SPAIN'S DOUBLE SHOCK: HINDSIGHT FROM THE UNITED STATES REGARDING AN IMMIGRATION INFUX AND ITS EFFECT ON SOCIAL SECURITY FUNDING

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"Like the famous river that many poor Mexicans cross to reach the wealthy United States, the Mediterranean Sea divides prosperous aging Europe from a highly populated, youthful, and economically underdeveloped North Africa."1

1. INTRODUCTION

Spain, similar to the United States due to an increasing age structure, is concerned about reaching a date beyond which there will be too few active workers relative to those retired.2 The dependency ratio—the ratio of older adults to younger adults—has been rising in both the United States and Spain.3 People are living...
longer, the first baby boomers are nearing retirement, and the native birth rate is low. Furthermore, experts predict the dependency ratio will continue to rise. Some hypothesize that the decrease in the active labor force will result in a significant shortage of social security funding. In response, some immigration advocates reply that since immigration fundamentally changes a nation's age structure, it is a helpful means of stalling an escalating dependency ratio. This Comment confirms that Spain has listened

4 See Agar Brugiavini & Franco Peracchi, The Length of Working Lives in Europe, 3 J. EUR. ECON. ASS'N 477, 479 (2005) (explaining that in the past 40 years, life expectancy in the EU has increased by 5 to 10 years in most countries).

5 See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2005 (2005) (estimating Spain's birth rate at 1.010% and the United States' birth rate at 1.1414%); see also Colectivo Ió6, Inmigrantes Extranjeros en España: ¿Reconfigurando la Sociedad?, PANORAMA SOCIAL, June 2005, at 32, 42-43 (showing more than 10% births in Spain during 2004 were from immigrant mothers); INSTITUTO NACIONAL DE ESTADÍSTICA [NAT'L INST. STATISTICS], POBLACIÓN [POPULATION] 2006, available at http://www.ine.es/prodyser/pubweb/espcif/pobl06.pdf (providing an explanation from INE, Spain’s National Institute of Statistics, that 76.4% of the country’s demographic growth in 2004 was due to immigration).

6 See, e.g., FRANK B. HOBBS WITH BONNIE L. DAMON, U.S. BUREAU OF THE CENSUS, 65+ IN THE UNITED STATES 2-22 (1996) [hereinafter 65+ IN THE UNITED STATES] (projecting that, for the United States, the ratio of elderly persons to those of working age (20 to 64 years) will nearly double between 1990 and 2050).

7 See SPAIN ECONOMIC SURVEY, supra note 3, at 144 (“[P]rojections carried out in 2000 for all the OECD countries pointed to the ratio of public pension spending to GDP rising by 8 percentage points by 2050, as against 3 to 4 percentage points in the rest of the OECD.”); see also ORG. ECON. CO-OPERATION & DEV., POLICY BRIEF: ECONOMIC SURVEY OF SPAIN, 2005, at 6 (2005) [hereinafter OECD POLICY BRIEF] (listing the “long-term sustainability of public finances, with particular attention to the public pension schemes” among the most important fiscal policy issues for Spain).

8 Former Federal Reserve Chairman Alan Greenspan pointed out economic effects that could result from an aging global population. In February 2003, Greenspan stated,

[The aging of the population in the United States will have significant effects on our fiscal situation. In particular, it makes our Social Security and Medicare programs unsustainable in the long run, short of a major increase in immigration rates, a dramatic acceleration in productivity growth well beyond historical experience, a significant increase in the age of eligibility for benefits, or the use of general revenue to fund benefits.]

to these advocates while executing its recent immigration strategies. However, considering that immigration adds both to the working-age population and to the future dependent population, an important question remains: Are immigrants' age differences when compared to natives' large enough to fundamentally alter a country's age structure, in turn reducing the impact of demographic shocks to an intergenerational social security system?

In recent years, the influx of immigrants to Spain has done more than merely change Spain's urban appearance. New labor market participants have emerged. As a result, social security funding is arriving from previously nonexistent contributors. Spanish economic strategists ask themselves whether such a rapid increase in immigration provides a net benefit to the country's social security fund and decreases the dependency ratio. These strategists may benefit from a comparison of Spain's situation with that of the United States. The United States, as a country with a

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9 For example, in 2005, during a controversial three month amnesty period, Spain processed work papers for an estimated 690,679 illegal immigrants already living in the country. See Joaquin Arango & Maia Jachimowicz, Regularizing Immigrants in Spain: A New Approach, MIGRATION INFORMATION SOURCE, Sept. 2005, http://www.migrationinformation.org/Feature/display.cfm?ID=331 (explaining that one motive behind the three month amnesty period is to stop so-called clandesinos (illegal immigrants) from working in the black economy and to have them pay taxes and social security).

10 See generally MINISTERIO DE TRABAJO Y ASUNTOS SOCIALES [MINISTRY OF LABOR & SOC. AFFAIRS], REPORT ON THE SPANISH STRATEGY FOR THE FUTURE OF THE PENSION SYSTEM 18 (2005) [hereinafter SPANISH STRATEGY FOR FUTURE PENSIONS] (explaining that, despite immigration, the percentage of young people aged between 15 and 19 has decreased over the 1990 to 2004 period).

11 See Alex Balch, Spain, in IMMIGRATION AS A LABOUR MARKET STRATEGY 159, at 161 (Jan Niessen & Yongmi Schibel eds., 2005) (explaining that based on the local register of inhabitants "[t]he foreign population has jumped from less than 1 million in 1999 to over 3.6 million in 2005."); see also BANCO DE ESPAÑA [BANK OF SPAIN], Inmigración: Desarrollos Recientes y Consecuencias Económicas [Immigration: Recent Developments and Economic Consequences], in BOLETÍN ECONÓMICO 41, 41 (2005) [hereinafter BOLETÍN ECONÓMICO] (indicating that immigrants accounted for roughly 1% of the population in 1991 as compared to about 8% in 2005).

12 See, e.g., KITTY CALAVITA, IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE 68 (2005) (highlighting that immigrants mostly "fill critical niches in the economy — usually those that have been vacated by Spanish workers").

13 See id. (indicating the role immigrants are having in entering the workforce).
history of immigration, antidiscrimination laws, and cultural diversity, may serve as a practical example of how immigration affects funding and of the dependency ratio inherent in an intergenerational social security system.14

This Comment argues that although immigration may partially contribute to solving the social security funding problem, the U.S. experience predicts that Spain will not solve the funding problem solely through increased immigration. As such, Spain needs to consider legislative reform of its social security program and restructure its currently questionable immigration law.15 This Comment’s subsequent analysis illustrates the importance of adjusting immigration legislation proactively in order to obtain the maximum benefits from immigration. When referring to immigration, this Comment targets the group of migrants to Spain from countries outside of the European Union. Due to EU policies discussed below, Spain has limited control over the entrance of EU citizens. Therefore, this Comment focuses on the entrance of non-EU citizens. This restraint reflects the reality that a major segment of working-age immigrants to Spain comes from non-EU countries.16

Section 2 considers whether current alarms regarding social security funding crises in the United States and Spain are valid. Section 3 analyzes current legal approaches to immigration in both the United States and Spain and discerns how the approaches have influenced immigration flows. After discussing the differences in the countries’ approaches to immigration legislation, Section 4 then explores the social security funding implications of a more strategic immigration plan. Section 5 suggests proposals for Spain. The proposals are based on the premise that there is no single solution,

14 See Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 95–96 (1995) (suggesting that integration of immigrants into a country requires that the host nation enforce antidiscrimination laws and be culturally accommodating).

15 See Arango & Jachimowicz, supra note 9 (attributing unauthorized immigration to a “poorly managed and financed administrative bureaucracy for the management of immigration, well-developed migration networks, and geographical or cultural proximity to dynamic source countries”).

16 See, e.g., Balch, supra note 11, at 159 (“New immigration is mainly from Latin American, North African and Eastern European countries, with proportionately less now coming from other EU countries.”); Boletín Económico, supra note 11, at 42 (mentioning that about 77.9% of all foreign-born residents in Spain come from non-EU countries).
but rather a mix of policy measures that could solve the problem. Above all, the proposals highlight the need to reform current Spanish immigration legislation in order to benefit from possible synergies between immigration and social security funding. First, Spain should abstain from "spontaneous" immigration legislation and ensure social, economic, and political integration of its immigrants. Second, Spain should more scrupulously select its immigrants, concentrating on satisfying labor market demands and boosting social security receipts while reducing future fiscal burdens. Third, Spain should consider alternatives to its current social security system, such as a progressive decline in state-sponsored benefits or movement toward privatization.

2. SOCIAL SECURITY FUNDING: IS THE PESSIMISM BEHIND THE PAY-AS-YOU-GO SYSTEM WELL-FOUNDED?

Currently, many social security systems entail a transfer scheme where taxes are collected from the current workforce to pay pensions for the previous, and now retired, workforce. As a result, many countries are concerned with the imminent retirement of a big portion of the labor force, the baby boomers. Projections indicate a potential demographic imbalance as a result of baby boomer retirement. Countries facing this conundrum, such as the United States and Spain, must analyze the feasibility of their current social security systems and the possibility of legislative reform to meet future funding challenges. Otherwise, these countries may face a day when there are too few active workers to sustain the pensions of the previous, retired workforce.

Despite decades-old concerns regarding Social Security funding, the United States has not enacted major reform of the Social

17 See 42 U.S.C. § 901(b) (2000) ("It shall be the duty of the Administration to administer the old-age, survivors, and disability insurance program under subchapter II of this chapter and the supplemental security income program under subchapter XVI of this chapter.").

18 See INT’L MONETARY FUND, IMF COUNTRY REPORT NO. 05/56, SPAIN: STAFF REPORT FOR THE 2004 ARTICLE IV CONSULTATION 14 (2005) (illustrating that the fiscal implication of aging with respect to pension reform will be a likely demographic shock if left unattended).

19 Id. at 15 ("Spain’s demographic profile implies a peak in the dependency ratio in about 40 years . . . .").
Security system since 1983. Yet reports have found that the U.S. retired population relies on Social Security as its only source of income at progressively higher rates. Nonetheless, the fiscal consequences of population aging in Spain may be different since U.S. Social Security benefits are less generous relative to earnings than benefits in Spain. The following two subsections explore the evolution and current state of both countries' social security systems.


In 1935, President Roosevelt signed the basic social security program into law, partly in response to the Depression. Social Security—known as Old Age, Survivors, and Disability Insurance ("OASDI")—represents one of the largest domestic spending programs in the United States. In brief, the existing system works as follows. Throughout their working lives, employees and their employers contribute to the overall Social Security fund via a tax on payrolls. In turn, these contributions sustain current pensioners. Any contributions in excess of current pension payouts are in-

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21 See 65+ IN THE UNITED STATES, supra note 6, at 4-14 (finding that since the 1940s, there has been a marked increase in reliance on Social Security). In 1992, Social Security benefits were the primary source of income for 63% of beneficiaries. See id. In the United States, reliance on Social Security may be due to the high esteem with which it is viewed by citizens. See Michael Tanner, Public Opinion and Social Security Privatization, CATO PROJECT ON SOC. SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Aug. 6, 1996, at 2 fig.1 (showing that 68% of Americans have a favorable opinion of Social Security, as compared to 28% and 25% who look favorably upon the federal income tax system and welfare, respectively).

22 See OECD POLICY BRIEF, supra note 7, at 7 ("The impact of ageing [sic] will be felt later on but more acutely than in other OECD countries, because it will be more pronounced than elsewhere and because the parameters underlying pension calculations are more generous . . . ").


24 SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2005, at 5.1 tbl.5.A1 (illustrating that retired workers and their spouses make up the largest group of beneficiaries given that they represent 33,024,800 of the total 47,707,380 OASDI beneficiaries). OASDI also provides benefits for disabled workers and for dependents and survivors of disabled and retired workers. Id.
vested in the equivalent of treasury bonds, with the aim of increasing the Social Security fund.25

More specifically, to qualify for retirement benefits, employees must pay a minimum tax threshold to earn the currently required forty credits.26 Retirement benefit payments are based on an employee’s earnings averaged over thirty-five years of his working life.27 Upon retirement, a worker satisfying the minimum necessary contributions is eligible for payments based in part on the amount of his contributions. The Social Security Administration (“SSA”) determines monthly benefits by first calculating the retired employee’s Average Indexed Monthly Earnings (“AIME”).28 AIME denotes the employee’s lifetime average monthly income, adjusted for inflation, during the group of years where earnings were highest. The SSA uses AIME to calculate monthly benefits by applying a weighted structure: 90% rate to the first AIME portion, 32% rate to the following AIME portion, and 15% rate to the remaining AIME up until the maximum wage base.29 The dollar amounts to which the rates are applied are adjusted annually based on changes in average wages.30 Other factors such as receiving benefits before age sixty-five, delaying retirement past age sixty-five, or having earnings after benefits begin may have the effect of increasing or reducing retirement benefits.31

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26 See A Glossary of Social Security Terms, Social Security Online, http://www.ssa.gov/glossary.htm (last visited Apr. 7, 2007) (“As you work and pay taxes, you earn credits that count toward your eligibility for future Social Security benefits. You can earn a maximum of four credits each year. Most people need 40 credits to qualify for benefits.”)


28 See 2006 Annual Trustees Report, supra note 25, at 99 tbl.V.C1 (explaining the components factored into AIME calculations).

29 Id. at 102.

30 See id. (explaining that the three ranges for calculating AIME are set but that the dollar amounts to which the ranges are applied vary by year).

31 See Daniel Shaviro, Making Sense of Social Security Reform 15-16 (2000) (highlighting that deciding to retire before or after the age sixty-five benchmark can decrease or increase one’s benefits, respectively, corresponding to the amount of time one deviates from the benchmark).
Social Security, as currently implemented, serves as a method of poverty-prevention insurance. By yielding fixed annual benefits for the duration of the employee’s life, Social Security provides insurance against the possibility that one will live longer than expected and prematurely consume all of the assets previously accumulated for retirement. Since retirees’ pensions are funded by the contributions of the current workforce, each generation of workers is connected to the previous workforce and the future workforce. The intergenerational structure has worked so far, but this system is inherently susceptible to demographic shocks. What happens if there is an overwhelming retired population as compared to the current workforce? Alternatively, what if current pensioners consume too much and thus leave future generations without adequate reserves?

Despite varying projections, both the Congressional Budget Office (“CBO”) and the Social Security Trustees foresee demographic concerns regarding the future financing of an intergenerational system. Both entities predict that a baby boomer demographic shock may disrupt the intergenerational system around the middle of the twenty-first century.32 Despite the decades-long debate about social security funding in the United States, implementation of change has been mild. For example, as early as 1982, the OASDI funds were in financial trouble.33 As an interim measure, Congress enacted legislation that permitted temporary borrowing from federal trust funds to cover the financial shortage.34 Subsequently, in 1983, congressional reforms ensued.35 The reforms increased the Social Security tax rate with the aim of generating a surplus in the trust fund which at yearend would be invested in U.S. Treasury se-

33 See Christine Scott, Cong. Research Serv., Social Security: The Trust Fund, at CRS-4 tbl.1 (illustrating 1982 and 1983 as the years with the largest negative current account balance in the Trust Fund).

https://scholarship.law.upenn.edu/jil/vol28/iss2/4
The reforms also called for an increase in the normal retirement age. Despite the 1983 reforms, continuing threats of financial deficiencies led to the formation of the Advisory Council on Social Security. The Advisory Council would revisit features of the 1935 Act on an ongoing basis and propose reforms to cushion susceptible demographic shocks or long-range deficits. Faced with a continuous funding concern, the 1994–1996 Advisory Council made three proposals for reform. The first option was a “Personal Security Account Plan” that suggested gradual replacement of the current system with mandatory savings in individual accounts. The second alternative was an “Individual Account Plan” to supplement the existing program with mandatory retirement saving in individual accounts. The third suggestion was a “Maintain Benefits Plan” that called for investing part of the Trust Fund surplus in the stock market in hopes of higher rates of return than U.S. Treasury Bonds. Options one and two aimed to eliminate the inter-generational feature of the current system by making each worker more individually responsible for funding his own future pension stream. Meanwhile, option three aimed to increase the overall fund by assuming riskier investments in the hope of greater returns than the risk-free Treasury bond market investments. Analysts for the Federal Reserve Bank of New York labeled the Advisory Council’s three plans as highly susceptible to market risk.


37 See PREDICTABLE SURPRISE, supra note 32, at 20 (explaining that the increase in “Normal Retirement Age from 65 to 67 [was] deferred and gradually phased in”).


39 Id.

40 Id.

41 Id.

42 See Miller, supra note 36, at 4 (noting the high volatility that is characteristic of equity returns and the difficulty in reasonably estimating the likely equity returns that future investors can expect).
These analysts suggested that the volatility of stock returns may not be worth their higher equity premium as compared to treasury bonds.\textsuperscript{43} However, there are valid counterarguments. First, by making each worker accountable for his own future pension stream, each worker will be able to assume a level of risk adequate for his particular economic status. Second, transitioning to an individual system eliminates many intergenerational demographic problems. Third, though there is more market risk with the Advisory Council’s proposals, an individual system rather than the intergenerational system will reduce political risk when compared to the current intergenerational system where all workers are subject to the risk that legislators will alter the system. The weakness in these counterarguments is that they assume a high level of investor sophistication. Certainly, it would be extreme to assume that all workers are sufficiently educated about the market to make the adequate risk/return investments for their situation.

Despite multiple proposals by economists, politicians, and others, the United States has not passed any major reform to its Social Security system since 1983.\textsuperscript{44} What remains clear is that currently the general approach to social security relies on maintaining a trust fund surplus. Erosion of the surplus, without reform, may have devastating effects on future retirees.

2.2. Spain’s Seguridad Social and the Creation of a Reserve Fund

The basic Social Security Act of 1963\textsuperscript{45} created the Spanish social security system. The 1978 Constitution reiterated that the social security system shall provide benefits to all eligible nationals who live and work in Spain and their families, as well as foreigners with legal residence permits.\textsuperscript{46} The system provides benefits that include workers’ compensation, medical care, hospitalization, retirement pension, disability, and unemployment.\textsuperscript{47} Retirement

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} See PREDICTABLE SURPRISE, supra note 32, at 10 (showing that despite reform, social security solvency remains a crucial item in the SSA agenda).
  \item \textsuperscript{45} Ley de Bases de la Seguridad Social [Social Security Bases Act] (B.O.E. 1963, 193).
  \item \textsuperscript{46} C.E., art. 41.
  \item \textsuperscript{47} Id.
\end{itemize}
\end{footnotesize}
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constitutes the largest portion of the system. Spain’s social security system is divided into various contribution groups based on occupation classes: general, agricultural, domestic, and self-employed are the largest groups. The general group is the common scheme where the employee and the employer each contribute to the system. The occupation classes require different contribution levels. For example, domestic services require a lower rate than agriculture services.

Law 26/1985 was passed in reaction to the emerging debate about a funding shortage and was the most radical in terms of cost containment. The law extended the minimum contribution period from ten to fifteen years and extended the period used to calculate pension base from two to eight years prior to retirement. Extension of the pension base put a stop to the widespread practice among employees called “pension buying.” The practice encouraged employees to agree with the employer—a couple years before retirement—to make a contribution proportional to their maximum salary to maximize retirement pension. Despite the cost containment measures of the 1985 reform, reports revealed the continued increase of average pensions and in turn, concern over a funding shortage. Since 1985, three major laws have modified basic social


49 Ley General de la Seguridad Social (B.O. 1994, 1) [General Law of Social Security].

50 Id. art. 222.

51 Arts. II–III of the Ley de Medidas urgentes para la racionalización de la estructura y de la acción protectora de la Seguridad Social (B.O.E. 1985, 26) [Urgent Measures for the Rationalization of the Structure and the Protective Action of Social Security].

52 Id.

53 See Maria Irazusta, Quiénes Sufrirán el Recorte de las Pensiones: Gobierno y sindicatos pactan la temida reforma de la Seguridad Social, EL MUNDO, Sept. 22, 1996 (providing numerical examples of how pension buying can be used to manipulate returns to contributions).

54 Id.

55 Spanish Strategy for Future Pensions, supra note 10, at 14 (demonstrating that the percentage increase in real terms for the average pension was 2.6% for the 1985–1990 period and 2.4% for the 1990–1995 period—significantly higher than the 1.5% increase during the 1980–1985 period).

Law 1/1994\textsuperscript{56} barely modified Law 26/1985. Consequently, as Spain progressed to the date where inflows into the social security system would be less than outflows, due to a baby boomer retirement demographic shock, the Congressional Committee on Budgets Commission (lower house) presented the Toledo Pact of 1995.\textsuperscript{57} The agreement was promptly approved by the Congress of Deputies.\textsuperscript{58} The Toledo Pact ensures continuity of the current social security system and compliance with Article 41 of the Spanish Constitution, which requires a public social security system.\textsuperscript{59} The Pact recognizes the need to counter two main problems: 1) increasing costs and 2) impending demographic shocks in the form of a disproportionately aged population. The government passed Law 24/1997 with these two objectives in mind.

The Toledo Pact sparked Law 24/1997 on the Consolidation and Rationalization of the Social Security System.\textsuperscript{60} The law provides for regulatory monitoring measures, including a more active advisory role of the National Institute of Social Security (INESS). INESS's role is comparable to the Advisory Council on Social Security created in the United States during the 1980s. Law 24/1997 focused on cost containment measures and increasing contributions. First, Law 24/1997 further extended the period used to calculate the pension base from the last eight to the last fifteen years of work.\textsuperscript{61} Second, the law tried to incentivize workers to continue

\textsuperscript{56} Article 10 of the Ley General de la Seguridad Social (B.O.E. 1994, 1) [General Law of Social Security].

\textsuperscript{57} See José A. Herce & Javier Alonso Meseguer, La reforma de las pensiones ante la revisión del Pacto de Toledo, 19 COLECCIÓN ESTUDIOS ECONÓMICOS 1, 21-26 (2002), available at http://www.pdf.lacaixa.comunicacions.com/ee/esp/ee19_esp.pdf (consisting of 15 general recommendations, the Pact of Toledo received support from trade unions and managers because it advised the adoption of measures which pleased both parts, such as the improvement of certain benefits, the reduction of social contributions whenever possible, and the prosecution of fraud in contributions as well as in benefits).

\textsuperscript{58} Pacto de Toledo (B.O.C.G. 1995, 134).

\textsuperscript{59} C.E., art. 41.

\textsuperscript{60} Ley de consolidación y racionalización del Sistema de Seguridad Social (B.O.E. 1997, 24) [hereinafter Ley 24/1997] [Law of Consolidation and Rationalization of the Social Security System].

\textsuperscript{61} Id. art. 4.
working beyond the age of sixty-five.\textsuperscript{62} Given Spain’s previously high unemployment rates,\textsuperscript{63} certain lobbies argued that the law would adversely affect the most destitute.\textsuperscript{64} However, this aspect is less criticized today since unemployment rates are falling. Third, Article 1 of Law 24/1997 contained measures to create a previously non-existent reserve fund for social security, and to clarify the financial instruments reserved for the social security reserve fund.\textsuperscript{65}

The enactment of Law 28/2003\textsuperscript{66} reinforces the importance of directing the social security surplus to the Reserve Fund rather than using it to fund other agencies. The law specifically defines what constitutes a surplus,\textsuperscript{67} provides for the creation of a Reserve Fund,\textsuperscript{68} and designates an organ responsible for allocation and investment of the funds.\textsuperscript{69} The following graphic, Figure 1, illustrates the great strides Spain has made in terms of creating and investing in a reserve fund, which was virtually nonexistent prior to the year 2000.\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{62} Id. art. 7 (providing reduced contribution schemes for those who choose that route and penalizing those who retire before sixty-five by decreasing their pension by 7 to 8\% for each year of early retirement).
\item \textsuperscript{63} Structural employment, characterized by emergence from a fascist dictatorship, strength of works councils and trade unions, and strong employment protection that reduced employers’ willingness to hire, has historically contributed to Spain’s previously high unemployment rate of 20\%. Factors that contributed to such high rates have been reduced. See Patrick A. Puhani, \textit{A Note on Changes in the Earnings and Unemployment Structures in Spain: Evidence from the Luxembourg Income Study}, 50 CESifo Econ. Stud. 299, 299 (2004) (discussing structural explanations for Spain’s unique unemployment experience).
\item \textsuperscript{64} See, \textit{e.g.}, Proposición de ley 122/000124 (B.O.E. 2004, 141-1) (exemplifying the Izquierda Unida party’s disagreement regarding conditions of recent social security legislation due to their effect of delaying retirement and the implications this could have on certain social classes).
\item \textsuperscript{65} Ley 24/1997, art. 1.
\item \textsuperscript{66} Ley 28/2003 reguladora del Fondo de Reserva de la Seguridad Social (B.O.E. 2003, 234).
\item \textsuperscript{67} Id. arts. 1–3.
\item \textsuperscript{68} See id. art. 4 (reserving the funds solely for payment of contributory pensions, solely in the case of deficit).
\item \textsuperscript{69} See id. art. 6 (creating the Management Committee of the Reserve Fund).
\item \textsuperscript{70} MINISTERIO DE TRABAJO Y ASUNTOS SOCIALES, SECRETARÍA DE ESTADO DE LA SEGURIDAD SOCIAL, FONDO DE RESERVA DE LA SEGURIDAD SOCIAL: EVOLUCIÓN DEL AÑO 2005 Y SITUACIÓN A 31-12-2005, INFORME A LAS CORTES GENERALES 6 (2006).
\end{itemize}
As is very visible, due to a combination of the Toledo Pact, Law 24/1997, and Law 28/2003, the Spanish government has prioritized funding the Reserve Fund with remaining social security contributions after all social security payments have been honored. As in the U.S. system, the funds are invested in various instruments, predominantly short and long-term treasury bonds.71 The Toledo Pact expired in 2003, but it was subsequently renewed.72 The goals of the Pact remain the same: prioritizing the separation of funds and their investment in a Reserve Fund, simplification of social security benefit calculations, and reduction of fraud.

A notable difference between Spain and the United States is that, on average, the United States requires about twice the number of years of contribution for pension benefits.73 Thus, one answer

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71 Id. at 38.
72 Aprobación del Informe de la Comisión no permanente del Pacto de Toledo (B.O.E. 2003, 596) (containing the text of the 2003 Toledo Pact renewal) [Approval of the Report of the Nonpermanent Commission of the Pact of Toledo].
73 Compare Social Security Online, supra note 26 (providing the calculations of future Social Security benefits based on tax payments), with text accompanying
for increasing the social security fund is for Spain to increase the number of contribution years required. From an equitable standpoint, public acceptance of reform will be greater if increasing the number of contribution years correlates with an increase in pension benefits. Spain could consider adopting an approach toward increasing the number of mandatory contribution years with a smaller increase in benefits per each extra year of contribution. The goal of such reform would be to increase the contributory pool, while only slightly increasing the amount of distributed benefits.

Spain has recently focused on increasing the contributory pool via increased contributors, in the form of immigrants, rather than increasing the periods and amounts of contribution by each contributing individual. Spain has been able to follow such an approach due to its currently vibrant and growing economy.\(^7^4\) The question remains as to whether increasing the number of contributors solves the problem. As explored in Section 3, the answer greatly depends on whether age gaps between the working and retiring population are adequate to smooth any demographic shocks inherent in the current intergenerational funding system.

3. **United States Versus Spain: Strategically Planned Immigration Compared to a Laissez Faire, Spontaneous Model\(^7^5\)**

Although national governments may in theory restrict all immigration, in practice this is both unfeasible and undesirable.\(^7^6\)

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\(^7^5\) The complexity of immigration strategy and its inadequate handling has been described as resulting from a series of “spontaneous” reactions. For more information on the use of this term, see SARAH COLLINSON, *BEYOND BORDERS: WEST EUROPEAN MIGRATION POLICY TOWARDS THE 21ST CENTURY* 88 (Royal Inst. of Acad. Aff. 1993), which proposes the idea that immigration policies in Western Europe “have emerged as a series of ‘knee-jerk’ reactions to problems as they arise, and have generally taken the form of direct enforcement mechanisms, as opposed to strategies designed to manage the broader causes and consequences.”
Similarly, absence of any immigration legislation and a pure open door policy is unsustainable. In fact, immigration legislation should reflect a country's understanding that immigration can be a double-edged sword: the right amount may be an economic and cultural blessing, while too much or too little can lead to social, political, and economic unrest.\(^7\)

The United States has adhered to the notion that national governments have the right to decide which and how many non-nationals can enter, stay, and work in their territories.\(^8\) The following subsections contend that the United States' approach to immigration has been more strategically planned than that of Spain. On the one hand, the United States has mainly aimed to approach immigration proactively. On the other hand, Spain has often treated immigration retroactively and spontaneously.

3.1. The United States' Strategic Approach

Established over 200 years ago, U.S. immigration laws have changed and evolved along with economic and political events.\(^9\) Congress, with the concurrence of the President, determines basic

\(^7\) See Dusan Drbohlav, Migration Policy Objectives for European East-West International Migration, 35 INT'L MIGRATION 85, 86-87 (1997) (citing the example of several Western European countries that attracted immigrants during the 1960s and 1970s and benefited from their presence due to a prior lack of manpower, but that now advocate for immigration restrictions due to increasing views of immigration as a threat to their economies).

\(^8\) See, e.g., Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

\(^9\) See Gordon H. Hanson, Challenges for US Immigration Policy, in THE UNITED STATES AND THE WORLD ECONOMY: FOREIGN ECONOMIC POLICY FOR THE NEXT DECADE 344-45 (C. Fred Bergsten ed. 2005) (noting that before the 1920s the only restraint on U.S. immigration was the Chinese Exclusion Act of 1892, which banned immigration from China but that with the passage of time, came more regulation such as the Immigration and Nationality Act of 1952 and the Hart-Celler Immigration Bill of 1965).
immigration law.\textsuperscript{80} In turn, federal law, based on the commerce power, confers upon the Attorney General the responsibility of admitting, regulating, and expelling aliens.\textsuperscript{81}

Socioeconomic and political events in the world have historically triggered immigration to the United States. The Irish Potato Famine of 1845–1850, Russian pogroms during the nineteenth century, the two World Wars, and Vietnam in the 1970s are only a few examples of the events that have sparked increased immigration. United States lawmakers have generally been effective in at least one regard: flexibility. Flexibility and proactive responses tend to predominate throughout U.S. immigration legislation. Though in hindsight certain parts of legislation may be scrutinized, there is nonetheless a multitude of examples defending the proactive nature of the United States’ immigration legislation approach: (1) the Bracero Program of 1943 allowed temporary entrance of Mexican workers in response to increased labor demand;\textsuperscript{82} (2) the Displaced Persons Act of 1948 allowed many people displaced by the War to enter the United States;\textsuperscript{83} (3) the Internal Security Act of 1950 reacted to security concerns and barred entrance of those engaged in Communist activity;\textsuperscript{84} (4) the Immigration and Nationality Act of 1952 reorganized previous immigration legislation while providing for quotas and other measures to control immigration;\textsuperscript{85} and (5) the Patriot Act, in response to concerns about national security, increased the level of scrutiny used in allowing immigrants to enter the United States.\textsuperscript{86} In addition, due to changing labor demands,

\textsuperscript{80} See U.S. CONST. art. I, § 8, cls. 3–4 (granting Congress the power to set immigration law through the commerce power by stating that Congress may “regulate commerce with foreign nations” and “establish a uniform Rule of Naturalization”).

\textsuperscript{81} Id.

\textsuperscript{82} Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, U.S.-Mex., Apr. 26, 1943, 57 Stat. 1152.


\textsuperscript{86} Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001,
from the industrial revolution to the software development age, the United States has persistently pursued "brain drain" policies to attract the most skilled workers from developing countries. These are only a few of the many examples that prove United States immigration legislation has been prompt in responding to economic and political factors.

Interestingly, the United States shares a common geographical trait with Spain. Both countries have southern neighbors characterized by poorer economies and significant populations that wish to migrate north. For the United States, similar to Spain, many illegal immigrants enter through the southern border. The United States has continuously tackled this issue. For example, the 1986 Immigration Reform and Control Act (IRCA) prohibited the employment of illegal aliens while simultaneously offering amnesty to those illegal aliens residing in the country prior to 1982. The following decade, Congress enacted the Immigration Act of 1990 that increased the annual quota of legal immigrants to be admitted into the United States and liberalized provisions in certain non-immigrant visa categories (such as the H-1B). Congress passed the 1990 Act based on concerns of skilled work shortage in the United States. Again, this conforms to the aforementioned proac-

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87 The "brain drain" refers to policies adopted by the United States and other developed countries to attract the migration of the most skilled workers from developing countries. Policies such as the H-1B visa program give skilled professionals preference in terms of waiting time and visa treatment with respect to entering the United States. Likewise, Australia, Canada, and the United Kingdom count worker skills toward the points needed by immigrants to gain immigration to these countries. See, F.H. Buckley, The Political Economy of Immigration Policies, 16 INT’L REV. L. & ECON. 81 (1996) (arguing that the United States should emulate Canada’s immigration screening programs in order to widen its doors to valuable immigrants and close them to value-decreasing ones).

88 See LUKE J. LARSEN, U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION IN THE UNITED STATES: 2003, at 1 [hereinafter FOREIGN BORN 2003] (indicating that out of the 35.5 million U.S. immigrants that were born in a foreign country in 2003, 53.3% proceeded from Latin America).


91 See id.
tive "brain-drain" approach. More recently, after September 11th the common policy has returned to one of selectivity and restriction.92 Given this increased scrutiny, the United States has exerted its right to control its borders and the entry of aliens.93 Over time, immigration legislation has evolved to match changes in economic events. In brief, the U.S. multifaceted model contrasts sharply with Spain’s more delayed, spontaneous immigration legislation model.

3.2. EU Legislation and Spain’s Spontaneous Approach

3.2.1. Immigration in the EU Context

The 1957 Treaty of Rome established the European Economic Community to “lay the foundations of an even closer union among the peoples of Europe.”94 Subsequently, the Single European Act of 1986 encouraged monetary, economic, and foreign coordination.95 Ultimately, the vision was to create a Europe without inside borders, a Europe where goods, services, capital, and people flowed freely from one member country to another.96

Integration was brought to an unprecedented level with the Maastricht Treaty of 1992, which reformed the European Economic Community into the European Community.97 As suggested by the

92 See, e.g., USA PATRIOT Act (providing more leeway through looser burdens for investigative agencies when tracking individuals); Peter Andreas, A Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines After 9-11, at 6 (Univ. of Cal., San Diego, Ctr. for Comparative Immigration Studies, Working Paper No. 77, 2003) (explaining that even the U.S.-Canada border, which has historically been characterized by lax immigration controls, has been subject to increased scrutiny post-9/11); see also Douglas S. Massey, International Migration at the Dawn of the Twenty-First Century: The Role of the State, 25 POPULATION & DEV. REV. 303, 316-17 (1999) (alleging that increased scrutiny with respect to immigration in the United States dates back to 1986 when immigrants’ rights and benefits began to be curtailed).

93 See Massey, supra note 92.


reformulation of the Community's name, the Maastricht Treaty involved more than economic integration. The Treaty provided that every citizen of a Member State would become a citizen of the European Union, with the goal of further increasing the policy of an integrated Europe.\(^9\) Nevertheless, tensions between border control and integration continue to render difficult the harmonization of immigration laws, especially when dealing with immigration from developing countries.\(^9\) These factors, combined with different geographical situations, historical interactions, and political interests, complicate the possibility of a solid EU immigration law.\(^10\)

In May 1999, the Treaty of Amsterdam signified a step forward in the creation of a common area of freedom, safety, and justice.\(^10\) The Treaty integrates the Schengen Treaty into the structure of the EU, with the ultimate effect of eradicating interior borders within Member States.\(^10\) However, exterior borders remain regulated at


\(^10\) See Dermot Hodson & Imelda Maher, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, 39 J. COMMON MKT. STUD. 719, 721-22 (2001) (stressing the problems of converging toward a common policy with respect to more sensitive issues such as immigration).

\(^10\) Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 (promoting objectives that will "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.").

\(^10\) See id. (aiming "to maintain in full the *acquis communautaire* and build on it"); see also Stephen J. Silvia & Aaron Beers Sampson, *Acquis Communautaire and European Exceptionalism: A Genealogy* 21 (Am. Consortium on Eur. Stud., Working Paper No. 2003.1, 2003) (exploring the definition of the *acquis communautaire* as an "inherently exclusionary framework, unavoidably divid[ing] the world into the admitted, the potentially admissible and an inferior non-admittable, non-EU 'other'"). But see Virginie Guiraudon, *The Constitution of a European Immigration Policy Domain: A Political Sociology Approach*, 10 J. EUR. PUB. POL'Y 263, 264 (2003) (explaining that one of the main worries with the Schengen Agreement was "that free movement within the EC required compensatory measures at the external borders lest Europe become a 'sieve'.").
the national level. In theory, the Treaty of Amsterdam creates the Common Foreign and Security Policy to regulate the EU’s security and borders. Nonetheless, despite agreements on coordinating policies at the EU level, most European immigration laws remain localized under each member state.\textsuperscript{103} This is particularly true for immigration from non-EU countries.\textsuperscript{104} As such, the remaining subsections concentrate on Spain’s national immigration policies.

3.2.2. Immigration at the National Level

In 1985, only a few months prior to entering the EU, Spain passed its first immigration law.\textsuperscript{105} The 1985 Immigration Law was criticized from various fronts.\textsuperscript{106} The Izquierda Unida political party and immigrant advocates labeled it as vague.\textsuperscript{107} Scholars designated it as a tool to make Spain the southern wall of “Fortress Europe.”\textsuperscript{108} The Constitutional Court challenged the law due to its

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\textsuperscript{103} See CALAVITA, supra note 12, at 4 (demonstrating that despite the Treaty of Maastricht and the Schengen Agreement’s provisions for free movement of EU citizens, immigration from non-EU countries is still very much conducted at the local level).

\textsuperscript{104} Id.

\textsuperscript{105} Article 13 of the Spanish Constitution of 1978 mandates that foreigners in Spain shall enjoy the public freedoms which this title and the law guarantee. C.E., art. 13. See also Gisbert H. Flanz, Constitutions of the Countries of the World: Spain (2003) (providing an English language version of the Spanish Constitution). As a result, Law 7/1985 was passed to enhance the rights and freedoms of foreigners in Spain. Previously, the only law on foreigners’ rights dated back to the Royal Decree of November 17, 1852.

\textsuperscript{106} See Univ. of Barcelona Group, The Reforms of Immigration Law (1985-2005) and the Equality of Rights, in CHALLENGE: THE CHANGING LANDSCAPE OF EUROPEAN LIBERTY AND SECURITY 17 (2005) [hereinafter Reforms of Immigration Law] (describing the name of the law as indicative of its restrictiveness since it connotes Spain’s position as one of a police agent rather than an immigration agent with respect to incoming foreigners).

\textsuperscript{107} From the 1985 law to the new developments in the 2004 reforms, Izquierda Unida remains consistent in believing the Spanish immigration law is vague, restrictive, and does not promote integration. See Diarios de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, VII Legislatura, July 8, 2003, No. 267, at 13,968–88 (proposing an alternative to the 2003 Law and commenting on the deficiencies of immigration law dating back to 1985).

\textsuperscript{108} See generally Patrick R. Ireland, Facing the True ‘Fortress Europe’: Immigrant and Politics in the EC, 29 J. COMMON MKT. STUDS. 457, 460 (1991) (discussing the notion of “Fortress Europe” by explaining that as the walls between member-states fall, the exterior walls may grow larger because since there is no concrete defini-
effect of depriving undocumented individuals of the rights of association, congregation, manifestation, and the liberty to unionize and strike. Indeed, the legislation had a very restrictive character, with strong emphasis placed on the issue of border control.

Spain's economic and cultural internationalization correlates heavily with its entrance into the European Community in 1986. In search of milder winters at an affordable price, pensioners from EU Member States were among the first to enter Spain's doors. Over time, Spain's internationalization acquired a more expansive character. Current immigration waves arrive from many non-EU countries and share a common need for employment. As a result of increased immigration at the turn of the century, Spain passed two new immigration regulations and adopted the Greco Program for integration.

109 See STC, July 7, 1987 (B.O.E., No. 115) (voiding several restrictions of the Organic Law 7/1985, including annulment of limitations relating to limitations in the rights to assemble and voiding the prohibition placed on judges to suspend administrative decisions with respect to immigration); see also Reforms of Immigration Law, supra note 106, at 18-20 (summarizing the multiple Constitutional Court cases that 'liberalized' the restrictive 1985 law).

110 See Reforms of Immigration Law, supra note 106, at 17-20 (summarizing the characteristics of the 1985 law).

111 See Martha Peach, Globalization of Education in Spain: From Isolation to Internationalization to Globalization, 26 Higher Educ. Eur. 69, 70 (2001) (“Among the elements in the history of Spain that have reduced the effect of the authoritarian and isolationist state has been... the entry into the European Union in 1986...”).

112 See, e.g., HARRY KING, GOING TO LIVE IN SPAIN 10 (2003) (alluding to climate as one of the reasons that British started immigrating to Spain).

113 See BOLETIN ECONOMICO, supra note 11, at 42 (providing that about 77.9% of all foreign born residents in Spain proceed from non-EU countries).

114 See, e.g., M.J. Álvarez, MÁS DE 200.000 INMIGRANTES TIENEN CONTRATOS INDEFINIDOS EN LA REGIÓN, ABC, Jan. 19, 2006, at 36-37 (indicating that the immigrants immigrating to Spain do so in search of a job).

115 See MINISTERIO DE TRABAJO Y ASUNTOS SOCIALES, ANUARIO DE MIGRACIONES 2002 [MIGRATION YEARBOOK 2002], at 336 (providing statistics and analysis of the evolution of immigration in Spain). Based on the territorial organization of Spain, and its political and administrative decentralization, the Greco Program acknowledges the vital role that regional governments will play in integrating the immigrant population. Law 4/2000 and the Greco Program are both explicit in their recognition that it is the development and implementation of integration policies at the local level that will have the greatest impact on integration. The Greco Program has four main goals: (1) global, coordinated design of immigration as a de-
The first of the two new regulations was Law 4/2000 on the Rights and Freedom of Foreigners in Spain and their Integration. Law 4/2000 laid down more rights for resident aliens and immigrants in irregular conditions than did the 1985 Law. As its name indicates, Law 4/2000 marked an attempt to transition from a policy of being the southern wall of "Fortress Europe" to a policy of integration. Among the most significant changes implemented by Law 4/2000 is the concept known in Spain as arraigo ("to take root"). This concept validates the possibility of an irregular immigrant becoming a legal immigrant after an extended stay in the country.

An irregular immigrant can gain regular immigrant status by two routes. The first route is called arraigo laboral and requires the immigrant to have stayed irregularly in Spain for a minimum of two years and to be able to prove that an employer has contracted him (illegally) for at least one year. The second route is called arraigo social and requires the immigrant to have stayed in Spain for at least three years irregularly and have a labor contract proposal as well as either a proven relationship with resident family members or a certificate of favorable social integration issued by a local government.

Upon satisfying the requirements for either route, the immigrant will be entitled to a temporary residence permit. However,
such a system explicitly acknowledges the possibility of securing regular immigrant status merely by having stayed sufficiently long in the country by irregular means. As such, the law recognizes and provides incentives for irregular immigration. Moreover, unlike laws in many other countries, Law 4/2000 provides irregular immigrants with explicit and unconditional rights to long-term health and education, thereby facilitating irregular immigration. In other countries, long-term provision of services such as healthcare and education will be granted only if a residence permit decision is pending or in cases of urgency. In sum, Law 4/2000 was a drastic change to the previous 1985 Immigration Law.

Less than six months after Law 4/2000, the Popular Party amended the law with Law 8/2000. The net effect was a close regression to the 1985 Law in terms of toughening up the consequences of irregularity—the law provided irregular residence and irregular work as sufficient reason for expulsion. However, near the end of 2004, the legislature acknowledged that immigration had become one of the greatest national concerns and passed a new amendment, Royal Decree 2393/2004, which introduced modifications that favor legal immigration while trying to mini-

119 For example, recognizing that many countries do not provide long-term health and education, Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states: “Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm . . . .” G.A. Res. 45/158, at 266, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) (emphasis added). Logically, to the extent that Spain provides more services to irregular immigrants than neighboring countries, Spain will receive more irregular immigrants. In turn, this complicates the ability of adequately obtaining social security contributions from illegally employed immigrants.

120 Ley Organica de reforma de la Ley Organica sobre derechos y libertades de los extranjeros en Espana y su integracion social (B.O.E. 2000, 2366) [Amending the Organic Law on the Rights and Liberties of Foreigners in Spain and Their Social Integration]

121 See, e.g., David Corkill, Economic Migrants and the Labour Market in Spain and Portugal, 24 ETHNIC & RACIAL STUD. 828, 838 (2001) [hereinafter Economic Migrants in Spain] (explaining that the law allowed greater flexibility in expelling illegal immigrants and cut back on immigrants' rights, partly founded on fears that providing too many benefits would be fiscally unsound).

122 Real Decreto por el que se apruba el Reglamento de la Ley Organica sobre derechos y libertades de los extranjeros en Espana y su integracion social (B.O.E. 2005, 323) [Royal Decree Approving the Regulation of the Organic Law].

https://scholarship.law.upenn.edu/jil/vol28/iss2/4
mize illegal immigration. Many aspects of 4/2000 were re-implemented. Most notably, a key provision of the Decree allows the government to hold regularization processes. A typical regularization process involves several steps. First, an illegal immigrant has to charge his employer with illegal hiring of an undocumented worker. Second, the employer would have to face all retroactive sanctions and fines unless he agrees to employ the immigrant for at least one more year and clears any pending obligations due to the employee. Third, the immigrant has to submit his criminal record for Spain and his country of origin along with a previous employment contract with at least six months of duration. After examination of the papers and approval, the employer has to subscribe the immigrant to the social security system as an employee with a temporary work permit. A month later, the immigrant will officially be recognized as a legal immigrant affiliated with Social Security.

Despite marking progression in Spain’s previous restrictive immigration policy, the retroactive nature of over-reliance on amnesty periods and regularization processes has side effects. Baptized as efecto llamada, the “call effect” produced by over-reliance on amnesty periods results in downplaying the importance of arriving to a country as a legal immigrant. Table 1 below provides estimates of the number of irregular immigrants that have arrived in Spain during the past couple decades:

123 Id.
124 Such a procedure took place during the three month period from February to May 2005. However, amnesty periods are not a novelty in Spain. See Economic Migrants in Spain, supra note 121, at 840 (describing the previous four amnesty periods undertaken in Spain); see also BOLETÍN ECONÓMICO, supra note 11, at 41 (explaining the required procedure mandated for the regularization of illegal immigrants during the amnesty period).
125 Id.
126 Id.
127 Id.
128 Id.
129 This Comment uses the terms illegal immigrant and irregular immigrant interchangeably.
130 INSTITUTO NACIONAL DE ESTADÍSTICA (National Statistics Institute), http://www.ine.es/ (last visited Apr. 7, 2007) (displaying data used to create Table 1). Between 1971 and 1991, the volume of immigrants represented about 1.1 to 2.2% of the total population. The 1997 to 2005 period marks the most growth for immigration to Spain. In less than a decade, Spain has situated itself parallel to
TABLE 1: SPAIN'S ESTIMATED POPULATION (1971 - 2005)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Population</th>
<th>Total Immigrants</th>
<th>Estimated Irregular Immigrants out of Total Immigrants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>34,117,623</td>
<td>365,376</td>
<td>34,795</td>
</tr>
<tr>
<td>1981</td>
<td>37,723,299</td>
<td>625,907</td>
<td>49,660</td>
</tr>
<tr>
<td>1991</td>
<td>38,846,823</td>
<td>719,647</td>
<td>71,366</td>
</tr>
<tr>
<td>1997</td>
<td>39,852,651</td>
<td>840,594</td>
<td>27,272</td>
</tr>
<tr>
<td>2000</td>
<td>40,499,791</td>
<td>1,109,060</td>
<td>474,947</td>
</tr>
<tr>
<td>2001</td>
<td>41,116,842</td>
<td>1,181,085</td>
<td>868,884</td>
</tr>
<tr>
<td>2002</td>
<td>41,837,894</td>
<td>2,109,087</td>
<td>1,340,167</td>
</tr>
<tr>
<td>2003</td>
<td>42,717,064</td>
<td>2,672,596</td>
<td>1,387,315</td>
</tr>
<tr>
<td>2004</td>
<td>43,197,684</td>
<td>3,034,326</td>
<td>1,714,256</td>
</tr>
<tr>
<td>2005</td>
<td>44,108,530</td>
<td>4,130,610</td>
<td>1,037,973</td>
</tr>
</tbody>
</table>

The high percentage of irregular immigrants as part of the overall immigrant population could very well be explained by the *efecto llamada* theory. *Efecto llamada* characterizes legislation that decreases a country’s ability to control immigration inflows because an immigrant will be under the idea that once he enters, it will be a matter of time before he is legalized. The result of such a policy is the encouragement of illegal, unsystematic immigration. In other words, the government will lose much of its ability to control the aspects of immigration to its country. Indeed, such was the case Spanish authorities confronted near their southern border in September and October 2005. If Spain downplays the importance of arriving with legalized status, immigrants will naturally

traditional immigration receiving countries such as France and Germany. However, as compared to France and Germany, Spain has been characterized by a substantial number of irregular immigrants. This is of particular concern for this Comment's analysis because irregular immigrants in Spain will not contribute to social security contributions but they are entitled to continuous education and health care without question as to their irregular status. *Id.*

131 See, e.g., *World Briefing Africa: Migrants Storm and Enter Spanish Enclave*, N.Y. TIMES, Oct. 4, 2005, at A4 ("About 650 African migrants charged razor-wire border fences around Spain's other enclave of Melilla in Morocco. . . . It was the fourth mass attempt since last week by sub-Saharan Africans trying to make their way to Europe to enter Melilla or Spain's other North African enclave, Ceuta. . . ."); Renwick McLean, *5 Killed in Mass Attempt to Cross From Morocco to Spanish Enclave*, N.Y. TIMES, Sept. 29, 2005, at A1 (informing about the death of 5 migrants and injury of 100 others while trying to enter Spain by way of Ceuta).
select Spain as their country of entry, rather than neighboring countries with more restrictive policies. Aside from other economic and social implications, such a spontaneous approach prevents Spain from strategically determining the number, age, and skill set of its immigrants—all important factors for a country wishing to use immigration as a source for increased social security trust fund contributions.

When reacting to the *efecto llamada*, Spanish policymakers must realize that a sharp reduction in the flow of irregular immigration would pose a rather severe threat to the Spanish economy, which has been rooted in an almost unlimited supply of foreign labor for the past decade. To effectively reduce irregular immigration, a government must introduce negative incentives for irregular immigration. However, reducing irregular immigration also requires considering new ways for treating regular immigration to offset the shortfall in the supply of irregular foreign labor. If Spain does not compensate for an irregular immigration shortfall, its economy might have to operate below its potential, with reduced economic growth as the major implication. Therefore, the answer from a lawmaking standpoint is to create a cohesive, pro-legal immigration policy which will gradually give the Spanish government more flexibility in determining the characteristics of its immigration while simultaneously allowing the maximization of any positive effect that immigrants may have in funding the social security reserve fund.

4. IMMIGRATION'S IMPACT ON SOCIAL SECURITY FUNDING: A SHORT-TERM OR LONG-TERM SOLUTION TO THE FUNDING CONUNDRUM?

4.1. U.S. Immigration's Impact on Social Security

Regardless of immigrants' contributions to social security, they too will age and become beneficiaries. Thus, unless most immigrants come from younger age groups, immigration may not offset the baby boomer shock's effect on the trust fund.132 Even then, re-

132 See Joel Feinleib & David Warner, *The Impact of Immigration on Social Security and the National Economy* 3 (Soc. Sec. Advisory Bd., Issue Brief No. 1, 2005) ("A 2004 memo from the Office of the Chief Actuary pointed out that the change in the actuarial balance of the Social Security Trust Fund from an increase in immi-
member that as a result of the intergenerational nature of the system, a one-time wave of young immigrants would eventually have a demographic effect comparable to the pending baby boomer retirement effect. Evidence suggests that immigrants tend to arrive in the United States slightly later in their productive years.  

133 This supports the proposition that the dependency ratio may slightly decrease because of immigration but that the decrease may not counter the baby boomer retirement effect. Moreover, there are two additional reasons why immigration alone will not solve social security funding concerns in the United States. First, the AIME formula discussed in Section 2.1 has a subsidy built into it that will tend to favor immigrants. Second, as the 2006 Annual Trustees’ Report indicates, there simply is no determinative factor in estimating social security projections.

The U.S. Social Security system, similar to Spain’s system, includes a formula aimed at providing a subsidy to a given class of families under a certain threshold characterized by overall lower lifetime earnings. Recent empirical evidence analyzing the effect of immigration on U.S. social security funding is scarce. However, one of the leading studies by National Bureau of Economic Research analysts Gustman and Steinmeier has found that “the income support feature of social security disproportionately transfers benefits to immigrants relative to U.S. born with identical earnings.”  

134 The reason for this result is explained by the method of calculating benefits. Even if he earned the same level of income as a U.S. citizen, the immigrant who did not spend his entire lifetime working in the United States will generally benefit more from the formula, which currently provides subsidies to those who have had years in which they did not receive income.  

135 In sum, the difference between taxes paid and benefits received will generally be larger for the native-born population than for the immigrant co-

133 See FOREIGN BORN 2003, supra note 88, at 3 (indicating that 45.1% of the foreign-born population were in the 25 to 44 age group while the 30 to 34 age group comprised the highest percentage).


135 Id. at 1–2.
hort, even when the earnings for the two groups are identical every year.136

In addition to Gustman and Steinmeier’s studies on the limitations of immigration as a funding source, the 2006 Annual Report illustrates that it would be erroneous to hope that a single factor, such as immigration, will cure social security financing concerns. The 2006 Annual Report indicates an abundance of factors affecting social security funds: future birth rates, death rates, immigration, marriage and divorce rates, retirement-age patterns, disability incidence and termination rates, productivity gains, wage increases, inflation, and many other demographic and economic factors.137 From the list, it seems that immigration, productivity gains, or wage increases may be somewhat easier to control than death rates, marriage/divorce rates, and other demographic factors. Legislative decisions determine the pattern of immigration. This means the future is easier to predict if there is cooperation between legislators and social security actuaries. On the other hand, the future is uncertain if there is no cooperation between these parties. However, the bottom line is that in the U.S. experience there is no single factor decisive in increasing the social security fund.

4.2. Spain’s Immigration Politics and Social Security

The U.S. experience only provides partial support for the idea that increased immigration can offset social security underfunding.138 As a result, Spain should consider that immigration alone may not counter the inherent intergenerational susceptibilities of its social security system. The increased number of immigrants that have actively infiltrated Spain’s social security system as a result of the amnesty period translates into a higher level of contributions in the short-term.139 However, in the long term, an

136 Id. at 2.
137 2006 ANNUAL TRUSTEES REPORT, supra note 25, at 6.
138 AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, UNDERSTANDING SOCIAL SECURITY REFORM: THE ISSUES AND ALTERNATIVES 11 (2005) [hereinafter ISSUES AND ALTERNATIVES] (indicating that young legal immigrants can be beneficial because they contribute to the social security system longer). But see id. at 5 (forecasting that the rate of social security returns will likely decrease over time).
139 See, e.g., Marcela Sanchez, Spain’s Immigration Experiment Worth Watching, WASHINGTON POST, Oct. 13, 2005, at A21 (highlighting that the Spanish government foresees a three percent increase in social security collections as a result of the 2005 amnesty period); see also Los inmigrantes regularizados aportarán 1.500 mi-
increase of system affiliates translates into increased pressure on the system because more affiliates incur more of everything—more income, but also more costs and expenses. As previously discussed in Section 2.2.4, immigrants in Spain are highly concentrated in construction, agricultural, and domestic sectors, which have a lower contribution requirement. Considering these and other factors, a Banco de España (Bank of Spain) analysis predicts that persistent arrival of immigrants will not solve the accounting problem for pension schemes. In spite of the present immigration waves, the dependency ratio is forecasted to continue increasing.

One of the answers as to why the dependency ratio is expected to continue increasing is because the new arrivals have not significantly affected the demography of the country's age structure. The figure below indicates demographic trends, as of 2005, of the recent immigration.

140 Boletín Económico, supra note 11 (acknowledging that regularizing immigrants increases returns and costs of social security).
141 Economic Migrants in Spain, supra note 121, at 829 (“Native workers are unwilling to do the more menial tasks or accept low wages and poor working conditions. As a result, immigrant workers tend to cluster in the sectors that Spaniards shun, notably construction, domestic service and catering.”).
142 Immigration did not alter the long-term predicted trajectory of the rate of dependency, even if the arrival of immigrants reaches levels as high as those projected by INE. This is due to several factors. First, a heavy immigrant population now will also result in a population segment in 20 to 40 years that will face the same problem. Second, Banco de España projects that by 2015, the life expectancy rate will be at 82.4 years. This reflects an expected increase in the life expectancy of about 3 years higher than the 2004 figure of 79.4. Boletín Económico, supra note 11.
143 Id. at 47 (projecting that the dependency ratio will accelerate from 25% up to 56.1% even in presence of generous immigration arrivals).
144 See generally Instituto Nacional de Estadística [National Statistics Institute] http://www.ine.es/ (last visited Apr. 7, 2007) (displaying data used to create Table 2).
TABLE 2: PRINCIPAL FOREIGN NATIONALITIES BY AGE (%) AS 2005

<table>
<thead>
<tr>
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These immigration statistics illustrate that there is not any disproportionately represented age group among the arriving immigrant population. Thus, from a purely demographic standpoint, the migrations may neither positively nor negatively affect any potential demographic shocks to the reserve fund. Aged immigrants, primarily from the U.K. and Germany, who surpass the fifty-year-old benchmark, most likely represent the previously discussed retirement group seeking better climates. On the other hand, there is a rather young immigrant population from Morocco, Ecuador, Peru, and China. However, about half of the overall immigrant population is between twenty and forty years old. This should mean that most immigrants have completed their formative education, where applicable, and are at full working potential. Since arrivals are proportionately spread through the different age ranges, the arrivals are not likely to alter the current and pending baby boomer effect on the social security reserve fund.

Long run sustainability of the social security system will require more than immigration and a growing economy. As the
United States case study illustrates, immigration may have proven to be helpful, but not decisive. As long as an economy is growing and has use for immigrant labor, immigration will have the eventual effect of increasing social security contributions. However, Spain's social security system will also require internal legislative reform in order to achieve the highest possible level of immunity from demographic shocks.

5. REFORM: EVOLVING FROM SPONTANEOUS TO PROACTIVE RESPONSES

5.1. A Cohesive Approach to Immigration and Social Security

U.S. immigration legislation, as previously discussed, is characterized by its proactive nature. Even if immigration is not the complete answer to cushioning demographic effects in an inter-generational social security system, the United States has aimed to maximize the benefits of immigration through proactive legislation. Spain should follow suit. This move will require Spanish legislators to abandon their current spontaneous approach to immigration law. Before passing new laws, legislators should consider how Spain's current economy, immigration policy, and social security system interact with each other, and only afterwards should they envision how new laws would help to maximize the returns of the current social security system.

As evidenced in previous sections of this Comment, Spain's recent economic outlook has been rather favorable, both in terms of stock market growth and unemployment rate decline.145 These two factors have allowed previously nonexistent groups, such as women, to enter the workforce.146 In the past, the absence of women from the active labor force led females to rely on widows' pensions after their spouses deceased. If the female workforce participation increases to the point where females can become independent of their spouses' pensions, this may produce a favorable effect in the enlargement of the social security trust fund.

145 See, e.g., IBEX, supra note 74 & accompanying text.
The future of Spain’s social security is also inevitably tied to the future of the country’s immigration policies. One drawback is likely related to Spain’s historically restrictive immigration law and retrospective immigration policy. For example, the constraining 1985 immigration law lasted well into the 1990s before the government finally realized that immigration was not a temporary phenomenon. Spain’s historic role as a sending country to the Americas, Africa, and northern Europe could explain the inadequate development of its own immigration law. Until recently, immigration policies have failed to encompass demands of the current situation. This failure can be partly attributed to previous lack of social or political culture dedicated to addressing the issue.

Lately there is evidence that Spain is beginning to abandon the spontaneous, haphazard model. Spain’s 1985 Immigration Law approached immigration as a temporary phenomenon and focused primarily on external control. Yet, the subsequent amendments have taken an internal control approach, characterized by provisions for family reunification and more favorable permanent residence provisions. Further, the creation of the Superior Council on Immigration Policy and Permanent Observatory for Migration reflects a more focused attempt toward immigration research.

147 Economic Migrants in Spain, supra note 121, at 830 ("Governments throughout southern Europe were caught off guard by the surge in immigrant numbers that occurred after the mid-1980s, and responded belatedly to a phenomenon that northern Europe experienced three decades earlier.").

148 CALAVITA, supra note 12, at 5 (explaining that the 1985 law was “oriented toward immigration as a contingent or emergency labor supply” and therefore “contained few provisions for permanent legal residency or naturalization”).

149 See Barbara Schmitter Heisler, Sending Countries and the Politics of Emigration and Destination, 19 INT’L MIGRATION REV. 469, 478–79 (1985) (explaining that Spain’s history as a sending country dates back to its colonial era).

150 See IMMIGRATION CONTROL, supra note 116, at 9 (“A country’s public immigration control refers to the rules and procedures governing selection, admission and deportation of foreign citizens.”). There are two main types of controls. External controls concern a country’s regulation regarding the arrival of foreigners. Internal controls are used to regulate the initial process from the arrival of immigrants all the way to their possible legalization and citizenship. Id.

151 Real Decreto por el que se crea el Consejo Superior de Politica de Inmigración (B.O.E. 2001, 344) [Royal Decree Creating the Superior Council on Immigration Policy].

152 Id.
These advancements must be complemented with more proactive legislation in the future.

If immigrants are to help counter the potential demographic shock, Spain must ensure that immigrant arrival does not worsen the shock. The latter is likely to happen in the absence of proactive regulation. Realizing that immigration adds both to the working age population and to the future dependency ratio, Spain should attempt to achieve immigration flows that cushion demographic gaps likely to have adverse effects on the intergenerational pension scheme. After conducting necessary demographic studies, Spain must consider alternatives. Recruiting younger immigrants may be helpful in countering the oncoming demographic shock. However, creating a substantial gap between newcomers and the baby boomer population may result in future demographic shocks. Implementing and adhering to a quota system, as the United States has historically done, may reduce the irregular immigrant underground economy from which Spain currently does not collect contributions.

On a less economic and more social level, legislators must consider the integration measures necessary so that new arrivals can make efficient contributions to the country and so that local groups will not view immigration as a threat to their well-being. Ideally, an effective integration program will ensure adaptation and reduce fiscal burdens in the form of unemployment, welfare, and social disruption. If too large, these burdens will counter any possible benefit of immigration to social security funding. The current response that immigration is receiving from many Spanish institutions does not always correspond to principles of solidarity. Newcomers face obstacles in the form of housing, employment, and

153 See Boletín Económico, supra note 11, at 48 (concluding that those countries characterized by high levels of integration and assimilation benefit the most from immigrant productivity and contribution to society).

154 See, e.g., Fiorella Dell'Olio, Immigration and Immigrant Policy in Italy and the UK: Is Housing Policy a Barrier to a Common Approach Towards Immigration in the EU?, 30 J. Ethn. & Migration Stud. 107, 118 (2004) (illustrating that in the EU “‘high numbers of undocumented immigrants and asylum seekers’” are the most likely to use shelters and other services for the homeless).

155 Economic Migrants in Spain, supra note 121, at 836 (describing the exploitation many immigrants face in terms of housing and work conditions).
social integration. The sudden incorporation of large arrivals of immigrants with cultural, ethnic, and religious differences generates concern about the ability of immigrants and natives to live in peaceful co-existence. During the last years, several xenophobic incidents in different cities and villages—El Ejido, Terrassa, and Villaverde, for example—highlight the need for a higher degree of involvement by public authorities to facilitate the integration of immigrant populations while maximizing the productivity of incomers and reducing the development of fiscal burdens.

The challenge faced by the government and the legislature is multifaceted. Social security funding could benefit from additional taxpayers. Entrepreneurs demand “cheap, ‘flexible’” labor provided by immigrants. Yet, the recent influx of immigration could lead society to the verge of a xenophobic backlash. Now, more than ever, the government needs to address the situation with proactive and cohesive policies—spontaneous immigration legislation will not suffice.

156 See Anna Triandafyllidou, The Political Discourse on Immigration in Southern Europe: A Critical Analysis, 10 J. COMMUNITY & APPLIED SOC. PSYCHOL. 373, 379 (2000) (indicating that overall integration in Spain is easier for those arriving from Latin America due to the historical ties).

157 See e.g., Roger Cohen, Europe’s Migrant Fears Rend a Spanish Town, N.Y. TIMES, May 8, 2000, at A1 (illustrating the violent confrontation between Spaniards and Moroccan immigrants in the southern coastal town of El Ejido as an event illuminating a progressively growing anti-immigrant stance among many Spaniards and Europeans in general).

158 See e.g., Enrique Figueredo & Silvia Taules, Once detenidos por un ataque racista contra magrebíes en Terrassa, EL MUNDO, May 15, 2003, at 19 (describing the resurgence of racial conflict in the Catalan town of Terrassa that in 1999 saw one of the worst xenophobic attacks in recent Spanish history).

159 See e.g., Pablo Herraiz, Tensión y rabia por la muerte de ‘Manu,’ EL MUNDO, May 6, 2005 (describing the racial tension among neighbors in the Madrid suburb of Villaverde where some Spanish-owned bars have closed their doors to immigrants, xenophobic groups have gathered in violent concentrations, and immigrant-owned businesses have suffered damages after the killing of a Spanish teenager by a Dominican immigrant).

160 Economic Migrants in Spain, supra note 121, at 829.

161 See BOLETÍN ECONÓMICO, supra note 11 (providing statistics about the recent increase in immigration rates).
5.2. The Art of Looking Away: A Lesson for Hacienda\textsuperscript{163}

A particular issue of increasing newsworthiness in the United States is the effect of illegal, rather than legal, immigration on Social Security. There is mounting evidence that the Internal Revenue Service welcomes immigrants' taxes, regardless of the immigrants' legal status in the country.\textsuperscript{164} The United States provides a Social Security Number (SSN) to all citizens and residents.\textsuperscript{165} However, the IRS also issues a Tax Identification Number (Tax ID) to those making a request.\textsuperscript{166} Since the Tax ID is usually not matched up with the SSN, individuals without an SSN can pay taxes by using their Tax ID.\textsuperscript{167} This system seems to provide an "under-the-table" win-win situation—the United States collects more taxes than it could legally require, and the undocumented worker can maintain the appearance of legal status. Moreover, once illegal immigrants obtain legalized status, they can retroactively request that their previous contributions be credited to their social security.\textsuperscript{168} The impact of this "looking away" policy on social security collections is noticeable.\textsuperscript{169} The practice has resulted in the creation of an


\textsuperscript{164} See Eduardo Porter, Illegal Immigrants Are Bolstering Social Security with Billions, N.Y. TIMES, Apr. 5, 2005, at A1 [hereinafter Illegal Immigrants] (recapitulating that over the years it has become more common for illegal immigrants to pay taxes in an effort to show their good faith presence).

\textsuperscript{165} See Form SS-5, 2, available at http://www.ssa.gov/online/ss-5.pdf (last visited Jan 23, 2006) (requiring that applicants born outside the U.S. prove their "U.S. citizenship or current lawful, work-authorized immigration status").


\textsuperscript{167} See id. (explaining that the tax numbers are not shared with immigration officials).

\textsuperscript{168} See Porter, supra note 164 ("A comparative handful of former illegal immigrant workers who have obtained legal residence have been able to accredit their previous earnings to their new legal Social Security numbers.").

\textsuperscript{169} See Feinleib & Warner, supra note 132, at 3 ("Among illegal immigrants, SSA actuaries currently assume that about half actually pay social security taxes although they are very unlikely to collect benefits.").
"earnings suspense file" by the SSA used to account for payments that come with unaccounted numbers.\textsuperscript{170}

In contrast, Spain’s Hacienda tends not to interact with undocumented workers until they legalize their status.\textsuperscript{171} In Spain, a historical underground economy\textsuperscript{172} has resulted in networks where it is hard to reduce illegal employment and in turn difficult for the government to collect taxes from such behavior. In response, Spain has enacted amnesty periods to legalize immigration and maximize revenue collection. After all, the government is more efficient at collecting payroll tax from legal employees with proper identification numbers. However, given Spain’s significant number of irregular employees,\textsuperscript{173} Spain may want to learn more about the U.S. “looking away” policy.

5.3. Could Privatization be the Response?

In the United States, both policy makers and academics have debated the possibility of privatizing Social Security. Privatization refers to a system where money would be taken out of the general

\textsuperscript{170} See Porter, supra note 164 (indicating that the financial amount designated to the "earnings suspense file" has been steadily growing through the decade, "generating $6 billion to $7 billion in Social Security tax revenue").

\textsuperscript{171} For an explanation of the equivalent to the SSN / Tax ID framework in Spain, see generally AGENCIA TRIBUTARIA, FACILIDADES PARA DECLARAR RENTA 2006 (2006), available at http://www.agenciatributaria.es/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Informacion_institucional/Campanias/Campania_Renta_2006/informacion/FDeclarRenta2006.pdf. Rather than the dual framework (SSN option or Tax ID option) in the United States, Spain has three different identities through which one can pay taxes. First, a Spanish citizen can use the Documento Nacional de Identidad (National Identity Number), abbreviated DNI. Second, one can use the Número de Identificación de Extranjeros (Identity Number for Foreigners), abbreviated as NIE, if one qualifies as a legal immigrant. Third, one can apply for the Número de Identificación Fiscal (equivalent to the Tax ID for individuals), abbreviated as NIF. In sum, an individual will only be able to file tax returns via a NIF, NIE, or DNI, all of which require citizenship or legalized status. For a more detailed English language explanation of the three Spanish identification documents, see http://www.spainexpat.com/spain/information/id_numbers_in_spain/ (last visited Apr. 7, 2007).

\textsuperscript{172} See CALAVITa, supra note 12, at 66 (explaining that in 2005, “about 23 percent of Spain’s GDP was provided by the underground economy, making it second only to Italy in terms of GDP derived from underground work”).

\textsuperscript{173} See Arango & Jachimowicz, supra note 9 (indicating that 700,000 illegal immigrants surfaced in response to the 2005 amnesty period).
social security accounts and trust funds and turned over into private investment accounts that individuals would own. The workers would then invest the funds in various financial assets, particularly mutual funds. At the end of their working lives, individuals would finance their retirements out of the accumulation of their accounts.

Implemented in 1981, Chile’s system is among the best-known privatized social security systems. Chile was facing the same demographic trends as the United States and Spain: a mix of increasing beneficiaries and decreasing contributors combined with mismanagement that forced the system toward bankruptcy. In response, Chile implemented a privatized approach which has three main components. First, each covered worker must place ten percent of his monthly earnings into an account that is managed by a government-approved financial services firm. Second, upon retirement, benefits can be taken either as a series of phased withdrawals or as an annuity. Third, a guaranteed minimum pension is available for those who have been in the system for a sufficient number of years.

The drawback of privatization is that it could expose individuals to more risk because if the stock market turned down, their returns during retirement would suffer. The approach undercuts the fundamental social insurance concept of social security. Moreover, Chile’s experience suggests that privatization schemes are


177 See Diamond, supra note 175, at 4 (explaining the mechanics of the Chilean privatized system).

178 See ISSUES AND ALTERNATIVES, supra note 138, at 50 (explaining that “[p]ersonal accounts expose account holders to uncertainty about their future benefit levels resulting from uncertainty about future financial market performance.”).
costly to run. On the other hand, some commentators view the reduction of political risk as one of the main achievements of the Chilean system. Chile has all but eliminated the possibility that free-spending politicians will dip into the social security pool.

Currently, the privatized system would be an extreme shift for Spain. The Spanish Constitution requires a public social security system; adopting Chile’s scheme would require an amendment. Moreover, a progressive decline in benefits to the point where retirees must rely on privately funded pensions would not be feasible either, since this would also conflict with the basic requirement of a public system inherent in Spain’s Constitution. However, given the scarcity of funds, Spain should at least re-calibrate its contribution/benefits scheme and encourage current workers to appreciate the importance of planning for sources of income other than social security pensions.

6. CONCLUSION

Over the past several years, immigration and social security trust fund management have emerged as top-rung political issues in many EU Member States. However, this has been particularly true in Spain, perhaps because over a decade ago the country had one of the lowest birth rates, rather high unemployment, and a great concern about the future of social welfare. Today, the country has among the highest immigration rates in the EU, a slowly decreasing unemployment rate, and a vibrant economy. Consequently, there is much debate about where the country stands in terms of social security pension funding.

The goals of this Comment have been twofold. First, the Comment explored whether a selective immigration policy could be used as an instrument to counter demographic shocks to an intergenerational social security pension scheme. As a case study, the U.S. experience reveals that even in the best sociopolitical climate, and with the most proactive legislation, immigration alone will

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179 See Diamond, supra note 175, at 6 (evidencing that the average administrative costs per affiliate of Chile’s privatized system can reach about 30% of the 10% mandatory savings rate).

180 Id. at 4 (describing the political risks of a pay-as-you-go system where politicians may increase social security benefits in times of large surpluses and decrease benefits in times of surplus deficiencies).

181 C.E., art. 41.
likely not eradicate concerns about demographic effects on the social security pension scheme. Thus, in addition to immigration, the need for overall social security reform must be given immediate priority. Spain may have realized this as well when it was almost faced with a social security crisis in the late 90s. Because of the Pact of Toledo, Spain today has a growing social security reserve fund. Even so, the country cannot drop its guard because of the imminent baby boom retirement, which will cause a demographic shock to the social security fund.

Second, the Comment has stressed that if immigration is to positively help the social security trust fund, it will only do so after legislators implement a proactive framework within which to maximize the synergies between immigration and social security funding. As noted throughout this Comment, as the share of immigrants in Spain increases, both policymakers and economists should analyze the fiscal impact, especially with respect to social security funding. The most viable intergenerational pay-as-you-go pension scheme will depend on an efficient immigration policy that balances the host country's demographics with the final effect of trying to smooth age distributions so that there will be enough active labor to fund retirees' pensions. In turn, the ability to do this will depend on Spain's social, political, and economic growth. As such, more than pure economics should be at stake while analyzing immigration effects on social security pension schemes. After considering immigration quotas, labor market absorption rates, and desired age ranges, the country needs to consider more subjective issues such as integration.

To summarize, the ideal political agenda in terms of future immigration and social security funding policies is relatively easy to identify: only by proactively managing immigration inflows and making the contracting of irregular immigrants more difficult and much less attractive can Spain hope to maximize the effects of immigration to social security contributions. Nonetheless, immigration, especially an immigration influx, will not eradicate demographic shocks to the reserve fund. There appears to be no single answer to social security reform. To adhere to the Spanish Constitution and sustain a viable public pension system, a multifaceted approach must be introduced now so that it will have taken full effect before the fund is depleted. If enacted promptly, legislative reform could be phased-in gradually, avoiding the need for more radical actions closer to the date of a demographic shock. Spain should maximize the synergies between social security and immi-
migration via a continuously proactive approach whereby legislation focuses on specific goals and forecasts, rather than on the enactment of spontaneous, short-term solutions.