies to certain adverse, but indirect, impacts on diverse property rights that are the result of government regulatory action. In the words of Supreme Court Justice Oliver Wendell Holmes in the seminal case of *Pennsylvania Coal Co. v. Mahon*, “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁵³ Under the leadership of Chief Justice William Rehnquist, the Supreme Court has very aggressively interpreted the Takings Clause to significantly narrow the range of exercises of governmental regulatory power that do not run afoul of the provisions strictures.

By contrast, though, historically speaking, the Court has said that the “power to tax is virtually without limitation.”⁵⁴ Indeed, the exercise of the taxing power has been sustained even though the taxes put the taxpayer at risk of being driven out of business,⁵⁵ are sharply progressive, fall much more heavily on some than other taxpayers,⁵⁶ or narrowly target only some of a class of potential class of taxpayers⁵⁷

In light of these strongly diverging approaches, a conceptual and practical challenge arises at the intersection of taxation with the targeting of particular property. So, for example, in a recent regulatory takings case the Court found unconstitutional a retroactive imposition of financial liability of employers for funding a private pension scheme. While not all of the Justices so held on the basis of the Takings Clause, one of the concurring Justices asserted that critical to the issue was whether the statute “operate[d] upon or alter[ed] an identified property interest.”⁵⁸ However, there is case law supporting the power of the state to tax property in kind.⁵⁹ But yet, again, such support may rest on a distinction between whether the property is viewed as fungible or not. That is, it depends on whether or not it is significant that the property is unique from the perspective of the holder (or perhaps others) and, as a related matter, how readily the property is convertible into cash.⁶⁰ On one hand, shares that are widely traded or even potentially tradable in a market would certainly seem to be fungible enough to obviate any concerns. On the other hand, the scheme here is to compel the issuance of additional shares in a manner calculated to dilute and shift ownership control over particular, identifiable assets.

Suffice it to say, all of this poses some fascinating issues. Is the compelled transfer really a regulatory taking? Is it a tax taking, or is that an oxymoron? Arguably, such a problem could be averted by the government offering a choice: the corporation could either pay a tax equal to 1 percent of the market value of outstanding stock as of a certain date or issue and transfer to the government a number of shares of value equal to that amount. (Of course, the corporation might elect to pay the cash, but the government could then turn around and acquire the shares on the open market.) However, some case law suggests that the choice suggested would not, itself, be one that the government might constitutionally pose.⁶¹

4. Governance Issues

Funding issues will raise not only serious political challenges, but also ones related to governance as well. The latter concern who has power to make critical decisions about management of the resources accumulated, what the means are by which to ensure that the decisions they make are perceived to be legitimate and good ones, and to hold decision-makers accountable if they are not. Most certainly, some of the most distinct

and, presumably, key aspects of Blackburn's proposal relate to decisions about how to invest the resources that would be accumulated by the government. Central are decisions about ownership interests in corporations. As noted, they would be raised directly and immediately if the share levy method of funding were to be implemented. However, they would arise in any case because regardless of the precise tax mechanism for funding the scheme, Blackburn appears to intend that the National Fund acquire a significant interest in corporate securities with those funds. We can gain a sense of the political challenges and the kinds of questions that must be addressed to meet them by looking at the response to (the modest) efforts to gain approval to invest U.S. Social Security funds in such securities.

The Investment of Social Security Trust Fund Monies in Corporate Securities

More particularly, we focus primarily on then President Clinton's proposal to invest some Social Security trust funds in private securities.⁶² Not surprisingly, it was not well received at the conservative end of the political spectrum. For example, Federal Reserve Board Chairman, Alan Greenspan, portrayed his opposition to

- ?? The inability "to secure and sustain institutional arrangements that would insulate, over the long run, the trust funds from political pressures" and
- ?? The belief that "[t]hese pressures, whether direct or indirect, could result in suboptimal performance by our capital markets, diminished economic efficiency, and lower overall standards of living than would be achieved otherwise."⁶³

Perhaps more starkly, a writer for the Cato Institute cited

- ?? The possibility that the federal government could become "the largest shareholder in `American corporations,' and raise the specter of government control of American business" and
- ?? The problem of "[p]olitical considerations and `social investing'...likely...influenc[ing] the government's investment decisions, allowing the government to manipulate economic markets."⁶⁴

Another writer, this one for the Heritage Foundation offered "four broad concerns" about "government-controlled investment" of a similar nature, i.e., that it would:

- ?? [M]ean the partial nationalization of major businesses, which would allow politicians to have direct involvement in the economy and influence over the decisions of individual corporations", e.g., by "[I]nsisting that a company place politicians on its board or directors" or "otherwise use their voting power to impose [political] control";
- ?? "[I]nvite crony capitalism – industrial policy that allows politicians to control the economy indirectly by attempting to pick winners and losers";
- ?? "[O]pen the door to corruption by allowing politicians to steer funds toward well-connected interest groups or corporate contributors";
- ?? "[I]nvite `politically correct' decisions at the expense of retirees because politicians could forego sound investments in unpopular industries (such as tobacco) to steer money toward feel-good causes that are likely to lose money."⁶⁵

Other critics raised additional concerns, such as

- ?? the problem of conflicts of interest: for example, ‘how the Government could pursue an antitrust case against Microsoft if it were also a Microsoft shareholder[?]’;⁶⁶
- ?? pressure for a broad geographic distribution of the companies in the investment portfolio” (just as “defense budget and other public works...[are] distributed among the states and congressional districts in response to political considerations”);⁶⁷
- ?? “political influences on the choice of the portfolio managers,” and the possibility that “the public relations value of managing Social Security assets would make this a valuable contract” with the corresponding risk that managers “might become focused on avoiding losses and thus sacrifice...potential gains” because of “worries about political influences on their reappointment”,⁶⁸ and
- ?? “keeping the stock market up...[as] an avoidable aspect of the day-to-day economic decision-making in Washington” (“when the Trust Fund’s balance sheets depend upon the market”).⁶⁹

Even liberal defenders of the general idea seemed to give credence to these kinds of concerns. They responded with specific ideas for the scheme that, in the first instance, would seem to be incompatible with the thrust of Blackburn’s proposals. For example, a prominent Washington-based liberal policy advocate and a policy analyst/researcher offered a spirited defense of Clinton’s proposal. In so doing, they insisted that “*virtually all parties to this debate* concur that no Congressional or executive branch involvement should be allowed in investing Social Security reserves in equities.” Rather, “most proposals to allow a portion of Social Security reserves to be invested in private securities entail the establishment of an independent board tasked with choosing private investment managers.”⁷⁰

Similarly, another prominent liberal scholar, policy researcher, and former Clinton administration official articulated an analogously sweeping view. She insisted that “[e]veryone involved in the debate in the U.S. agrees that having the federal government in the business of picking winners and losers in the stock market and voting on corporate proposals is undesirable.”⁷¹ In her view, such intervention might best be averted by “indexing trust fund equity investments to a broad market average to avoid picking individual stocks,” “establishing an expert investment board to select the index, to choose portfolio managers for the accounts, and to monitor the performance of the managers.”⁷² She suggested similar sweeping approval for measures that would “ensure that government ownership does not disrupt corporate governance,” i.e., “that voting rights be given to the asset managers, not voted at all, or voted in the same fashion as the other shareholders, which is equivalent to not voting at all.”⁷³

At first blush, though, the seeming universal rejection of Clinton’s proposal by a Senate resolution suggests little political support at the time for even what was a heavily hedged approach to government investment, let alone a scheme of the sort suggested by Blackburn. We say “at first blush” because the text of the resolution approved simply asserted opposition to “the Federal Government...not directly investing [Social Security] contributions...in private financial markets,”⁷⁴ without any gloss on those words that would constrain later, potential votes on specific proposals. More particularly, “[a]lthough [the Clinton proposal was] not particularly well-received in Congress (in part because of

Chairman Greenspan's opposition at that time),”⁷⁵ it detailed a very restrained scheme for structuring the investments.”⁷⁶ For example, it involved management of the reserves by “an independent, non-political, professional management board structured so the board would be beyond Administration and Congressional control” whose members “would have been expected to have substantial experience in pensions and investing” and who “would in turn have contracted with private fund managers selected through competitive bidding.” Moreover, these managers, who “could include entities such as Merrill Lynch, Vanguard, or State Street Bank,” would have “invest[ed]...a modest portion of Social Security reserves in broad index funds in the equities markets. Investments in individual stocks, rather than in index funds, would not have been permitted.”⁷⁷ Further, “[t]o ensure the independence of the professional management Board that would select the private fund managers, the board [was to] be structured like the Federal Reserve Board or the Federal Retirement Thrift Investment Board, the entity that oversees the investment of the funds that federal employees deposit through the Thrift Savings Plan.”⁷⁸

However, it would appear that for some conservatives, the key issue is not necessarily one of directing Social Security contributions into private financial markets. Rather, it is whether the benefits are conceived of in terms akin to a defined benefit or a defined contribution plan. So, for example, Greenspan conceded that “the federal government can manage equities without political interference if they are held in defined contribution funds or small, defined benefit plans, such as the one run by the Federal Reserve. Defined contribution funds, such as the federal government's Thrift Savings Plan, are effectively self-policed by individual contributors, who would surely object were their retirement assets to be diverted to investments that offered less than market returns.”⁷⁹ Similarly, another conservative commentator found that government investments were acceptable if there were “a system of individually owned, privately invested accounts.” In such a case, a model based on the Thrift Savings Plan “would replicate the TSP’s safeguards – property rights, a fiduciary responsibility, transparency, and an ability to remove funds from a nonperforming investor.”⁸⁰ Of course, for other conservatives, this would still go too far.⁸¹

Recall also, that the Social Security system not only operates as a kind a defined benefit plan for pension purposes, but also has significant value through the disability and survivors’ insurance that it provides as well, a benefit that often gets left out of calculations comparing outcomes under Social Security with those of other schemes.⁸² So, at least in American politics, if Clinton’s proposal had advanced in any serious way, account would also have had to be taken of the interests and arguments that would be brought into play. Blackburn’s proposal, of course, is intended to be a supplementary, secondary pension scheme, in addition to the basic one – here, Social Security – so, in the first instance, issues the disability and survivors’ benefits would nominally not come into play, though as a practical political matter, that may not in fact be the case.

With this political background we now turn to specific governance issues that are raised by Blackburn’s proposals.

National Fund Governance

The National Fund would be charged with extremely important, complex, and diverse decisions. These decisions would have profound immediate implications for RPFs and, ultimately, the companies or other entities that would be the objects of RPF investments

or exercise of decision-influencing power, as well as the larger economy and society. However, Blackburn does not offer us much information about the internal structure and operation of the National Fund that would have these powers and responsibilities. Similarly, he says little or nothing about the relationship between the National Fund and the President and Congress on an ongoing basis (if and when the latter would have sanctioned the scheme for its creation).⁸³

(1) The kinds of decisions that bear upon National Fund governance

What kinds of decisions bear upon national governance? According to Blackburn, the National Fund would, on one hand, apparently not have power to make decisions about direct investments in securities. Nor would it have a direct role in exercising powers of ownership as they relate to corporate governance or policy, such as exercising the voting power that is a concomitant of being formal owner of shares. Indeed, to the extent that the share levy is employed, Blackburn both implicitly and explicitly limits investment decisions by both the National Fund *and* the RPFs. A limit is implicit in the automatic “investment” by the National Fund in shares of corporations in amounts proportional to their profits-related income. (The relative number of shares in which they become “invested” would depend upon the size of profits-related income compared to the then current price of each particular corporation’s shares.) And Blackburn would explicitly bar the RPF recipients of the share levy, for a period as long as five years, selling the shares they obtain.⁸⁴

However, the National Fund would probably have power, presumably delegated by Congress, to determine *criteria* pertaining to RPFs that define

- ?? whether RPFs are structured to be egalitarian and democratically representative, including criteria pertaining to the degree to which benefit holders enjoy representation, the level of voice of beneficiaries or contributors in receiving fund policy, the extent to and manner in which members elect trustees and have a role in formulating general investment policy, and the scope of regular information and consultation on funds’ policies they are required to be provide.
- ?? what are the codes of practice based on social priorities to which receiving funds must conform to qualify for receipt of national fund resources and tax benefits (and the amount of tax benefits received).
- ?? what are fair rules for the distribution of benefits, including criteria relating to redistribution from people with higher incomes to those with lower lifetime earnings.
- ?? what are actuarially-fair pay-out rates, including assurance of generational equity
- ?? what kinds of projects are deserving and not so unduly risky as to qualify them as objects of RPF investment.
- ?? for how long must RPFs must be committed to holding assets they are given.

Correspondingly, the National Fund – or perhaps a related, separate entity – would have the power to determine whether, in fact, receiving funds *meet the specified criteria* referenced above.

Choices with regard to setting criteria would be made in light of

- ?? the need for decision-makers to be accountable.

- ?? the qualifications of the decision-makers.
- ?? the nature of the decisions being made.
- ?? the interests at stake and how they might be affected by the decisions made.⁸⁵
- ?? risks associated with agglomerations of power.
- ?? the perceived legitimacy of the assignment of position and power.

Let us explore those choices more closely.

(2) Criteria related to ensuring democratic and egalitarian RPFs

Consider, first, criteria by which RPFs are deemed to be democratic and egalitarian. Such criteria are central to the rationale for the overall scheme being advanced. Because of this, arguably, federal legislators should fashion and be held accountable for them. But as a practical matter, matters of RPF governance would not be simple ones. It would be difficult to readily identify causal links between governance problems as such. This is particularly so because governance operates on a day-to-day basis, and the kinds of financial outcomes that are most likely to gain attention. Identifying links to non-financial outcomes would probably be even harder. As a result, it may, in fact, be difficult to press legislative accountability.

The foregoing points to embodying these key criteria in the founding legislation. Certainly these governance issues are within the ken of legislators. They are concerned with such matters on a regular basis. There are numerous models for institutional governance, from unions to corporations to community action agencies to labor union-related funds as currently conceived that reflect extensive legislative experience in grappling with resolving tensions between governance and other, substantive goals.⁸⁶ Making the required choices will require accommodating and considering complex and value-laden goals and balancing diverse, innumerable, and likely conflicting interests. Again, these are matters for legislative resolution. In sum, both legislators and probably the general public are likely to perceive it as both appropriate and legitimate for Congress must make key decisions in this area.

(3) Criteria related to ensuring appropriate social investments by RPFs

Consider second and by contrast, criteria for assigning responsibility to make choices about defining what social investments should qualify RPFs for funding and enjoying the benefit of tax incentives. On one hand, by the very nature of social investments, the exercise of defining them is largely a subjective, value-laden one best suited for legislators to make.⁸⁷ And because the decision to move beyond purely conventional “financial return” criteria might have significant impact in both individual and collective financial (and other) terms, it is legislators who arguably should devise and be held accountable for making them.

On the other hand, precisely because choices about what are appropriate social investments have such impact, legislative choices articulated beyond a fairly high level of generality might appear less than legitimate for at least two kinds of reasons. First, the choices may be seen as being too closely linked to picking classes of winning and losing investments. There is a not insubstantial risk of public suspicion about the relation between those choices and economic interests specially tied to legislators. Second, legislators might not be seen as being equipped with the knowledge and experience to

authoritatively define in any detailed way what are social investments. Moreover, it would seem that judgments about defining social investments are fluid and variable over relatively short periods of time, at least as compared with those about democratic governance. As a result, one would, in any event, not want legislators to make decisions not likely to be revisited soon. To do so would lock the National Fund and, by implication, RPFs into social investment criteria in a rigid way.

In essence then, broad gauge criteria for defining social investments might best be in the hands of legislators. The locus of responsibility for fleshing out those criteria at the next level of specificity might be the National Fund. This does not necessarily mean that the National Fund would make the final determination in those terms. Rather, the National Fund might be mandated to report recommendations to Congress on a regular basis. Depending upon how the National Fund was constituted and governed, those recommendations might have the cachet of having been formulated by people whose judgments might be respected, but still be subject to congressional check.⁸⁸

(4) Criteria related to ensuring fair rules for the distribution of benefits

Criteria established to ensure fair rules for the distribution of benefits, including criteria relating to redistribution from people with higher to those with lower lifetime earnings, pose other challenges. Generally speaking, views about the legitimacy of the process for making the rules and who makes them are likely closely linked to the means chosen for raising the monies that are the source of payments. More particularly, from whom the monies are raised will not only immediately raise hotly contested issues about the fairness of imposing such a burden, but also other at least equally contested ones about who gains from the scheme as well. On one hand, Blackburn is pretty clear about his preference for filling the coffers of the National Fund by means of the share levy. On the other hand, as noted, he anticipates other contributions based on employment income apparently spurred by matching funds supplied by the National Fund (which would also make contributions for those without labor market employment).⁸⁹ At the same time, and also as noted, Blackburn seems to promise every person a quasi-defined benefit retirement income related to a percentage of lifetime earnings.⁹⁰ In other words, there are at least two kinds of funding streams that sustain the scheme: one, drawn from taxes (or their equivalent) on entities or organizations that are not ostensibly direct beneficiaries of the proposal; the other, contributions from potential individual beneficiaries (leverage, enhanced, or supplemented by the National Fund.) Those who are burdened but receive no direct benefit will be concerned about both of those facts. Those who make contributions and receive direct benefits will still be concerned about the relationship between those contributions and those benefits, the level of the benefits, and the security of the flow of benefits.

Probably the most attention will be given to the amount and security of the ultimate financial return to beneficiaries. Whether the return is thought to be legitimate and acceptable will, correspondingly, probably be linked to beneficiaries' perceptions about the extent to which they see the resources at risk as "theirs" and what responsibility, if any, beneficiaries have for making those decisions, whether directly or by ratification of RPF decisions. But, as noted, Blackburn is murky at best on what is at risk. At one point, he writes that the resources are to be distributed to ensure universal participation and benefit from a "second pension." However, at another point, when he suggests that the proceeds of the share levy distributed to the RPFs are the amounts calculated on the basis of age characteristics, what does he mean? Would people of different ages be

credited with different amounts of the levy? If so, how? How does the foregoing square with individuals having rights in three funds “based on region, leisure pursuit, and school or college”? Blackburn asserts that “beneficiary and contributory members [would] have an equal voice in [a receiving fund’s] policies” and “the right to elect the trustees.” Would the votes have equal weight or be calculated according to individuals’ financial stakes in the fund in one, the other, both, or neither cases?

Registered Pension Fund Governance

RPFs, would have the power, constrained by the standards and incentives set by the National Fund, to make specific investment decisions, and in particular situations to exercise shareholder power over decisions concerning corporate governance and policy, allocate benefits among various beneficiaries, and structure the relationship among those who govern the fund and beneficiaries and contributors. Such decentralization may have merit, but Blackburn says little about the governance and operation of the RPFs beyond the general requirements noted above to be imposed by founding legislation and the National Fund pursuant to it.

But a realistic sense of the political calculus that could at the outset, profoundly shape governance and significantly influence its operation over the long term is essential. It would seem likely that those who are perceived to have made contributions to the National Fund and RPFs will have a vested interest in the manner in which their contributions are used or placed at risk as a result of particular choices made by RPFs. Hence, they will be deeply concerned about the mechanisms by which those choices are made. In turn, the play of politics in launching and maintaining Blackburn’s scheme may reflect the force of these interests. So for example, Michael Graetz and Jerry Mashaw have argued that there is a “strong business constituency for restraint in unemployment compensation benefits,” spurred in part by the fact that those benefits are solely funded – at least directly – by taxes on employers.⁹¹ By contrast, Social Security is sustained by direct and equal contributions from employers and employees. The interests of the latter are reflected generally in broad-based awareness of and concern about the outcomes and fate of the system and in the creation of significant organized groups of retiree or near-retirees such as the AARP. In addition, there will be diverse parties or constituencies. Among them, for example, would be the corporations whose shares would be owned, financial intermediaries, and providers of financial services (such as brokers and financial advisors) with significant financial and other stakes in the outcomes of RPF governance and operations in general and the specific actions that are taken, in particular.

Consider Blackburn’s favored scenario, in which significant resources to sustain the secondary pension scheme are to be extracted from businesses by means of a share levy. Even if the effort to institute such a levy were to survive the likely business-led onslaught against it, at minimum, there would be strong, active, and ongoing business interest in the operation of the scheme. Claims for influence over it would obviously be driven by the required contribution from business. But they would also be given force by arguments that the contribution is compelled in the name of ensuring adequate and secure enough retirement income for these businesses’ workers, and hence, how well the scheme functions to meet the goal is of vital interest to those employers. To the extent that these arguments have political weight, there is the prospect of an institutionalized business role in governance and, in any event, business influence through the ordinary play of politics over the scheme’s day-to-day operations. By

contrast, whatever the interests of organized labor in, and its concerns about, the scheme, its strength is limited and, in the near term at least, there is little evidence of major growth. That, combined with the fact that Blackburn's proposals do not contemplate any distinctive role for organized labor, suggests challenges for a significant and sustained role for unions in governance.

Governance issues might be played out differently if significant funding were to come from other sources, e.g., from a wealth tax or public assets.⁹² The history of estate and inheritance taxes in this country suggests that once the hurdle of enactment of the scheme is overcome, interest group advocacy in the use of the monies might not be great. It appears that revenues from those taxes have been fed into the equivalent of a general government fund and used for diverse purposes. Of course, here, the revenues would be targeted (for retirement security), but given how broadly the benefit would be spread, it would seem that interest group advocacy relating to the use of the monies taxed would not loom as significant. Funding from public assets would, arguably, be even less problematic, because none of it would be gained from any particular individual and, correspondingly, no particular individual would have any particular claim to its use. However, the experience with the Alaska Permanent Fund points to how the pressure generated by the fact that the assets are "everyone's" may spur demands that everyone enjoy the benefits. Those demands might result in blocking the scheme envisioned by Blackburn.

As noted, despite Blackburn's desire to ensure a democratic and egalitarian role for participants in the RPFs, he offers few suggestions about the bearing of that role on investment and other decisions by the RPFs. What he does say focuses more RPF reliance on technical expertise. For example, he suggests that "[i]n the US the state level Federal Reserve Banks (FRBs) could play a key role as managers of the state-level pension reserve trust fund, [the RPFs]. They could maintain a register of approved funds, offer actuarial advice and conduct their own independent research."⁹³ While these last two of these roles appear to be more bureaucratic in nature and arguably entail non-discretionary judgments, the first suggests a grant of considerable power and authority inconsistent with Blackburn's cited goals. First, FRBs are governed centrally by the national-level Federal Reserve Board, so they would not operate independently in the way that Blackburn would want them to. Second, the twelve FRBs are state-level only in the sense that each one has responsibility for a group of states. For example, the Federal Reserve Bank of Boston is responsible for six New England states: Connecticut (excluding Fairfield County), Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Third, neither the Federal Reserve Board nor any of the individual FRBs have any role or experience in providing the kind of advice or doing the research to which Blackburn refers.⁹⁴ Fourth, The seven members of the Board of Governors of the Federal Reserve are presidential nominees whose appointment is subject to consent by the Senate. Six of the nine directors of the boards of each of the individual FRBs are chosen by member commercial banks; the other three are chosen by the Federal Reserve Board.⁹⁵ So regardless of whether there is any sense to adapting the Federal Reserve Board and individual FRB bank structure to fashion one for the National Fund (and perhaps RPFs), the former is hardly consistent with democratic or egalitarian principles for the latter.

Blackburn also suggests that "[t]he expertise of universities could be drawn upon to strengthen fund management"⁹⁶ and that "the Pension Benefit Guaranty Corporation [(PBGC)], with its experienced staff, might be expanded to administer the national

pension reserve.”⁹⁷ Whatever the expertise he imagines universities could bring to bear on certain kinds of decision-making, they would do little to facilitate democratic or egalitarian decision-making. Similarly, the federal government created the PBGC, a public entity established to provide insurance against financial failures by defined benefit retirement plans maintained by private employers. The PBGC does not have the relevant expertise or experience to play an advisory role in managing National Fund resources, and certainly it is neither organized nor equipped to deal with issues of democratic or egalitarian governance.

Moreover, the question of RFP governance is complicated by Blackburn’s suggestion – though it is not clear how seriously it is made – that “[i]ndividuals might have rights in three different funds – based on region, occupation, leisure pursuit, and school or college - in order to spread risk.”⁹⁸ At another point, Blackburn suggests an even broader range of funds, i.e., ones “[b]ase[d]...on alumni associations, resident groups, occupational groups, sporting clubs and other affinity groups.”⁹⁹ None of those categories is readily linked to the funding aspects of Blackburn’s scheme. How communities of interest as they concern secondary pension income for retirement might conceivably be grounded in leisurely pursuits, or even schools or colleges (as alumni?) is hardly evident. Of course, there are clearly communities of interest of workers that center partly on pension issues. These communities of interest are typically institutionalized through unions that may have had a role in the creation and, in some instances, management of pension assets. While these unions are sometimes organized along occupational lines (but even then, only so in geographically limited areas), they frequently are not. And, of course, many workers are not in unions. So even if the incentives – created by the chance to draw on resources generated by the share levy or other means and doled out by a National Fund – are in place to spur the formation of RPFs by occupation, there are not obvious means to effectively do so. Even if they were formed, what form, if any, might their governance take that would legitimate RFP decisions with regard to investment in either a social or financial dimension? A similar question can be posed about the legitimacy of decisions between current payouts of investment income or accumulation for use at later time.

Currently there would appear to be no functional structures organized on a regional basis that could readily form the basis for RPFs constituted in that way. (We have already touched on the nominally regionally-based Federal Reserve Banks really offering no useful means to achieving that end.) There is, of course, extensive experience with elaborate pension fund structures in the states, e.g., by virtue of creation of pension funds that could form the basis for RPFs constituted at that level. But whatever the value of that experience and the possibility for building on those structures, just as with current occupational/union schemes, it is not clear how funding of the sort envisioned would be allocated at the state level or decisions regarding their use could legitimately be made.

Nonetheless, for both political and substantive reasons, there is merit to Blackburn’s idea of a decentralized approach to allocating power decisions about investments and cast votes (or otherwise play a role) in issues of corporate governance and, perhaps, operation. Given the experience detailed above on investment of Social Security funds, undoubtedly those of a more conservative bent, and even many progressives, might agree on the following: that it would be problematic to have the vast resources of which the National Fund nominally would be disposed controlled directly by a single entity. Dispersal of National Fund resources among a wide range of appropriate entities would

ameliorate those concerns as a general matter. And more specifically, to the extent there are legitimate fears about a single government-influenced entity having direct control over a fraction of all shares in any particular corporation large enough to have significant control over the corporation, spreading National Fund resources over a number of (for the most part) independently governed ones would ameliorate that concern. (In such a case, there would be no need to impose a requirement that might otherwise be thought to be necessary, i.e., limiting public ownership of more than a very modest percentage of outstanding shares in any given corporation.¹⁰⁰) The same argument also has some relevance to investment decisions, particularly in new enterprises or other economic activities. In addition, it could be argued that those decisions are one that needs to be sensitive to local or regional considerations. If power over investment is spread among a range of entities, it might be more likely that the entities would be more aware of and to more likely take account of such considerations.

The question remains, though, what those entities would be. Particularly, with regard to power over investment, the experience in this country with Community Development Finance Institutions (CDFIs) is suggestive. The phrase CDFI has a generic and a technical meaning, the latter of which is of most interest to us. Generically speaking, CDFIs are “financial institutions that specifically target minority and low-income communities.”¹⁰¹ They include “community development banks and credit unions [CDBs and CDCUs,] community development venture capital providers [CDVCs,] micro-enterprise [loan] funds [MLFs,] and housing, business, and facility loan funds [BFLFs].”¹⁰² All share “a primary mission of improving economic conditions for low-income individuals and communities by providing financial products and services that usually cannot be obtained from more ‘mainstream’ financial institutions.”¹⁰³ Technically speaking, some among this category are certifiable as such by the U.S. Department of the Treasury, certification being “a prerequisite for receiving financial support [from the federal CDFI] Fund, from many banks...[,] and from a growing number of state-run CDFI programs.”¹⁰⁴

To be certified as a CDFI, an organization must, in the first instance, meet a six-part test. The criteria most relevant here are that the organization must “have a primary mission of promoting community development,” “principally serve a Target Market,” and “be a Non-Governmental entity, and must not be controlled by one or more governmental bodies.”¹⁰⁵ Community development is defined as “[a]ctivities purposefully improving the social or economic conditions of low-income or other underserved people or residents of distressed communities.”¹⁰⁶ The other three criteria are that “[t]he organization must be a Financing Entity,” “provide Development Services in conjunction with its financing activities,” and “maintain Accountability to its defined Target Market.”¹⁰⁷ According to Federal regulations, “[a] CDFI must maintain accountability to residents of its Investment Area(s) or Targeted Population(s) through representation on its governing board or otherwise.”¹⁰⁸

In the aggregate, CDFIs are significant. According to a recent report, CDFIs controlled over \$9.3 billion in assets in 2003, although mainstream financial institutions dispose of vastly greater assets¹⁰⁹ and size of CDFIs’ investments is modest in comparison to their loans.¹¹⁰ CDFIs have been able to leverage monies made available to them through the federal CDFI Fund (if they are certified) and private sector resources, magnifying their economic impact.¹¹¹ while maintaining a record of financial viability.¹¹² According to that report, ‘CDFIs establish representation of the communities they serve at the highest levels of senior management and governance. Because of the emphasis on underserved

markets, female and minority representation in particular are typically areas of strong concern. On average, women and minorities are very well represented on boards of directors of institutions among all four CDFI institution types...., especially when compared with the board representation of the nation's largest (Fortune 1000) firms."¹¹³ A full and accurate picture of CDFIs' impact is not yet available. In any event, there are challenges, political, financial, and otherwise, that might have to be met before CDFIs might be brought to a truly large scale, assuming that it were sensible for them to be.¹¹⁴

Nonetheless, CDFIs offer us an encouraging example of government promoted, supported, and regulated entities with a mission to achieving conventional financial and social and economic goals that have achieved political acceptance and established an early record of success. They are an attractive example for several reasons. First, while the CDFI scheme is formulated by and one in which government has some operational role, CDFIs are not literally government run. Second, and correspondingly, it is a decentralized scheme in which non-governmental actors – here, non-profit organizations – make critical decisions about the use of financial resources. Third, those decisions are mandated to be in light of ostensibly non-financial criteria. Fourth, the mandate is imposed at a fairly high level of generality: it is prescriptive, yet only broadly so, enabling non-government actors to exercise independent judgment. That judgment is informed, in some cases, by knowledge that they (and not government actors) have about those whose interests they are ostensibly helping to advance, e.g., knowledge of the relevant communities, enterprises, and individuals. Fifth, conformity with the mandate is assured, in the first instance, through certification and then by a process that involves in effect, authorization of a cluster of actions by the non-government actor, rather than review and decision-making with respect to individual actions.¹¹⁵ Sixth, there is provision for some degree of accountability to (and, arguably, influence by) populations that are the ostensible beneficiaries of the scheme.

That the CDFI scheme provides a useful example does not necessarily imply that it immediately offers a model that could be very readily adapted to the kind that Blackburn envisions. For one thing, the scale of resources subject to Blackburn's scheme is vastly greater. For that reason, the stakes and interests of particular political, financial, and other constituencies are dramatically raised. For another, while in the first instance, RPF resources would seemingly be invested in corporate shares (if Blackburn's hoped for share levy is the primary funding mechanism), he does appear to anticipate that the RPFs might invest their resources in other than those relative large corporations that are the likely objects of Blackburn's greatest interest. Nonetheless, the bulk of the financial value of the assets, and arguably the return on them, would be derived from the shares in large corporations. And, perhaps correspondingly, the social and other non-financial impact of RPFs' ownership of assets would most be felt through the exercise of their powers of ownership, rather than through exercise of the power to invest in (or lend to) an enterprise in the first instance, as in the case of CDFIs.

Conclusion

Blackburn's broad gauge proposal to create a secondary pension scheme, one core purpose of which would be to gain social control of capital investment, is bold and thought provoking. Starting from the premise that the proposal and its means for achieving that purpose have merit, I have focused on challenges to moving from those broad gauge proposals to practical change.¹¹⁶ Among the challenges are ones of politics

and design, particularly as they relate to achieving Blackburn's core purpose. I have limited myself to political challenges in the American context. My aim was to tease from the relevant current political discourse, and to some degree past discourse, a sense of what the starting point is likely to be for any political conversation about ideas such as Blackburn's and how far and, perhaps, in what ways we need travel to move toward realizing them to any significant degree. We have a lot to learn and a long way to go, at least in this country, in that regard.

I also identified issues I thought critical to how one might flesh out Blackburn's sketch of an institutional structure for the scheme to achieve the stated goals while gaining the political support necessary to establishing that structure. That discussion suggests that Blackburn may be on the mark about the need to craft a decentralized structure with democratic and egalitarian governance for managing it. But it also implies that the particular form suggested by Blackburn is of dubious merit. Finally, it offers the early success of some loosely related government scheme for responsible community-based investment in the United States as some encouragement to analogous thinking here, though not though not necessarily a model for it.

¹ Substantial portions of this paper were written while I was Director of the Asset Development Institute at the Center on Hunger and Poverty in the Heller School for Social Policy and Management at Brandeis University.

² Hereinafter cited as "Blackburn, p. ___."

³ Here, by "retirement," we mean primarily voluntary withdrawal from participation in the labor market, but it can and should include at least withdrawal from self-employment. Note that sole proprietors are contributors to the American social security system.

⁴ That is, retirement implies a reduction in the ability to generate new claims (derived from employment or self-employment) on current or recent production. Thus, a retired person's standard of living will depend to a significant degree upon his or her ability to draw upon entitlement to claims that they have accumulated. People can, of course, maintain their standard of living in other ways, such as by changing their living arrangements to being more frugal in how they use their resources. Here, we focus only on doing so by having the ability to draw upon a pool of established claims.

⁵ These assets can be converted to cash to use for immediate consumption or may be retained, yet drawn upon for consumption purposes insofar as they produce a cash income flow.

⁶ That is, government commitments to provide a flow of cash income, the availability and amount of which are determined by previously established criteria and current beneficiaries' prior action to meet those criteria. The fulfillment of those commitments will, in some cases, depend on the ability and willingness of government to make claims on current production, primarily through taxation, and distribute them, in turn, to beneficiaries of the entitlements. However, in principle, if the government has a specific duty to make payments, arguably it would be required to draw on other resources.

⁷ Thus, Blackburn sees as an important value in itself giving pensioners as beneficial owners of the investments in the pension funds he would create, a means for exercising a voice in the choice of how those investments are made and how power flowing from that ownership interest is exercised. However, promoting such a voice does not necessarily mean that it will be a progressive one. Moreover, his proposals arguably presuppose an extreme form of shareholder supremacy that might not result in the progressive outcomes anticipated. In this regard, note the following evocative observations by former Secretary of Labor, Robert Reich:

“While the frontal lobes of loyal Democrats are delighted by populist campaign rhetoric that scolds corporations for being socially irresponsible, their hypothalami still want hefty returns on the savings in their pension plans--and the two aren't necessarily compatible. The board of directors of CalPERS recently rejected a proposal from one board member to dump the shares of tobacco companies and to refrain from investing in nations that didn't meet some minimally humane political and social criteria. The board's chairman feared a slippery slope. "Do we one day ban investments in alcohol, handguns, and rap music?" he asked rhetorically. (CalPERS's investment staff noted that just the sale of the fund's tobacco stocks would cost it upwards of \$56 million in transaction costs alone.)”.

Reich contended that “[w]hen Alcatel, a mostly French-owned telecommunications company, announced that its annual profit would be less than had been forecast, its management was driven to the distinctly un-French solution of restoring profits by laying off some 12,000 employees. CalPERS was not the sole instigator, although French President Jacques Chirac testily noted in his Bastille Day address last year that the layoff was triggered when "California retirees suddenly decided to sell Alcatel.”

He added: “Europe's much-vaunted "stakeholder" capitalism makes European companies sensitive to multiple constituencies, which is precisely why it doesn't sit well with shareholders intent on making companies attentive only to them--and why stakeholder capitalism is under attack. CalPERS recently complained that a German utility gave the cities it served too much control over its board, thereby diminishing the value of the utility's shares owned by CalPERS. Utility executives explained that its system of city representation maintained a bond with the utility's customers, but when CalPERS then threatened to dump its shares, the utility promptly scrapped the system.”⁷“Democratic Voters and Democratic Investors,” by Robert B. Reich, *The American Prospect*, Volume 11, Issue 20, September 1, 2000. Available at <http://www.prospect.org/print/V11/20/reich-r.html>.

⁸ More generally, the issue relates to the proportion of the non-working to the working population.

⁹ This is only one of a variety of “solutions” to the ostensible demographic problem. Here, older persons continued participation in the workforce potentially could increase the amount of wealth produced overall and, of necessity afford working older persons additional claims on it. Other solutions include greater immigration and higher productivity.

¹⁰ The shift is, of course, also the result of conscious government policy with respect to (in Blackburn's terminology) primary pensions, i.e., to limit their growth or even effectively reduce them. So, for example, in the United States, the most recent significant “reform” of Social Security increased the age at which later cohorts would qualify for a normal level of benefits. And, in all events, under the current system, replacement rates (relative to earnings) are expected to decline for later cohorts as well.

¹¹ “In most countries today there is still a basic state pension. In the reformed pension regime the basic state pension would be raised until it was equivalent to about 40 per cent of average earnings (in the UK it is currently only 15 per cent and in the US approximately 25 per cent). To achieve this priority goal it might be necessary for the public reserve fund elaborated above to make some top-up payments. The basic pension should be paid in full to all citizens (at present many are not entitled to it because of limited contribution records).” Blackburn, p. ____.

¹² “Each person's membership in three secondary pension funds would aim to supply about 30 per cent of average earnings, or of their own previous earnings, up to three times average earnings, whichever was the higher.” Blackburn, p. ____.

¹³ Blackburn, p. ____.

¹⁴ At another point he asserts broadly, that “all tax-subsidized retirement programs and pension funds would earn their tax breaks by demonstrating a sense of social responsibility.”

¹⁵ Blackburn, p. ____.

¹⁶ Blackburn here notes that he “give[s] more details of such matters in *Banking on Death*, pp. 465-539.”

¹⁷ By contrast, according to Wolff, “[t]axes are currently levied on wealth in Austria, Denmark, Finland, Germany, Luxembourg, the Netherlands, Norway, Spain, Sweden, and Switzerland. In addition, France had a wealth tax system in place from 1982 to 1987 and Ireland from 1975 to 1977. (Japan also had a direct wealth tax for a short period after World War II.) Also, with the exception of Spain, most of these systems have been in place for at least 60 years. In all 11 countries, the wealth tax is administered in conjunction with the personal income tax. In all cases, except Germany, a joint tax return is filed for both income and wealth. Almost all these countries also tax estates (or inheritances), capital gains, and real property.” “Time for a Wealth Tax?,” by Edward Wolff, *Boston Review*, February/March 1996 Vol. XXI No. 1. Available at <http://www.bostonreview.net/BR21.1/wolff.html>.

¹⁸ *The Stakeholder Society*, by Bruce Ackerman and Ann Alstott, Yale University Press, New Haven, 2001.

¹⁹ See, for example, “American Stakeholder Accounts,” by Ray Boshara, New America Foundation, Issue Brief #2, Washington D.C., June 2003. Available at http://www.newameica.net/Download_Docs/pdfs/Pub_File_1292_1.pdf.

²⁰ “A History of the Death Tax, A Source of Revenue, or a Vehicle for Wealth Redistribution?,” by Debra Rahmin Silberstein, *Probate & Property*, May/June 2003, pp 58-64.

²¹ See *id.*, p. 61.

²² Note, though, that the current legislation preserves the gift tax and eliminates some of the tax advantage that currently accrues because the tax basis of inherited property, now equal to its value at the death of the grantor, is replaced with the almost certainly lower grantor’s original basis for all assets exceeding an (large) exempt sum. See *id.*

²³ So stating is not to suggest that “public opinion” as such was the dispositive or most critical factor in the success of the repeal legislation. See “Death and taxes: The estate tax repeal and American democracy,” Mayling Birney and Ian Shapiro, Yale University, which explores “the formation and role of public opinion, the dynamics of organized interests, the constraints of institutional structures and rules, and the power of agency and resources in shaping political outcomes,” here the repeal of the estate tax. Available at <http://www.princeton.edu/~csdp/events/pdfs/BirneyShapiro.pdf>. Nor is it meant to imply that, whatever the support for elimination of the estate tax, doing so was a high priority for Americans. In fact, it apparently was not. *Id.*

²⁴ See, for example, “Do Misperceptions Guide the Tax Policy Debate?,” Brookings Briefing, December 16, 2003, Brookings Institution, Washington D.C. Transcript, available at <http://www.brookings.edu/comm/events/20031216.htm>. For greater details see “Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind,” by Larry M. Bartels Department of Politics and Woodrow Wilson School of Public and International Affairs, Princeton University, 2001, available at http://www.brookings.edu/comm/events/20031216_Bartels.pdf, and “The Role of Misconceptions in Support for Regressive Tax Reform,” by Joel Slemrod, University of Michigan, November 10, 2003, available at http://www.brookings.edu/comm/events/20031216_Slemrod.pdf.

²⁵ See, for example, “Tax Wealth to Broaden Wealth, Reframing the debate and mobilizing a constituency,” by Chuck Collins, *The American Prospect*, Vol. 14. No. 5, May 1, 2003, available at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=6788> and “Tax the Wealthy, Why America needs the estate tax,” by William H. Gates and Chuck Collins, *The American Prospect*, Vol. 14. No. 11, June 2002. Available at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=6308>.

²⁶ For example, one commentator, in addressing issues of “public resources” or “commons” broadly includes “government-owned property, including public lands, government research and development, and information resources”; “natural systems such as the atmosphere, water, local ecosystems, and genetic structures of life”; “user-managed regimes for conserving land, managing community gardens, developing software, and controlling access to fisheries and other

natural resources”; gift economies, or social networks based on gift exchange, which create economic and social values within academia, Internet communities, and geographic localities”; “shared, inherited knowledge such as scientific research, historical knowledge, and folk wisdom, all of which contribute to the public domain” ; “cultural traditions and norms, which serve as a set of common moral presumptions and expectations for managing daily life.” “New Democracy Forum: Ruled by the Market?,” *Boston Review*, Vol. 27, Nos. 3-4 , Summer 2002, featuring “Reclaiming the Commons,” by David Bollier, and commentaries thereon, Available at <http://bostonreview.net/BR27.3/contents.html>.

²⁷ “The Homestead Act: A Major Asset-building Policy in American History,” by Trina Williams, Center for Social Development, George Warren Brown School of Social Work, Washington University, St. Louis, Working Paper 00-9, 2000, p. 15.

Available at <http://gwbweb.wustl.edu/csd/Publications/2000/wp00-9.pdf>.

²⁸ “The Homestead Act passed in May of 1862. The statute provided that anyone who is head of a household, a military veteran, or over 21 years of age was entitled to 160 acres of unappropriated land as long as they had not borne arms against the United States Government. Applicants had to be U.S. citizens or at least have filed intention of becoming one. After filing an application for surveyed land with the appropriate land office and swearing that the property was for one’s own use with the purpose of cultivation and settlement, the person had 6 months to move onto the land and begin improvements. The land was exempt from sale, taxes or previous debt. Any time after five years, the applicant was entitled to take out final papers and receive a patent for the land, after providing evidence that all conditions had been fulfilled and paying nominal charges to the appropriate land office. If the claimant abandoned the land or changed residence, the plot reverted back to the government. The Preemptive Clause of 1841 was still in effect, however, so if homesteaders wanted to pay the minimum price per acre before the five years expired, they could still buy title to the land. This was called the commutation of a homestead.” *Id.*, p. 3.

²⁹ *Id.*, p. 8.

³⁰ *Id.*, pp. 8-9.

³¹ For a description of the “Lieberman/McCain “Climate Stewardship Act,” see <http://www.ussskytrust.org/liebermanMcCainFAQ.htm>.

³² See “Global Warming Bill Could be Biggest Giveaway of Public Asset since Railroads Senators Propose Giving Away the Sky in Order to Save it.” Available at <http://www.ussskytrust.org/PRESSRELEASE-WEB.htm>.

³³ The proponent, Peter Barnes, suggests that the “Trust pay[] equal annual dividends to all U.S. citizens” and that dividends could be “placed tax-free in Individual Retirement Accounts or Individual Development Accounts for children.” Excerpts from *Who Owns the Sky?* by Peter Barnes. Available at <http://www.skybook.org/contents.html#Appendix>.

³⁴ “The Permanent Fund Dividend Story,” by Cliff Groh, November 17, 1997, pp. 3-4. Available at http://conferenceofalaskans.com/pdf/pfd_story.pdf. The remaining revenues go into the State’s General Fund. See “Permanent Fund overview,” Conference of Alaskans. Available at http://conferenceofalaskans.com/pdf/how_fund_works.pdf. “The 1976 Constitutional Amendment (Article IX), Section 15), provided for “creation of a dedicated fund,” “a minimum level of mineral resource revenue contributions to the principal of the Fund,” and the deposit of “all earnings to the General Fund unless otherwise provided by law.” “Alaska’s Permanent Fund, Legislative History, Intent and Operations,” Trustees Papers Volume V, Alaska Permanent Fund Corporation. Available at <http://www.apfc.org/library/TP5-4.cfm?s=5>.

³⁵ “The Permanent Fund Dividend Story,” by Cliff Groh, November 17, 1997, p. 4. Available at http://conferenceofalaskans.com/pdf/pfd_story.pdf. The Alaska state government has collected billions of dollars from the development of the Prudhoe Bay oil field on state-owned land. *Id.*, p 2.

³⁶ “Alaska’s Permanent Fund, Legislative History, Intent and Operations,” Trustees Papers Volume V, Alaska Permanent Fund Corporation. Available at <http://www.apfc.org/library/TP5-4.cfm?s=5>.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id. Those bills were defeated for the above reasons and because they would have caused fundamental and major changes in responsibility among various state departments.” Ibid. More particularly, by 1980, “several concepts concerning economic development had emerged...Important among these were that economic intervention activities had little chance of succeeding, that the likelihood of loss of the body of the Permanent fund was high, the size of the Permanent Fund would be inadequate for large infrastructure projects, and that economic development would encourage immigration and worsen the state[’s taxable base.” Moreover, “[c]onsultants were very influential and numerous during the development of the Permanent Fund.” Among other things they “concluded that structural problems, rather than a lack of dollars, were causing the shortage [of rural capital],” “seriously questions” “[t]he ability of the Permanent Fund to create new industries and/or to promote existing industries,” and “expressed” “concern for the potential inflationary results of Permanent Fund investments in Alaska.” One conservative economist argued that argued that Fund Loans would represent special interest subsidies that would “benefit small groups” and be economically inefficient and “nearly all of the consultants agreed that if the Permanent Fund provided loans at below-market rates or at higher risk than commercial banks, an erosion of the principal of the fund would occur.” Id.

⁴³ “In any program increasing the dispersal of our oil wealth all Alaskans, not simply taxpayers, should be beneficiaries. We already have numerous programs selectively dispersing portions of our oil wealth in the form of expanded subsidized government programs and low-interest loans.” “Alaska’s Permanent Fund, Legislative History, Intent and Operations,” Trustees Papers Volume V, Alaska Permanent Fund Corporation (quoting Governor John Hammond). Available at <http://www.apfc.org/library/TP5-4.cfm?s=5>. Note that “[it] appeared that Hammond was taking the advice of consultants such as [conservative economist Milton]Friedman.” Id.

⁴⁴ Id.

⁴⁵ Id. (quoting Governor John Hammond).

⁴⁶ “The Permanent Fund Dividend Story,” by Cliff Groh, November 17, 1997, p. 1. Available at http://conferenceofalaskans.com/pdf/pfd_story.pdf.

⁴⁷ Id., pp. 4-5. However, the legislation that provided for dividends based on cumulative residency was challenged – ultimately successfully – on constitutional grounds. The challenge resulted in a blockage of the planned payments and occasioned a struggle over alternative legislation, should the original scheme fail.

⁴⁸ Id., pp. 9-10.

⁴⁹ Id., p. 19.

⁵⁰ “Id. The bill passed by substantial margins, although an attempt the next year to end the program appears to have been fairly hard fought. Id., p. 28.

⁵¹ Blackburn, p. ____

⁵² Similar protection against such action by States has been read into the Constitution through the Supreme Court’s interpretation of the Due Process Clause of the Fourteenth Amendment.

⁵³ 260 U.S. 393 (1922).

⁵⁴ *United States v. Ptasynski*, 462 U.S. 74, 79 (1983).

⁵⁵ See, for example, *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974).

⁵⁶ See, for example, *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898).

⁵⁷ See, for example, *Houck v. Little River Drainage Project*, 239 U.S. 254 (1915).

⁵⁸ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998)(Kennedy, J., concurring in the judgment).

⁵⁹ See, for example, *Leonard v. Earle*, 279 U.S. 392 (1929).

⁶⁰ See *Leonard v. Earle*, 279 U.S. at 396.

⁶¹ See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

⁶² In his 1999 State of the Union message, President Clinton stated as follows: “[Specifically, I propose that we commit 60 percent of the budget surplus for the next 15 years to Social Security, investing a small portion in the private sector just as any private or state government pension would do. This will earn a higher return and keep Social Security sound for 55 years. Transcript, State of the Union speech, President William Jefferson Clinton, January 19, 1999. Available at <http://www.cnn.com/ALLPOLITICS/stories/1999/01/19/sotu.transcript/>.] Note that a faction of an earlier created, 13-member congressionally-mandated Social Security Advisory panel “suggested that Congress consider creating an investment board, similar to the federal employees’ thrift investment board. This board would invest part of the Social Security trust funds in the financial markets, perhaps through stock and bond index funds, rather than the direct purchase of stocks and bonds.” “CRS Report for Congress (96-504 EPW), Ideas for Privatizing Social Security” by David Stuart Koitz, Specialist in Social Legislation, Education and Public Welfare Division, Congressional Research Service, The Library of Congress, Updated April 6, 1998. Available at <http://www.concordcoalition.org/entitlements/crs040698.html>.

⁶³ “On investing the social security trust fund in equities,” Testimony of Chairman Alan Greenspan before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, U.S. House of Representatives, March 3, 1999. Available at <http://www.federalreserve.gov/boarddocs/testimony/1999/19990303.htm>. With regard to suboptimal performance, Greenspan conceded that “relevant comparisons to private plans are difficult to construct” and referred (without citation) to “evidence that the average rate of return on state and local pension funds tends to be lower than the return realized on comparable private pension funds, other pooled investments, and market indexes.” Also, although he admitted that “a significant part of this disparity would be eliminated were these returns adjusted for risk, because public pension plans are often invested more conservatively than private plans,” he contended that “there is evidence that returns are lower even after accounting for differences in the portfolio allocation between stocks and bonds.” More particularly, he suggested that “evidence had shown that state pension plans that are required to direct a portion of their investments in-state and those that make “economically targeted investments” experience lower returns as a result” and that there was “evidence suggesting that, the greater the proportion of trustees who are political appointees, the lower the rate of return. A lower risk-adjusted rate of return on financial assets is almost invariably an indication of lower rates of return on the real underlying assets on which they are a claim.” *Id.*

⁶⁴ “The Perils of Government Investing,” by Michael Tanner, Cato Institute Briefing Papers, No. 43, Cato Institute, Washington, D.C. December 1, 1998. Available at <http://www.cato.org/pubs/briefs/bp43.pdf>.

⁶⁵ “Why Government-Controlled Investment Would Undermine Retirement Security,” by Daniel J. Mitchell, The Heritage Foundation Backgrounder, No. 1248, February 5, 1999. Available at <http://www.heritage.org/Research/SocialSecurity/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14856>.

⁶⁶ “Social Security Investment Plan Raises a Debate,” by Diana B. Henriques, *The New York Times*, Section 1, Column 1, National Desk, January 24, 1999, Sunday, Late Edition – Final.

⁶⁷ “U.S., Stocks Not a Good Mix,” by Martin and Kathleen Feldstein, *The Boston Globe*, Tuesday, February 2, 1999. Available at <http://www.nber.org/feldstein/bg020299.html>.

⁶⁸ *Id.*

⁶⁹ “Transcript of Proceedings, The Great Social Security Debate, July 27, 1998, Albuquerque, N.M.” C0-sonsred by the Concord Coalition and The American Association of Retired Persons (remarks by Representative Jim Kolbe (R-AZ). Available at <http://www.concordcoalition.org/entitlements/abqss0798.html#session1>.

⁷⁰ “The Greenspan Concern Over Public Ownership of Private Assets: Can the Social Security Trust Fund Safely Own Assets?,” by Peter Orszag and Robert Greenstein, Center on Budget and Policy Priorities, February 26, 2001 (citing, the discussion in *Countdown to Reform: The Great Social Security Debate*, by Henry Aaron and Robert Reischauer, The Century Foundation, 1999). Available at <http://www.cbpp.org/2-26-01tax3.pdf>. (Emphasis added.) The authors also argued that “[o]ne could even create a new government-sponsored enterprise, with a government

charter but a private ownership structure, as the intermediary to add another layer of private-sector protection against government interference in markets.” Id.

⁷¹ “Restructuring Pensions for the 21st Century: The United States’ Debate,” by Alicia H. Munnell, Oxford Institute of Ageing Working Papers, October 2002, p.18. Available at <http://www.ageing.ox.ac.uk/publications/papers/5-Munnell.pdf>. (Emphasis added.)

⁷² Id.

⁷³ Id., pp. 18-19. Here the author notes, in connection with the design of the federal Thrift Savings Program (TSP), not only that “TSP designers insulated investment decisions by setting up an independent investment board, narrowing investment choices, and requiring strict fiduciary duties,” but also that “[t]he TSP also operates in a political culture of noninterference. Its creators made clear from the beginning that economic, not social or political, goals were to be the sole purpose of the investment board...” Id., p. 19 (citing “Discussion of Public Investment in Private Markets,” by Francis X. Cavanaugh, in *Framing the Social Security Debate: Values, Politics and Economics*, A. Douglas Arnold, Michael J. Graetz, and Alicia H. Munnell, eds., Brookings Institution Press for the National Academy of Social Insurance, Washington, D.C. 1998.)

⁷⁴ The literal language of the resolution, offered by then Senator John Ashcroft, read as follows: “It is the sense of the Senate that the assumptions underlying the functional totals in this resolution assume that the Federal Government should not directly invest contributions made to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) in private financial markets.” Available at <http://thomas.loc.gov/cgi-bin/query/D?r106:3:./temp/~r106SbtecZ::> For the record of the vote see the document available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00060. For conservative commentary, see “Senate to Clinton: No Government Investing,” Cato Institute Project on Social Security Choice, March 29, 1999 (reporting “Sense of the Senate Resolution” unanimously (99-0) rejecting the Clinton proposal). Available at <http://www.socialsecurity.org/daily/03-29-99.html>.

⁷⁵ “The Greenspan Concern Over Public Ownership of Private Assets: Can the Social Security Trust Fund Safely Own Assets?,” by Peter Orszag and Robert Greenstein, Center on Budget and Policy Priorities, February 26, 2001. Available at <http://www.cbpp.org/2-26-01tax3.pdf>. The “Clinton Administration’s proposal envisioned use of a broad index such as the Wilshire 5000 rather than an index like the S&P 500 that covers only the largest companies.” Moreover, “the actual investment would [have] be[en] undertaken by private-sector pension managers, not by the government. Then-Treasury Secretary Robert Rubin noted that ‘there [are] really two layers of protection’ against political interference under such a proposal. He stated: ‘there’ll be an independent body that will oversee the investment of the funds, and then the funds themselves will be invested by private sector money managers, not by the government. The government will be involved absolutely not at all in the investment.’” Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id. Note that “[t]he TSP is a defined contribution savings and investment plan that serves over two million federal employees. It offers participants a choice among several investment funds, including a common stock index fund, a government securities fund, a fixed income index fund, a small cap fund and a foreign stock fund.” “Could Individual Accounts Lead to Government Interference in the Stock Market?,” by Alison Shelton, Public Policy Institute, Public Affairs, AARP, June 2002, p. 8. Available at http://research.aarp.org/econ/ib57_stock.pdf. “Under the TSP system, the federal government handles most of the administrative functions, and contracts most investment functions out to the private sector. The TSP invests the government securities fund itself, but contracts with private investment managers who invest the stock and bond investments.

The government maintains the records of each individual's investment choices and how these investments performed. *Id.*, p. 4. "[T]he TSP has an independent board consisting of five part-time members. The board appoints a full-time Executive Director." *Ibid.*, p. 9.

⁷⁹ "On investing the social security trust fund in equities," Testimony of Chairman Alan Greenspan, Before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, U.S. House of Representatives, March 3, 1999. Available at <http://www.federalreserve.gov/boarddocs/testimony/1999/19990303.htm>. Note, though, that despite this concession, Greenspan was, for other reasons, opposed to investment of Social Security contributions in private financial markets. He stated: "[I]nvesting the social security trust funds in equities does little or nothing to improve the overall ability of the U.S. economy to meet the retirement needs of the next century. Given this lack of evident benefit, it is unclear to me why we should take on the risk of interference, which, probably short of a Constitutional amendment, cannot be eliminated. Even if concerns about politically driven investment were not to materialize, what would have been gained by such a huge shuffling of funds?" *Id.*

⁸⁰ "The Perils of Government Investing," by Michael Tanner, Cato Institute Briefing Papers, No. 43, Cato Institute, Washington, D.C. December 1, 1998, p. 9. Available at <http://www.cato.org/pubs/briefs/bp43.pdf>.

⁸¹ See for example "The Archer-Shaw Social Security Plan, Laying the Groundwork for Another S&L Crisis," by Andrew G. Biggs, CATO Institute Briefing Papers, No. 55, February 16, 2000, available at <http://www.cato.org/pubs/briefs/bp55.pdf>, commenting on what was a proposal by arch-conservatives Representatives Bill Archer (R-Texas) and Clay Shaw (R-Florida.). While their proposal envisioned individual accounts, the workers were "restricted to only `pre-approved, low-risk, investment options.'" According to the author, such an approval process "presents a threat similar to the one posed by President Clinton's plan for direct government investment controlled by a board of impartial investment advisors," because "government-directed investment ...inevitably invites political pressure that disports capital markets and risks taxpayer losses." (Emphasis in original.) *Id.*

⁸² For example, with regard to Social Security disability insurance, see "The Value of Social Security Disability Insurance," by Martin R. Homlmer, AARP, Report #1001-09, June 2001. Available at http://research.aarp.org/econ/2001_09_ssdi.pdf.

⁸³ Recall the conservative concern that no matter what the initial character of a scheme to invest Social Security (or arguably any other publicly controlled) funds in securities, there would loom the ongoing power of Congress and the President to change it, for the worse, and hence conservative resistance to create what they would see as a crack or hole in the dike.

⁸⁴ According to Blackburn, "[t]he various beneficiaries of the share levy would not be able to sell the shares for a lengthy period." Blackburn, p. 15. More particularly, Blackburn would have the state-level funds qualify to receive the shares only if they "commit[] to holding most of [their] assets for, say, five years." Blackburn, p. 18.

⁸⁵ Those decisions would, in turn, depend upon the fact and extent of contributions made, the impact of investment or other risk, and the extent to which contributors or beneficiaries can exercise voice or have exit.

⁸⁶ They would also be familiar with questions that would have to answered if nominal democratic governance is to be practically meaningful. How easily will beneficiaries be able to reach and communicate with one another? How likely is it that beneficiaries will be actively involved? What assurance is there that they will get the kind of information they need to make a reasoned decision? About objectives or goals? About means of implementation? Of effectiveness of implementation? Even if beneficiaries had the information they need would they have the ability to understand it? Or the incentive to act on it? For example, if beneficiaries don't have individual accounts (or in other ways don't see the funds' resources as "their own") or if they have a quasi-entitlement (of income) instead, what incentive would they have to monitor governmental decision-making with respect to investment choices? By contrast, what is the likelihood that powerful interest groups are more likely to mobilize to effectively influence particular investment decisions. In all events, are there matters for which an affirmation determination by beneficiaries must be made? Or only ratification or veto of a determination made by others?

⁸⁷ See, for example, the criteria employed by Calvert Group, Ltd., which describes itself as "offering the largest family of socially-screened mutual funds as well as tax-free investment products" and as having "evolved...to become one of the Washington D.C. area's largest mutual fund management firms with more than \$9 billion in assets under management for over 300,000 investors." "Social Analysis Criteria," Available at http://www.calvert.com/sri_647.html. There is little doubt that the criteria set forth, on their face, appear laudatory, even greatly so. But there are literally several dozen of them, each subject to considerable interpretation and informed by potentially different value judgments. In the first instance, it is not evident how a workable set of criteria could be forged into a legislative scheme that would not be so complex as to be unworkable, but sufficiently detailed to afford the requisite guidance, accountability and control envisioned by Blackburn.

⁸⁸ One would also have to establish criteria to resolve potential tensions between Blackburn's effort to advance social investment goals and his desire to ensure democratic and egalitarian governance for RPFs. Blackburn certainly seems to presuppose that criteria for social investment will be established at the National Fund and, hence, at the federal level. It is not clear how specific he would have those criteria be or whether he would envision rather particularized goal setting. But at a certain point such criteria- and most certain goal-setting would come into conflict with RPF beneficiaries' exercise of control over the RPFs. That is, they may not agree with the mandated goal or even the criteria established at the federal level. Would they have the right to override either? Whether they should depends, in part, on whether the resources placed at risk by a problematic investment decision (whether the decision were based on social investment of "pure" financial investment grounds) are viewed as "theirs." If some of the resources were derived from their own contributions or ones made on their behalf, rather than, say, from a share levy, part of the fund would be "their own," and the contention that they should have some veto or override power would have some force. If according beneficiaries "voice" in this circumstance were not acceptable, should beneficiaries have the chance to "exit" when it comes to social investment decisions. That is, should they have the right to cash out "their" investments and be allowed to place them elsewhere for similar purposes? Or should funds derived from the share levy at the outset even be segregated at the outset from those accumulated by other means? In essence, should there be a process to separate out the making of "economic" and "social" investment decisions? But even if some monies are beneficiaries' own, should the federal government/National Fund employ tax incentives to encourage participation in funds using social investment criteria?

⁸⁹ "There would be some variation in retirement income, reflecting different contribution records and investment returns. As in today's occupational schemes contributions would be calculated as a proportion of income for those in employment. Those who were unemployed, or caring for dependents, would benefit from contributions paid on their behalf from the pension reserve." Blackburn, p. 18.

⁹⁰ "Each person's membership in three secondary pension funds would aim to supply about 30 per cent of average earnings, or of their own previous earnings, up to three times average earnings, whichever was the higher." Blackburn, p. 18.

⁹¹ *True Security, Rethinking American Social Insurance*, by Michael Graetz and Jerry L. Mashaw, Yale University Press, New Haven, Connecticut, 1999, p. 198. Another factor that increases the employer stakes in unemployment compensation is the fact that the taxes on employers are experience rated. A contrast between the business role in relation to Social Security and unemployment compensation would also need to take account of the fact that while Social Security is managed entirely at the federal level the unemployment compensation system, while mandated and overseen by the federal government, is in the main run by the states.

⁹² As discussed above, the prospect of funding the pension scheme from increased property taxes is minimal, so we do not discuss that possibility.

⁹³ Blackburn, p. 18. He adds that such "independent research" "would be welcome to all shareholders, since, even post Sarbanes-Oxley, it is unrealistic to expect banks to disclose rigorous information about their favored corporate clients." *Id.*, p. 18.

⁹⁴ According to the Federal Reserve Board's web-site, "[t]oday the Federal Reserve's duties fall into four general areas: (1) conducting the nation's monetary policy; (2) supervising and regulating banking institutions and protecting the credit rights of consumers; (3) maintaining the stability of the financial system; and (4) providing certain financial services to the U.S. government, the public, financial institutions, and foreign official institutions." Available at <http://www.federalreserve.gov/>.

⁹⁵ "Each Reserve Bank has its own board of nine directors chosen from outside the Bank as provided by law. Three directors, designated Class A, represent commercial banks that are members of the Federal Reserve System. Three Class B and three Class C directors represent the public. The member commercial banks in each District elect the Class A and Class B directors. The Board of Governors in Washington, D.C., appoints the Class C directors to their posts. From the Class C directors, the Board of Governors selects one person as chairman and another as deputy chairman. No Class B or Class C director may be an officer, director, or employee of a bank or a bank holding company. No Class C director may own stock in a bank or a bank holding company. The directors in turn nominate a president and first vice president of the Reserve Bank, whose selection is subject to approval by the Board of Governors. Each Branch of a Reserve Bank has its own board of directors of five or seven members. A majority of these directors are appointed by the Branch's Reserve Bank; the others are appointed by the Board of Governors." "The Federal Reserve System, Purposes and Functions," Board of Governors of the Federal Reserve System, Washington, D.C. 1994. Available at <http://www.federalreserve.gov/pf/pdf/frspf1.pdf>.

⁹⁶ Blackburn, p. 18.

⁹⁷ Blackburn, p. _____. ("Institutions like the Pension Benefit Guaranty Corporation (PBGC), which insure secondary funded schemes, would be entitled to call on the pension reserve. But companies which persistently called on its aid would be obliged to sign up as full members of the national scheme. Indeed the PBGC, with its experienced staff, might be expanded to administer the national pension reserve.")

⁹⁸ Blackburn, p. 18.

⁹⁹ Blackburn suggests that such a multiplicity of funds "would help to promote participation and reduce costs." Blackburn, p. ___. Precisely why they would is not obvious.

¹⁰⁰ The inevitable transfer of stock ownership effected by Blackburn's share levy proposal starkly poses this issue. But it is likely to be posed by any other funding scheme, since it is likely that a significant fraction of the revenues from the designated source would be invested in corporate shares.

¹⁰¹ "Community Development Financial Institutions: Current Issues and Future Prospects," by Lehn Benjamin, Julia Sass Rubin, and Sean Zielenbach, presented at "Sustainable Community Development," Community Affairs Research Conference, Federal Reserve Board, March 2003, p. 12 Available at http://www.federalreserve.gov/CommunityAffairs/National/CA_Conf_SusCommDev/pdf/zeilenbachsean.pdf.

¹⁰² "Community Development Financial Institutions: Current Issues and Future Prospects," by Lehn Benjamin, Julia Sass Rubin, and Sean Zielenbach, presented at "Sustainable Community Development," Community Affairs Research Conference, Federal Reserve Board, March 2003, p. 2. Available at http://www.federalreserve.gov/CommunityAffairs/National/CA_Conf_SusCommDev/pdf/zeilenbachsean.pdf.

¹⁰³ Id. "They augment this financing with a range of educational services and borrower-specific technical assistance, so as to increase their borrowers' economic capacities and potential." Ibid. More particularly, CDFIs "provide both financing and nonfinancing services, both of which can be grouped into five principal categories: Microenterprise development, providing financial and technical assistance to very small business. Small- and medium-sized business development, providing similar services to more mature businesses. Housing financing, for the construction of

affordable housing and direct lending and services to low-income families. Community services, including financing and other assistance to community service organizations. Consumer financial services, including financing and nonfinancing assistance to individuals for health, education, emergency, debt consolidation, transportation, and consumer purposes. "Community Development Financial Institutions, Providing Capital, Building Community, Creating Impact," Report by the CDFI Data Project on Data Provided for the 2001 Fiscal Year," Written by the Corporation for Enterprise Development," p. 5. Available at <http://www.cfed.org/>.

¹⁰⁴ The Community Development Finance Fund operates "programs designed to increase capital access and availability in under-served markets." "Its largest....program has...been....[to] provide[] a range of grants, loans, and equity investments to CDFIs to help them build their lending capacities."¹⁰⁴ "One-third of the Funds dollars go to the Bank Enterprise Award (BEA) program, which rewards banks for increasing their lending and investing activity in economically distressed markets and/or in CDFIs." [The Fund now is] charged with administering the New Markets Tax Credit Program." "Community Development Financial Institutions: Current Issues and Future Prospects," by Lehn Benjamin, Julia Sass Rubin, and Sean Zielenbach, presented at "Sustainable Community Development," Community Affairs Research Conference, Federal Reserve Board, March 2003, pp. 7-8. Available at http://www.federalreserve.gov/CommunityAffairs/National/CA_Conf_SusCommDev/pdf/zeilenbachsean.pdf

¹⁰⁵ "CDFI Certification, Overview," U.S. Treasury. Available at <http://www.cdfifund.gov/programs/programs.asp?programID=9>.

¹⁰⁶ "Glossary 2004 CDFI Fund Program," U.S. Treasury. Available at <http://www.cdfifund.gov/docs/fa/2004/glossary.pdf>.

¹⁰⁷ "CDFI Certification, Overview," U.S. Treasury. Available at <http://www.cdfifund.gov/programs/programs.asp?programID=9>.

¹⁰⁸ "Part II, Department of the Treasury, Community Development Financial Institutions Fund," 12 CFR Parts 1805 and 18, Federal Register, February 4, 2003. Available at http://www.cdfifund.gov/docs/2003_cdfi_regulations.pdf.

¹⁰⁹ "Community Development Finance Institutions, Providing Capital, Building Community, Creating Impact," written by the Corporation for Enterprise Development, with the National Community Capital Association, 2003, p.4. Available at http://www.cdvca.org/pdf/cdp_report.pdf. Note, though, that in 2001, the 100 largest U.S. banks alone controlled almost \$6.5 trillion in assets." Ibid.

¹¹⁰ Id.

¹¹¹ For an overview of the impact of a sample of CDFIs, see "Community Development Finance Institutions, Providing Capital, Building Community, Creating Impact," written by the Corporation for Enterprise Development, with the National Community Capital Association, 2003, pp. 34. Available at http://www.cdvca.org/pdf/cdp_report.pdf.

¹¹² Id., pp. 31-32..

¹¹³ Id., p. 19 and figure 11 (p. 20).

¹¹⁴ See for example, "Taking Stock: CDFIs Look Ahead After 25 years of Community Development Finance," by Mark Pinsky, The Brookings Institution, Center on Urban and Metropolitan Policy and Harvard University, Joint Center for Housing Studies, December 2001 and "Community Development Financial Institutions: Current Issues and Future Prospects," by Lehn Benjamin, Julia Sass Rubin, and Sean Zielenbach, presented at "Sustainable Community Development," Community Affairs Research Conference, Federal Reserve Board, March 2003.. Available at <http://www.brookingsinstitution.org/dybdocroot/es/urban/capitalxchange/pinsky.pdf> and http://www.federalreserve.gov/CommunityAffairs/National/CA_Conf_SusCommDev/pdf/zeilenbachsean.pdf, respectively.

¹¹⁵ In the case of CDFIs, as noted, the certification process is one internal to the U.S. Treasury as is the procedure for deciding which certified CDFIs are to receive funds for different kinds of activities. We are not aware of any study or analysis of how those processes and procedures have operated in fact, and any problems with them, particularly related to "political" influence on decision-making.

¹¹⁶ As noted earlier, whether public control of corporate assets by means of a secondary pension scheme is the best way to ensure “socially responsible” use of such assets as contrasted with, say, worker ownership or “stakeholder capitalism,” is an issue I do not canvas, but will likely be the subject of conference discussion.