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BOOK REVIEW:

***THE BATTLE FOR SOCIAL SECURITY:
FROM FDR'S VISION TO BUSH'S GAMBLE,*
NANCY J. ALTMAN (HOBOKEN: JOHN
WILEY & SONS, INC., 2005, 362 PP.
\$24.95 (U.S.), CLOTH)**

KATHRYN L. MOORE*

As Richard Kaplan has noted, "During the past decade, few issues have caused more ink to spill or more trees to fall than Social Security."¹ At the risk of spilling yet more ink on this subject, I am writing this review to bring attention to a recent and valuable addition to the debate on Social Security reform: *The Battle for Social Security: From FDR's Vision to Bush's Gamble*, by Nancy J. Altman.

Running over three hundred pages, Altman's book is ambitious. It is part history,² part critique of President Bush's proposal to fundamentally restructure the current Social Security system by introducing personal retirement accounts,³ and part reform proposal.⁴ Overall, it succeeds on all accounts.

Altman's success should come as no surprise. She is eminently qualified to write such a book. Graduating from the University of Pennsylvania Law School the year ERISA was enacted, Altman was assistant to Alan Greenspan when he served as Chairman of the bipartisan National Commission on Social Security Reform from 1981 to 1983. In addition, among other things, she is a founding member of the National Academy of Social Insurance and Chairman of the Board of Directors of the Pension Rights Center.

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1. Richard L. Kaplan, 27 COMP. LAB. L. & POL'Y J. 297, 297 (2006) (reviewing JOHN TURNER, INDIVIDUAL ACCOUNTS FOR SOCIAL SECURITY REFORM: INTERNATIONAL PERSPECTIVES ON THE U.S. DEBATE (2006)).

2. See NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* 9-253 (2005).

3. See *id.* at 255-96.

4. See *id.* at 297-309.

At the outset, it is important to note that this book is not an objective critique of the strengths and weaknesses of the current Social Security system. Altman is a passionate supporter of the current system and a harsh critic of proposals, like President Bush's proposal, to fundamentally restructure the current system by adding individual accounts. Readers looking for an objective critique of the current system or a defense of individual account proposals would do well to look elsewhere.⁵ On the other hand, readers interested in a heartfelt defense of the current system, a detailed and lively account of the history of the system, a reform proposal that addresses Social Security's long-term deficit without fundamentally changing the system, and many unique and interesting insights will find this book well worth reading.

Altman's book begins by emphasizing an often forgotten fact: Social Security is much more than just a retirement program. It also provides survivor and disability benefits.⁶ Indeed, according to Altman:

In the chaotic aftermath of [September 11, 2001,] millions of Americans reached into their pockets to contribute to the Red Cross and other charitable organizations assisting the families of the 9/11 victims. But the most immediate, sustained, and generous support for those families came from Social Security.⁷ Much of the book is devoted to providing a detailed history of the development of the Social Security program. Although many other histories of Social Security have been written,⁸ this history is worth reading. First, though perhaps not most importantly, it is fun and interesting to read. Altman does not simply dryly describe the facts. Rather, she makes the history come alive. She paints colorful pictures of the individuals who helped create Social Security. For example, she describes John R. Commons, the "grandfather of Social Security" as a "brilliant, creative scholar with a self-deprecating sense of humor and a warmth of manner.

5. For a more critical overview of the Social Security system, see, for example, DANIEL SHAVIRO, *MAKING SENSE OF SOCIAL SECURITY REFORM* (2000). For one of the first books to call for the fundamentally restructuring of Social Security and the creation of personal accounts, see PETER J. FERRARA, *SOCIAL SECURITY: THE INHERENT CONTRADICTION* (1980).

6. In addition, Medicare is part of the Social Security program. For a discussion of the early history and enactment of Medicare, see ALTMAN, *supra* note 2, at 191-206.

7. *Id.* at 3.

8. For a recent history, see DANIEL BÉLAND, *SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE* (2005). Older, but outstanding, historical treatments of Social Security include MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* (1979), ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* (1966), and EDWIN E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT: A MEMORANDUM ON THE HISTORY OF THE COMMITTEE ON ECONOMIC SECURITY AND DRAFTING AND LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT* (1963).

Rumpled in appearance, serious in expression, and intellectual though he was”⁹ In addition, she offers many interesting anecdotes.¹⁰ For example, of particular interest to lawyers, she describes the intrigue behind the structuring of the Social Security system to withstand a constitutional attack. When Social Security was originally enacted in 1935, the Supreme Court interpreted the Commerce Clause much more narrowly than it does today, and there was some question as to whether Social Security could withstand a constitutional challenge.¹¹ In the months before the formation of the Committee on Economic Security (“CES”), the group that President Franklin Roosevelt charged with drafting the original Social Security bill, two Supreme Court Justices hinted to individuals close to the Administration that the Social Security program could withstand a constitutional challenge if it was based on the federal government’s taxing power. Justice Louis Brandeis pointedly asked his son-in-law, the author of Wisconsin’s unemployment legislation and close associate of Assistant Secretary of Labor Arthur Altmeyer, if he was familiar with *Florida v. Mellon*,¹² a federal estate tax case, and suggested that he

9. ALTMAN, *supra* note 2, at 9. The following passage provides further illustration of Altman’s compelling descriptions of the important players in Social Security’s early history:

One outstanding leader in the creation and development of Social Security is Arthur Altmeyer, a serious, bespectacled, scholarly man called “Mr. Social Security” by President Roosevelt. Another is the gregarious, energetic Wilbur Cohen, about whom Senator Douglas quipped, “. . . an expert on Social Security is a person who knows Wilbur Cohen’s telephone number.’ One more invaluable hero is the dignified and personable Robert M. Ball, who the late Senator Daniel Patrick Moynihan said was “as wise a counselor as any Senator will know.” Still another is Robert J. Myers, a tall, shy, soft-spoken actuary, whom Moynihan labeled “a national treasure.”

Id. at 5-6.

10. Some of the anecdotes are merely amusing. For example, Altman describes how in January 1983 Robert Ball snuck out of his home to avoid the press and attend a clandestine meeting of the National Commission on Social Security Reform:

In desperation, Ball called Darman [an assistant to President Reagan]. Behind Ball’s house was an extremely steep slope, covered in snow, which led through a thickly wooded area to the George Washington Parkway, a major high-speed thoroughfare. Darman dispatched a White House car while the 68-year-old Ball darted out the back door and gingerly sidestepped down the slope to the waiting car. The press missed the out-the-back-Jack escape.

ALTMAN, *supra* note 2, at 247.

11. On May 24, 1937, the United States Supreme Court upheld the Social Security Act against a constitutional challenge in *Helvering v. Davis*, 301 U.S. 619 (1937). Altman describes President Roosevelt’s court packing threat and the role it may, or may not, have had in the Court’s decision to uphold the Social Security Act. See ALTMAN, *supra* note 2, at 116-25.

12. See *Florida v. Mellon*, 273 U.S. 12 (1927).

read it if he was not. At a tea at his home, Justice Harlan Fiske Stone whispered to Secretary of Labor Frances Perkins, chair of the CES, "The taxing power of the Federal Government, my dear; the taxing power is sufficient for everything you need and want."¹³

Altman's colorful descriptions and anecdotes do more than simply make the book entertaining to read. They effectively illustrate the need for the current Social Security system's provision of social insurance. Social insurance is designed "to prevent hardship, poverty, or dependence that might be caused by the contingencies covered wherever and whenever these might occur among workers able to join their employers and the government in a national program."¹⁴ It involves the "pooling of resources and risk among equals."¹⁵

Altman describes the pre-Social Security world as one in "[which] hardworking Americans who lost their wages through no fault of their own [could] be forced into poverty and reliance on charity."¹⁶ Altman continues:

It was not just the sky that was dark and cold [on Roosevelt's inauguration day, Saturday, March 4, 1933]. By the beginning of 1933, about 15 million Americans were unemployed — almost 40 percent of the workforce. Of these, between 1 and 2 million people

13. ALTMAN, *supra* note 2, at 51. More entertaining, though less significant, Altman relays a related anecdote. Three members of the staff of the CES felt strongly that the old age program should be national in scope. *Id.* at 46. One staff member of the CES, the CES' general counsel Thomas Eliot, objected and claimed that a purely federal program would be unconstitutional. *Id.* at 47. Prepared for this argument, Barbara Armstrong, a Berkeley law professor, responded with briefs from two constitutional law scholars, Berkeley law professor Dudley O. McGowveny and Duke law professor Douglas B. Maggs, arguing that a unitary federal approach could withstand judicial scrutiny. *Id.* Thomas Eliot dismissed the briefs and asserted that Harvard law professor Thomas Reed Powell, "the dean of Constitutional law men in American law schools," said a unitary federal approach was unconstitutional. *Id.* Armstrong, unbeknownst to Eliot, was Reed's personal friend. *Id.* at 48. She traveled to Boston to ask him whether he had ever opined that a unitary approach was unconstitutional. He assured her that he had not and gave her a letter stating:

Dear Tom:

Somewhere you picked up the impression that I believed that it would be unconstitutional to have a compulsory old age insurance system in this country. Of course, until the Supreme Court has a specific law and passes upon, no one can be sure of this. But to the extent that I am supposed to be a constitutional law authority, I say of course we can have it.

Sincerely yours,

Thomas Reed Powell

P.S. I have no doubts whatsoever.

Id.

14. J. DOUGLAS BROWN, *ESSAYS ON SOCIAL SECURITY* 57-58 (1977).

15. ALTMAN, *supra* note 2, at 32.

16. *Id.* at 15.

were traipsing the country in vain, looking for any kind of work. Hundreds of thousands of others who had lost homes and savings were camped just outside of Washington, in New York's Central Park, and in and around other cities, in shacks, tents, and cardboard boxes – shantytowns angrily nicknamed “Hooverilles.”

Millions more were underemployed, working just two or three days a week, one or two weeks a month. Even those still employed full time saw their earnings cut by a third. People were hungry for any kind of work, no matter how little it paid. When New York advertised for 100 men to shovel snow for 50 cents an hour, 1,000 men lined up at the employment office at dawn, some dressed in expensive overcoats and homburg hats. A mother of six picketed in protest at being excluded, on account of her sex, from the temporary snow-shoveling job.¹⁷

Altman illuminates the fundamental difference between social insurance and welfare: “Welfare programs are designed for people who are already poor. Social insurance prevents workers from becoming poor in the first place.”¹⁸ By limiting benefits to individuals who are poor, welfare discourages work and savings. In contrast, wage-related social insurance, like the current Social Security system, encourages work and savings by providing larger benefits for larger wages and by providing a floor of protection upon which workers can add savings.¹⁹

Social insurance is also fundamentally different from President Bush’s proposed reform of the Social Security system.

17. *Id.* at 21-22.

18. *Id.* at 32.

19. *Id.* at 33. Altman’s discussion of the Clark amendment illustrates how Social Security encourages savings. According to Altman, the Clark Amendment was the most bitterly debated issue in the final weeks leading up to the enactment of the Social Security. *Id.* at 77. This amendment, spearheaded by Walter Forster, a man who made his living drafting and selling pensions, would have permitted employers that offered private pensions to opt out of Social Security. *Id.* Ultimately, a compromise was reached pursuant to which the Social Security bill was reported out of conference without the Clark amendment in exchange for the appointment of a special joint committee to study the issue and develop a proposal that would be satisfactory to both the House and Senate. *Id.* at 79. The following year, however, interest in the Clark Amendment waned. *Id.* at 95-96. Walter Forster and the other insurance brokers who had championed the amendment abandoned it because, rather than ruining their business, the passage of Social Security had led to the brokers selling more retirement plans than ever before. *Id.* at 96. As Altman describes:

Prior to the enactment of Social Security, most people saw retirement on an adequate income as an impossible goal. With the promise of Social Security, it became a realistic goal. At the same time, most people saw that the promised benefits were inadequate, if they wanted to maintain their standards of living in retirement. Consequently, they began to think about methods to supplement the promise.

Id.

His reform is part of his vision of an “ownership society”²⁰ in which individuals “[o]wn their own home, own their own business, own their own health care plan, [and] own a piece of their own retirement.”²¹ This reform, which “trust[s] the people”²² and “say[s] that the government must stand on the side of people,”²³ is the very antithesis of social insurance. Social insurance embodies solidarity and collective action²⁴ through the “pooling of resources and risks among equals.”²⁵ The “ownership society” eschews collective action and idealizes individual responsibility and individual risk.

Although other critiques of private accounts have been written,²⁶ Altman’s critique is particularly interesting in that it places the proposed reform in historical and political context. For example, Altman begins her discussion of private accounts by discussing a 1983 article entitled “Achieving a ‘Leninist’ Strategy” in which two of the early proponents of individual accounts described themselves as revolutionaries and plotted the overthrow of Social Security.²⁷ These early individual account proponents urged their fellow revolutionaries to “be prepared for a long campaign” and to use “guerilla warfare against both the current Social Security system and the coalition that supports it” to achieve this reform.²⁸ She then describes how President Bush more or less followed this strategy in his unsuccessful bid to reform the system in 2005.

20. The Cato Institute has been credited with coining the phrase “ownership society.” See Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 182 n.7 (2005-2006).

21. See Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 21 (2004) (quoting President Bush in a 2004 campaign advertisement).

22. *Id.*

23. *Id.*

24. See Kathryn L. Moore, *President Bush’s Personal Retirement Accounts: Saving or Dismantling Social Security?* 2005 N.Y.U. REV. OF EMP. BENEFITS & EXECUTIVE COMPENSATION 5-1, 5-23 & nn. 109-11.

25. ALTMAN, *supra* note 2, at 32.

26. For example, see the following critiques written by this author, Moore, *supra* note 24; Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341 (2000); Kathryn L. Moore, *Redistribution Under a Partially Privatized Social Security System*, 64 BROOK. L. REV. 969 (1998); Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131 (1998).

27. ALTMAN, *supra* note 2, at 255 (citing Stuart Butler & Peter Gemanis, *Achieving Social Security Reform: A “Leninist” Strategy*, 3 CATO J. 547, 556 (1983)).

28. *Id.* at 255-56 (quoting Stuart Butler & Peter Gemanis, *Achieving Social Security Reform: A “Leninist” Strategy*, 3 CATO J. 547, 552-556 (1983)).

Altman's book concludes by endorsing Robert Ball's three-part plan to bring Social Security into close actuarial balance.²⁹ The first part of the Ball/Altman plan consists of dedicating the estate tax to funding Social Security beginning in 2010.³⁰ Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"),³¹ the estate tax exemption is scheduled to gradually increase from \$1 million in 2002 to \$3.5 million (or \$7 million for a couple) in 2009, and be abolished in 2010.³² Under EGTRRA's sunset clause, however, the entire Act will expire in 2011,³³ and the estate tax will be revived at its 2000 levels beginning in 2011. Ball and Altman propose freezing the estate tax at the 2009 level and earmarking the proceeds for Social Security beginning in 2010.³⁴ According to estimates by Social Security actuaries, earmarking the estate tax would reduce Social Security's long-term debt by about 0.5 percent of payroll.³⁵

The second part of the Ball/Altman plan consists of gradually increasing the maximum taxable wage base until it reaches ninety percent of earnings.³⁶ Under current law, both employees³⁷ and employers³⁸ are required to pay a tax of 6.2 percent of wages, up to a maximum taxable wage base,³⁹ indexed to the increase in average wages nationwide and equal to \$97,500 in 2007,⁴⁰ to finance Social Security benefits.⁴¹ The maximum taxable wage base also serves as a benefits base, which establishes the maximum amount of earnings that are used to calculate benefits.⁴² In 2004, just under eighty-five percent of all earnings were subject to the tax,⁴³ and the share of earnings subject to the tax is expected

29. Close actuarial balance is defined as "income . . . within plus-or-minus 5 percent of outgo over the next 75 years." ALTMAN, *supra* note 2, at 297.

30. *Id.* at 299-301.

31. Pub. L. No. 107-16, 115 Stat. 38 (2001).

32. Pub. L. No. 107-16, § 521, 115 Stat. 38, 69-72 (2001).

33. Pub. L. No. 107-16, § 901(b), 115 Stat. 38, 150 (2001).

34. ALTMAN, *supra* note 2, at 299-301.

35. *Id.* at 301; *see also* Memorandum from Stephen C. Goss, Chief Actuary to Robert M. Ball, Estimated OASDI Financial Effects for a Proposal With Six Provisions That Would Improve Social Security Financing – Information 2 (April 14, 2005), available at http://www.ssa.gov/OACT/solvency/RB_20050414.html (indicating that this provision would reduce the long range deficit by .51% of taxable payroll).

36. ALTMAN, *supra* note 2, at 301-03.

37. 26 U.S.C. § 3101(a) (2000).

38. 26 U.S.C. § 3111(a) (2000).

39. 26 U.S.C. § 3121(a)(1) (2000); 42 U.S.C. § 430(a) (2000).

40. Cost-of-Living Increase and Other Determinations, 71 Fed. Reg. 62636 (Oct. 26, 2006) (announcing the cost of living increase and other determinations for the 2007 taxable wage base).

41. The self-employed are required to pay similar taxes. 26 U.S.C. § 1401(a) (2000).

42. 42 U.S.C. § 430 (2000).

43. Soc. Sec. Admin., Annual Statistical Supplement to the Social Security

to further decrease to eighty-three percent of all earnings by 2015 and remain stable thereafter.⁴⁴

In 1977, Congress amended Social Security to increase the maximum taxable wage base in four steps that were designed to ensure that the taxable wage base would cover ninety percent of all wages by 1982.⁴⁵ In addition, it was expected that Social Security's indexing provisions would ensure that "the proportion of total payroll covered by the base [would] be eliminated at a constant level over the long run."⁴⁶ Due in large part to the fact that salaries for top earners have grown faster than for average earners,⁴⁷ the share of earnings subject to the tax decreased to eighty-five percent of all earnings by 2004 and is expected to further decrease to eighty-three percent of all earnings by 2015.⁴⁸

Ball and Altman propose that the maximum taxable wage base be increased by two percent each year (in addition to the currently scheduled automatic increases due to the growth in average wages) until the base reaches the ninety percent standard set in 1977.⁴⁹ Under this approach, it would take about forty years to reach the ninety percent level.⁵⁰ According to estimates by Social Security actuaries, this proposed increase in the taxable wage base would reduce Social Security's projected shortfall by 0.61 percent of the taxable payroll.⁵¹

The final element of the three-part Ball/Altman proposal consists of investing a portion of the Social Security surplus in equities.⁵² Under current law, any surplus in the Social Security Trust Fund must be invested in United States government bonds.⁵³ Ball and Altman propose that the law be amended to permit up to twenty percent of the surplus to be invested in a broadly diversified, indexed equity fund or funds. Specifically, they propose that the investment be implemented gradually: one

Bulletin, 2005, Table 4.B1, at 4.12-4.13 (2006).

44. See DEBRA WHITMAN, SOCIAL SECURITY: RAISING OR ELIMINATING THE TAXABLE EARNINGS BASE, CRS REPORT FOR CONGRESS 8 (May 2, 2005).

45. See Social Security Amendments of 1977, Pub. L. No. 95-216, § 103, 91 Stat. 1513 (1977) (increasing the base to \$17,700 in 1978, \$22,900 in 1979, \$25,900 in 1980, and \$29,700 in 1981).

46. H.R. REP. NO. 95-702, pt. 1, at 18 (1977), as reprinted in 1977 U.S.C.C.A.N. 4155, 4175.

47. Virginia P. Reno & Joni Lavery, *Options to Balance Social Security Funds Over the Next 75 Years*, NATIONAL ACADEMY OF SOCIAL INSURANCE, Feb. 2005, Brief 18, at 4.

48. WHITMAN, *supra* note 44, at 8.

49. ALTMAN, *supra* note 2, at 302.

50. *Id.* at 302.

51. *Id.* at 303; Goss, *supra* note 35.

52. ALTMAN, *supra* note 2, at 303-04.

53. See 42 U.S.C. § 401(d) (2000) ("Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.").

percent of assets at the end of 2006, two percent of assets at the end of 2007, and increasing by one percent each year until twenty percent of assets are invested in equities at the end of 2025. They propose a separate limitation on total trust fund investments equal to fifteen percent of the total market value of all stocks. According to estimates by Social Security actuaries, the proposed diversity of investments would reduce Social Security's projected deficit by 0.37 percent of taxable payroll.⁵⁴

As I have discussed at length elsewhere,⁵⁵ I believe the Ball/Altman proposal merits serious consideration. Although Altman describes the proposal as "pain-free (for almost everyone),"⁵⁶ the proposal is not entirely costless. Perhaps, and most significantly, it would impose costs on the six percent or so of workers who would be required to pay higher payroll taxes. In addition, investing a portion of the Social Security trust fund in equities would necessarily increase Social Security's administrative costs. The current Social Security system is administered in an extremely efficient manner, with total administrative expenses equal to about one percent of total expenditures.⁵⁷ Undoubtedly, the administrative cost of investing in private equities would be higher than the administrative cost of investing in United States government bonds. How much higher, however, is not entirely clear.

Nevertheless, the Ball/Altman proposal should not be rejected because it would impose some costs. There is no costless solution to Social Security's long-term deficit. And the Ball/Altman proposal is well worth considering because it would address Social Security's long-term deficit without fundamentally restructuring the system.

54. ALTMAN, *supra* note 2, at 303. *Cf.* Goss, *supra* note 35, at 1-2 (noting that all three elements of Ball/Altman proposal would reduce the deficit by 1.47 percent and attributing 0.61 percent reduction to increasing taxable wage base and 0.51 percent reduction to federal estate tax provision).

55. See Kathryn L. Moore, *Social Security Reform: Fundamental Restructuring or Incremental Change*, 11 LEWIS & CLARK L. REV. 341 (forthcoming 2007); Kathryn L. Moore, *Social Security: An Analysis of the Ball/Altman Three-Point Plan*, 2007 N.Y.U. REV. EMP. BENEFITS AND EXECUTIVE COMPENSATION (forthcoming).

56. ALTMAN, *supra* note 2, at 297.

57. 2006 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS 4 (2006). If administrative expenses for the disability program are excluded, administrative expenses fall to about 0.6 percent of expenditures. *Id.*

