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RETIRING SOCIAL SECURITY'S (NON)PAYMENT AT DEATH AFTER EIGHT DECADES

*Alberto B. Lopez**

Section 202 of the Social Security Act, which originated in the 1939 Amendments to the 1935 Social Security Act, authorizes monthly benefits payments to an eligible person until the month prior to the month of death. Under this rule, an individual who dies on November 30th at 11:59 pm is not eligible to receive a check for benefits accrued during November because the individual failed to survive one additional minute; eligibility for payment ended on October 31st. After a beneficiary's death, the Social Security Administration ("SSA") either prevents deposit of a check for month-of-death benefits or mandates return of monies deposited prior to receiving notice of death. Thereafter, survivors often struggle to pay a deceased beneficiary's expenses or reimburse the SSA for deposited money used to benefit the deceased beneficiary.

This paper argues for a modification to the Social Security payment schedule to provide a final payment to beneficiaries for benefits accrued during the month of death. The proposal prorates payments during the first and last months of eligibility according to the number of eligible days in each of those months. While increased Social Security benefits may add financial cost to the system, any added expense represents a small fraction of annual SSA expenditures and would not be administratively burdensome for the SSA given its annual calculations of cost-of-living adjustments. In the end, prorating the first and last Social Security payments not only better computes the actual sums due to beneficiaries as compared to the current rule, but also promotes the "family security" contemplated by amendments made to the Social Security program over eight decades ago.

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INTRODUCTION

From its origin in the Great Depression to the twenty-first century,¹ the Social Security program has been subjected to a constant stream of criticism. During congressional hearings in 1935,² one member of Congress feared that the program would “threaten the integrity of our institutions and pull the pillars of the temple down upon the heads of our descendants” because it allocated too much power to the federal government.³ With less hyperbole and more humor, a member from Oklahoma wondered if a centralized plan to redistribute money from current employees to retirees was just a “teeny-weeny bit of socialism.”⁴ Today, critics deride the Social Security program as a “Ponzi scheme” and alarmingly predict that the program will soon be insolvent.⁵ As a practical matter, unrelenting critiques should be expected because the eighty-seven year old social safety net is funded by one of the scariest words in politics—taxes.

Public opinion polls consistently find overwhelming support for Social Security despite its tax-based funding,⁶ but polling numbers might dip if pollsters asked about Social Security payments at death. Social Security benefits are paid in arrears; therefore, an individual beneficiary receives a monthly payment that represents benefits that accrued during the prior month.⁷ While a beneficiary's death obviously terminates monthly distributions in the future, Section 202 of the Social Security Act states that a beneficiary's eligibility ends with the month preceding death.⁸ As a result, a beneficiary is not eligible to receive a Social Security payment for benefits accruing during the month of

¹ Martha A. McSteen, *Fifty Years of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/50mm2.html> (last visited Oct. 10, 2022).

² Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C. ch. 7 (2018)).

³ Nancy J. Altman, Opinion, *Securing Healthcare*, L.A. TIMES, Aug. 14, 2009, at A23.

⁴ *Id.* For more on the history of the Social Security Act of 1935, see generally Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 MINN. L. REV. 379 (1984); Grace Abbott, *The Social Security Act and Relief*, 4 U. CHI. L. REV. 45 (1936).

⁵ Lawrence Kotlikoff, *America's Ponzi Scheme: Why Social Security Needs to Retire*, PBS NEWS HOUR (Apr. 7, 2014, 12:50 PM), <https://www.pbs.org/newshour/nation/americas-ponzi-scheme-why-social-security-needs-to-retire>; Alan Rappeport & Margot Sanger-Katz, *Social Security is Projected to be Insolvent a Year Earlier than Previously Forecast*, N.Y. TIMES, <https://www.nytimes.com/2021/08/31/business/economy/social-security-funding.html> (Sept. 24, 2021).

⁶ Kim Parker, Rich Morin & Julia Menasce Horowitz, *Looking to the Future, Public Sees an America in Decline on Many Fronts, 4. Retirement, Social Security and Long-Term Care*, PEW RSCH. CTR. (Mar. 21, 2019), <https://www.pewresearch.org/social-trends/2019/03/21/retirement-social-security-and-long-term-care/> (finding that most individuals believe that “benefits should not be reduced in any way.”).

⁷ SOC. SEC. ADMIN., PUBL'N NO. 05-10077, WHAT YOU NEED TO KNOW WHEN YOU GET RETIREMENT OR SURVIVORS BENEFITS 1 (2022), <https://www.ssa.gov/pubs/EN-05-10077.pdf>.

⁸ 42 U.S.C. § 402 (2018) (“Old Age and Survivors Insurance Benefits Payments”) (originally enacted as Social Security Act of 1935, Pub. L. No. 74-271, § 202, 49 Stat. 620, 623).

death. Furthermore, any payment transferred to a beneficiary for benefits accruing during the month of death must be returned to the Social Security Administration (“SSA”).⁹ If a month-of-death benefits check is deposited in a deceased beneficiary’s bank, a deceased beneficiary’s survivors or personal representative must notify the bank and arrange for the return of that money to the SSA.¹⁰

For a beneficiary’s survivors, returning deposited money threatens to exact an unanticipated financial toll after the death of a Social Security recipient.¹¹ Many Social Security beneficiaries, perhaps most, use a portion of their monthly checks to pay their bills prior to their deaths.¹² Following a beneficiary’s death, survivors with access to a beneficiary’s bank account may use those funds to pay the beneficiary’s final expenses or other outstanding debts. Once they receive notice of the return requirement under Section 202, which may or may not be timely, survivors may “struggl[e] to find the money to pay back the Social Security Administration.”¹³ To comply with the law, survivors may open their own wallets or sell a deceased beneficiary’s property to repay the SSA for the deposited Social Security benefits used to support a deceased beneficiary. Regardless of how the SSA is reimbursed, “the loss of this benefit causes serious financial problems for the surviving family members because they are unable to financially subsidize the expenses accrued by the late beneficiary during their last month of life.”¹⁴

The consequences of the SSA’s refund protocol are best captured in the experiences of survivors who encounter the policy. Describing the experience after the death of a brother-in-law who had been receiving Social Security benefits, one survivor explained that

⁹ See SOC. SEC. ADMIN., PUBL’N NO. 05-10077, *supra* note 7, at 11.

¹⁰ *Id.*

¹¹ Data regarding the public’s knowledge of the requirement to return month of death benefits is unavailable. However, other studies show that the public lacks knowledge about various aspects of the program; therefore, a reasonable possibility exists that the mandatory return requirement is surprising to most who deal with it. See The Harris Poll, *The Nationwide Retirement Institute 2021 Social Security Survey*, NATIONWIDE, (July 2022), https://nationwidefinancial.com/media/pdf/NFM-20936AO.pdf?_ga=2.254744520.1770116609.1646020675-1725411908.1646020675 (finding that “clear gaps in knowledge exist” regarding specific aspects of the Social Security program).

¹² For a study of the relationship between Social Security, IRAs, and pensions and aggregate income, see generally Irena Dushi & Brad Trenkamp, *Improving the Measurement of Retirement Income of the Aged Population*, (Soc. Sec. Admin., Office of Rsch., Evaluation, and Stat., Working Paper No. 116, 2021), <https://www.ssa.gov/policy/docs/workingpapers/wp116.html>.

¹³ 143 CONG. REC. S11765 (daily ed. Nov. 5, 1997) (statement of Sen. Snowe).

¹⁴ 142 CONG. REC. S5946 (daily ed. June 6, 1996) (statement of Sen. Snowe).

On February 29, 1996 at 9:20pm. He passed away. The way I figure it, the month of February has 696 hours in it. He was alive for 693 hrs and 20 min. of the month, missing a full month by 2 hours and 40 min. Or to put it another way, he was alive for 99.99617 percent of the month missing a full month by 0.0038314 percent. With this evidence in hand, the SSA then decided that his check for the month of Feb. had to be returned to them. Unfortunately, his debts for the month didn't disappear just because he failed to live the extra 0.0038314 percent of the month.

And since they waited till April to let anyone know of this policy, we paid his outstanding bills with this money. Now they want the money back.¹⁵

When described from that perspective, the SSA policy of withholding benefits for the final month of life appears to be, in a word, arbitrary.

The purpose of this short piece is to propose a change to the SSA payment schedule that distributes a prorated benefits check for the final month of a beneficiary's life based upon the dates of a beneficiary's initial eligibility and death. The next section of this paper offers an abbreviated history of the SSA's current payment scheme with a description of the original 1935 Act and the 1939 Amendments. Part III of this paper argues that the financial and administrative concerns that impede reconfiguration of Section 202 are insufficient to support continued utilization of the 1939 framework. Changing the current payment framework is neither too costly nor too great an administrative burden such that a payment schedule from over eighty years ago should remain inviolate. The next section of the paper, Part IV, suggests that a proportional payment for the first and last month of eligibility best reflects the actual benefits accrued by beneficiaries thereby achieving a better balance on the SSA's accounting books. The paper concludes that prorating the first and last Social Security payments best promotes the intent of the 1939 Amendments to protect "family security."

I. A BRIEF HISTORY OF SOCIAL SECURITY PAYMENTS AT DEATH

Although a small segment of the population received pensions before the 20th century, such as Civil War veterans,¹⁶ the Great Depression sparked a nationwide push to provide governmental aid to aged persons. In 1934, for example, less than 50% of the elderly received sufficient income to be self-

¹⁵ *Id.* at S5946-47.

¹⁶ *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (last visited Oct. 10, 2022) (describing Civil War pensions as "America's First 'Social Security' Program").

supporting, which sparked the passage of pension legislation in thirty states by 1935.¹⁷ In addition to relief at the state level, millions of Americans wrote letters to President Roosevelt requesting federal assistance because they needed help now.¹⁸ In response, President Roosevelt created a Committee on Economic Security to draft a proposal to promote the financial security of the aged population.¹⁹ The Committee's final product, the Social Security Act of 1935, provided "some measure of protection . . . against poverty-ridden old age."²⁰ Because of its myopic support for employed persons, however, the 1935 Act failed to ameliorate hardships experienced by many families in need of aid. As a result, Congress amended the 1935 Act in 1939 to shift from an employee benefits program to a family benefits program.²¹ Since that time, the Social Security program has undergone substantial changes, but one provision from 1939 remains in effect to this day—a payment schedule that precludes depositing a check for benefits accumulated during the final month of life. The following sections provide background on the 1935 Act and 1939 Amendments as well as describe congressional efforts to reform Section 202.

A. *Eligibility and Death Under the 1935 Act and 1939 Amendments*

The modern structure of Social Security has its roots in Title II of the 1935 Social Security Act, which created an "Old-Age Reserve Account" to provide incomes to qualifying individuals.²² To qualify for a full benefits distribution, an individual must have reached the age of sixty-five years and earned a specified amount of wages before reaching the age of full eligibility.²³ The benefit was to be paid in equal monthly installments with a maximum benefit of \$85/month.²⁴ While \$85/month in the late 1930s or early 1940s might seem

¹⁷ *Id.*

¹⁸ *Letter to President Roosevelt Regarding Old-Age Pensions*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/lettertoFDR.html> (last visited Oct. 10, 2022).

¹⁹ See *Historical Background and Development of Social Security*, *supra* note 16.

²⁰ *Id.*

²¹ *Id.*

²² Social Security Act of 1935, Pub. L. No. 74-271, § 201, 49 Stat. 620, 622-23 (current version at 42 U.S.C. § 401 (2018)).

²³ *Id.* § 210(c) (codified as amended in scattered sections in 42 U.S.C. ch. 7 (2018)). Currently, an individual may be eligible for a distribution at 62 years of age, but that distribution is less than the amount to be received upon reaching the age of 65 years. 42 U.S.C. § 402(a) (2018); 42 U.S.C. § 416(l) (2018) (defining retirement age as 65 years). For an example of the reduction of benefits associated with receiving benefits before reaching the age of retirement, see *Starting Your Retirement Benefits Early*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/agereduction.html> (last visited Oct. 29, 2022).

²⁴ Social Security Act of 1935 § 202(a)-(b) (current version at 42 U.S.C. § 402(a)-(b) (2018)).

paltry, the value of \$85 in 1942 is \$1,528 in today's money.²⁵ Interestingly, the average Social Security beneficiary received a check for \$1,555 in 2021;²⁶ therefore, the dollar value of Social Security benefits received by an average beneficiary has not changed much in nearly a century.

After specifying who qualified for benefits under Section 202, subsequent sections of the 1935 Act governed the distribution of payments upon death based upon the total payout during a beneficiary's life. If a beneficiary received less than the amount due during the beneficiary's lifetime, Section 203 required post-mortem payments to a beneficiary's estate with various adjustments.²⁷ If the total amount to be paid to an estate under Section 203 was less than \$500, for example, the money owed to the estate may

be paid to the persons . . . entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of the estate.²⁸

On the other end of the payment spectrum, the estate of a beneficiary who had received an overpayment during life was required to repay "the United States" following the death of that beneficiary.²⁹

Four years after the enactment of the Social Security Act, Congress decided to chart a different path for the program by shifting focus from employees to families in its 1939 Amendments to the original blueprint.³⁰ To implement the change, Congress identified a new classification of persons eligible to receive a recipient's benefits—dependents.³¹ The group of dependents eligible under the 1939 Amendments included surviving spouses, minor children, and, in some cases, aged parents of a deceased Social Security beneficiary.³² Dependents did not receive a beneficiary's full distribution, but instead received a check that

²⁵ *Inflation Calculator: The Changing Value of a Dollar*, DOLLARTIMES, <https://www.dollartimes.com/inflation/> (last visited Oct. 15, 2022).

²⁶ *Fact Sheet—Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Oct. 29, 2022).

²⁷ Social Security Act of 1935 § 203 (codified as amended in scattered sections in 42 U.S.C. ch. 7 (2018)).

²⁸ *Id.* § 205 (codified as amended in scattered sections in 42 U.S.C. ch. 7 (2018)).

²⁹ *Id.* § 206 (codified as amended in scattered sections in 42 U.S.C. ch. 7 (2018)).

³⁰ *Legislative History—1939 Amendments*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/1939amends.html> (last visited Oct. 12, 2022).

³¹ *Id.*

³² Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 202(b)(1), 53 Stat. 1360, 1364 (current version at 42 U.S.C. § 402(b)(1) (2018)); *id.* § 202(c)(1) (current version at 42 U.S.C. § 402(d)(1) (2018)); *id.* § 202(f)(1) (current version at 42 U.S.C. § 402(h)(1) (2018)).

equaled one-half of the benefit amount forwarded to the beneficiary during life.³³ Finally, a life change for the dependent, such as death, marriage, or reaching the age of majority, terminated a dependent's eligibility for benefits.³⁴ Regardless of the specific classification of a dependent as a spouse, child, or parent, expanding the safety net for a broader swath of the population promoted "family security" upon the death of a Social Security beneficiary.³⁵

In addition to broadening the scope of individuals entitled to receive benefits, the 1939 Amendments also modified the payment of benefits upon the death of a beneficiary. Under Section 202,

every individual who . . . has attained the age of sixty-five and filed an application for primary benefits, shall be entitled to receive a primary insurance benefit . . . for each month, beginning with the month in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies.³⁶

As a result, an individual who reaches the age of retirement in June and applies for benefits will receive a first Social Security check in July. If that same individual dies in June at some future date, however, the individual is not eligible to receive and retain a Social Security check in July because eligibility for benefits ended "with the month preceding the month in which he dies."³⁷ The 1939 framework for payouts, then, involved a full payment for the first month of eligibility regardless of the date of first eligibility and prohibited a last payment during the month of death—and that scheme remains the payment protocol today.

B. Reform Efforts in Congress

Withholding a final payment for month of death benefits has spurred calls for reform in the not-too-distant past. In 1996, a member of the House of Representatives introduced the Social Security Benefits Fairness Act of 1996 because barring month of death benefits was "cruel and affects people adversely

³³ Social Security Act of 1935 § 210(c) (codified as amended in scattered sections in 42 U.S.C. ch. 7 (2018)); Social Security Act Amendments of 1939 § 202(b)(1) (current version at 42 U.S.C. § 402(b)(1) (2018)); *id.* § 202(c)(1) (current version at 42 U.S.C. § 402(d)(1) (2018)); *id.* § 202(e)(1) (current version at 42 U.S.C. § 402(e)(1) (2018)).

³⁴ *See, e.g.*, Social Security Act Amendments of 1939 § 202(c)(1) (current version at 42 U.S.C. § 402(d)(1) (2018)).

³⁵ *FDR's Statements on Social Security 13, Presidential Statement on Signing Some Amendments to the Social Security Act—August 11, 1939*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/fdrstmts.html> (last visited Oct. 12, 2022).

³⁶ Social Security Act Amendments of 1939 § 202(a) (current version at 42 U.S.C. § 402(a) (2018)).

³⁷ 42 U.S.C. § 402(a) (2018).

when they are already saddened and distraught by the death of a family member.”³⁸ Instead of prohibiting a month of death benefit in its entirety, the proposal required paying either a 50% or a full benefit to a surviving spouse or an estate depending upon the beneficiary’s date of death.³⁹ If the beneficiary died on or before the fifteenth day of a month, the beneficiary’s surviving spouse or estate would receive one-half of the beneficiary’s payment.⁴⁰ On the other hand, the surviving spouse or estate would receive the full benefit for the month of death if the beneficiary died after the fifteenth day of a month.⁴¹ After its introduction, the bill died in the House Committee on Ways and Means.⁴² Notably, the same bill was introduced to five subsequent sessions of Congress but always met the same fate.⁴³

At the other end of the Capitol Building, the Senate has also had several chances to modify the 1939 Amendments to provide month-of-death benefits. Presented at nearly the same time as its counterpart in the House, the Social Security Family Protection Act provided a Social Security payment to surviving family members that varied depending upon the date of death.⁴⁴ Duplicating the bill in the House, a beneficiary’s family would receive either 50% or 100% of the deceased beneficiary’s benefits depending on whether the beneficiary died before or after the fifteenth day of the month of death.⁴⁵ Again like its sibling in the House, the Family Protection Act never reached the floor for a vote.⁴⁶ Furthermore, none of the four later Senate proposals to distribute a final payment to beneficiaries for month-of-death benefits proceeded beyond the introductory stage of the legislative process.⁴⁷ Despite multiple attempts to change Section 202, Social Security’s “unfair and absurd” rule against paying month of death benefits has been repeatedly inoculated against reform.⁴⁸

³⁸ 142 CONG. REC. E1305–06 (daily ed. July 17, 1996) (statement of Hon. Tim Holden).

³⁹ Social Security Benefits Fairness Act of 1996, H.R. 3585, 104th Cong. (1996).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Social Security Benefits Fairness Act of 1997, H.R. 68, 105th Cong. (1997); Social Security Benefits Act of 1999, H.R. 163, 106th Cong. (1999); Social Security Benefits Act of 2001, H.R. 1464, 107th Cong. (2001); Social Security Benefits Act of 2007, H.R. 1380, 110th Cong. (2007); Social Security Benefits Act of 2009, H.R. 954, 111th Cong. (2009).

⁴⁴ Social Security Family Protection Act, S. 1832, 104th Cong. (1996).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Social Security Family Protection Act, S. 1370, 105th Cong. (1997); Social Security Family Protection Act, S. 786, 106th Cong. (1999); Social Security Family Protection Act, S. 882, 107th Cong. (2001); Social Security Family Protection Act, S. 362, 108th Cong. (2003).

⁴⁸ *See* 142 CONG. REC. E1305–06 (daily ed. July 17, 1996) (statement of Hon. Tim Holden).

The failure of reform proposals to reach the floor of either chamber of Congress at any point is mildly surprising given that support for change crossed party lines. In 1996, the House's Social Security Benefits Act had nineteen co-sponsors (seventeen Democrats, two Republicans) and eventually reached a high of seventy-eight co-sponsors in 2001 (sixty Democrats, eighteen Republicans).⁴⁹ The House's cooperative push for reform, however, withered thereafter as the last bill in 2009 had only three co-sponsors (two Democrats, one Republican).⁵⁰ Similarly, the Senate's Social Security Family Protection Act had eight co-sponsors (five Democrats, three Republicans) in 1996 and increased that number to twelve one year later (six sponsors from each party).⁵¹ Again, the push for change waned as the final bill presented to the Senate in 2003 had five co-sponsors (three Democrats, two Republicans).⁵² The absence of floor debate may be eye-opening, but the failure to reform Section 202 is far from shocking because the potential for negative political repercussions associated with changing Social Security creates an incentive for politicians to kick the can down the road.

Recently, Congress expressed renewed interest in amending the Social Security program in advance of the 2022 midterm elections. Members of the House of Representatives introduced a bill in October 2021, entitled "Social Security 2100: A Sacred Trust," that aims to increase monthly payments to all recipients as well as broaden the eligibility requirements to receive program benefits.⁵³ For example, monthly distributions to all eligible individuals would increase by 2%, and children who live with their grandparents or other relatives would have greater access to benefits.⁵⁴ To fund the increased financial outlay, the "Sacred Trust" includes a provision that increases taxes,⁵⁵ which will inevitably generate opposition.⁵⁶ Nevertheless, lawmakers recognize the need to

⁴⁹ Social Security Benefits Fairness Act of 1996, H.R. 3835, 104th Cong. (1996); Social Security Benefits Fairness Act of 2001, H.R. 1464, 107th Cong. (2001).

⁵⁰ Social Security Benefits Fairness Act of 2009, H.R. 954, 111th Cong. (2009).

⁵¹ Social Security Family Protection Act, S. 1832, 104th Cong. (1996); Security Family Protection Act, S. 1370, 105th Cong. (1997).

⁵² Social Security Family Protection Act, S. 362, 108th Cong. (2003).

⁵³ Social Security 2100: A Sacred Trust, H.R. 5723, 117th Cong. (2021). The bill was originally introduced during a prior legislative session. *See* Social Security 2100 Act, H.R. 860 116th Cong. (2019).

⁵⁴ H.R. 5723 §§ 101, 112. Several benefit enhancements are temporary. *See, e.g., id.* §101(b) ("(F) With respect to monthly benefits payable for months in calendar years 2022 through 2026, this paragraph shall be applied by increasing by 3 percentage points each of the percentages specified in subparagraph (B)(ii) and in the table in subparagraph (D).").

⁵⁵ *Id.* § 201. More specifically, the proposal increases payroll taxes on individuals earning more than \$400,000/year. *Id.* For more about the payroll tax, see *infra* notes 72–74 and accompanying text.

⁵⁶ *See, e.g.,* Romina Boccia, *The Social Security 2100 Act is a Bad Deal for Workers*, CATO INST. (Aug. 25, 2022), <https://www.cato.org/blog/social-security-2100-act-bad-deal-workers>.

review the Social Security program to address the needs of its recipients, especially since the program has not been modified in decades.⁵⁷

As currently proposed, Social Security 2100 does not include a provision for a final month-of-death payout to deceased recipients despite offering long-term economic relief for survivors of deceased recipients.⁵⁸ The “Sacred Trust” enhances long-term “Social Security benefits for widows and widowers in two-income households so that they are not penalized for having two incomes,” which, in essence, means that “widows and widowers also receive more generous benefits.”⁵⁹ The improved benefit, however, is only received in the future after a surviving spouse applies to receive survivor’s benefits.⁶⁰ While increasing a payout to qualifying surviving spouses presumably improves their financial futures, a Social Security recipient’s death occasions immediate economic costs in the form of medical expenses from final care, funerals, and burials. To minimize the instantaneous financial challenges that often accompany death, a final distribution to recipients directly benefits surviving spouses by making more assets immediately available to them following a spouse’s death. The purpose of Social Security 2100 is laudable, but its omission of month of death benefits will leave some survivors and their families in the same financial bind experienced by survivors and their families since the inception of the Social Security program.

II. ASSESSING IMPEDIMENTS TO REFORMING SECTION 202

The political feasibility of reforming any aspect of Social Security may appear limited in today’s heated political climate, but Social Security 2100 has 202 co-sponsors (all Democrats) and is offered at a time when it is likely to affect an increasing proportion of the population.⁶¹ Census projections indicate that “the United States will experience considerable growth in its older population” between 2012 and 2050; the United States is an “aging nation.”⁶² Approximately

⁵⁷ *Id.*

⁵⁸ *See generally id.*

⁵⁹ *Social Security 2100: A Sacred Trust*, JOHN B. LARSON, <https://larson.house.gov/issues/social-security-2100-sacred-trust> (last visited Oct. 26, 2022); Lorie Konish, *House Democrats Call for Action on Social Security Reform. What That Could Mean for Your Benefits*, CNBC (Aug. 15, 2022), <https://www.cnbc.com/2022/08/15/what-democrats-call-for-social-security-reform-means-for-benefits.html>.

For the text of the provision, see H.R. 5723 § 105.

⁶⁰ SOC. SEC. ADMIN., PUBL’N NO. 05-10084, SURVIVORS BENEFITS (2022), <https://www.ssa.gov/pubs/EN-05-10084.pdf>.

⁶¹ H.R. 5723.

⁶² Jennifer M. Ortman, Victoria A. Velkoff & Howard Hogan, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU (May 2014), <https://www.census.gov/library/publications/2014/demo/p25-1140.html>.

79.1% of individuals between sixty-five and seventy-four years of age registered to vote in 2020, which represents the largest voting bloc among all age groups.⁶³ Soberingly, the individuals that constitute the largest voting bloc are at the greatest risk of Alzheimer's dementia.⁶⁴ Because Alzheimer's is the sixth leading cause of death in the country,⁶⁵ an increasing number of families will be confronted by the absence of a recipient's final Social Security payment. At some point, the confluence of voting demographics and economic forces will put the absence of month-of-death benefits in the spotlight and increase pressure to reform Section 202.⁶⁶ Under those circumstances, any proposed reform of Section 202 will need to address the monetary and administrative obstacles that have derailed past attempts to change the negative impact of Section 202.⁶⁷ The following sections describe three common obstacles to Section 202 reform: the financial cost of reform, the argument that the omission of final payment is balanced by the first payment, and the increased administrative burden of paying a month-of-death benefit to deceased recipients.

⁶³ *Share of People Registered to Vote in the United States in 2020, by Age*, STATISTA (Sept. 30, 2022), <https://www.statista.com/statistics/999919/share-people-registered-vote-age/>.

⁶⁴ ALZHEIMER'S ASS'N, 2022 ALZHEIMER'S DISEASE FACTS AND FIGURES: MORE THAN NORMAL AGING: UNDERSTANDING MILD COGNITIVE IMPAIRMENT 19 (2022), <https://www.alz.org/media/documents/alzheimers-facts-and-figures.pdf>.

⁶⁵ *Deaths From Alzheimer's Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 26, 2017), <https://www.cdc.gov/aging/publications/features/alzheimers-disease-deaths.html>.

⁶⁶ Importantly, Social Security 2100 could be modified to provide a month-of-death benefit to deceased Social Security recipients. The proposed 3% increase in all regular monthly distributions, for example, could be slightly reduced to fund month of death payments.

⁶⁷ As an alternative to legislative amendment, a reform effort could begin with litigation that challenges Social Security's withholding of payment for the month of death under the Fifth Amendment's Due Process and Takings Clauses. Under the current rule, a program participant loses a sum of money on an arbitrary basis because one cannot control the date of death. Furthermore, a program participant contributes to the trust fund during the participant's life but does not receive a payment for the month of death. Instead of a final payment that represents the accrued benefit for the month of death, the sum that would have been distributed to a deceased beneficiary as a last payment is withheld and subsequently distributed to other participants. However, federal courts have consistently held that an accrued benefit is not a property interest protected by the Fifth Amendment. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) ("We must conclude that a person covered by the Act has not such a right in benefits payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment."); *Mancari v. Berryhill*, 680 F. App'x 469, 470 (7th Cir. 2017) ("[A] person's expectation that he will receive Social Security benefits is not protected by the Takings Clause; those benefits 'may be altered or even eliminated at any time.'" (quoting *U.S. R.R. Bd. v. Fritz*, 449 U.S. 166, 174 (1980))); *Weems v. Comm'r of Soc. Sec. Admin.*, 2019 WL 1529196, at *5–6 (S.D. Ohio 2019) (rejecting claims that a reduction in the amount of money due under the Disability Insurance Benefits program under the Social Security Act's Windfall Elimination Provision violated the Fifth Amendment's Due Process and Takings Clauses).

A. *Monetary Cost of Reform and the Risk of Insolvency*

Like almost any federal spending program, one fundamental objection to including a month-of-death check in the Social Security payment schedule is that doing so would be too costly. Past estimates published by the Congressional Research Service indicate that distributing a full benefit for the month of death without any conditions regarding the time of death would cost \$1.6 billion annually (based upon 2002 data).⁶⁸ Similarly, providing a 50% payment to beneficiaries dying during the first half of the month and a full benefit for beneficiaries dying during the last half of the month would cost \$1.2 billion per year (using the same 2002 data).⁶⁹ More broadly, retired workers and dependents will receive Social Security payments that equal a total of \$1.2 trillion in 2022, which constituted a whopping 21% of the federal government's budget for that year.⁷⁰ In fact, Social Security expenditures accounted for a greater proportion of the federal budget in 2022 than almost any other federal government program (including defense) except for health insurance programs like Medicare and Medicaid.⁷¹ Given its substantial slice of the federal budget, increasing Social Security's annual budgetary allocation to fund month-of-death benefits will inevitably wave financial red flags.

Recent bleak estimates regarding the future solvency of the Social Security program can only heighten financial concerns about funding month-of-death benefits for deceased Social Security beneficiaries. Social Security benefits are paid from a trust funded by payroll taxes; current employees and employers each contribute 6.2% of annual wages to a trust fund that manages distributions to current program beneficiaries.⁷² According to the SSA's 2021 Fiscal Report, the trust fund "reserves are projected to be depleted in 2034."⁷³ The reasons for the predicted shortfall include a drop in the birth rate post-1965, longer lives of retirees, and the retirements of Baby Boomers.⁷⁴ Regardless of the causes,

⁶⁸ CONG. RSCH. SERV., SOCIAL SECURITY BENEFITS ARE NOT PAID FOR THE MONTH OF DEATH 2 (2011), <https://crsreports.congress.gov/product/pdf/RS/93-792#:~:text=Section%20202%20of%20the%20Social,in%20the%20law%20since%201939> (referencing decade-old estimates based upon "unpublished date for 2002").

⁶⁹ *Id.*

⁷⁰ *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. FOR BUDGET & POL. PRIORITIES (July 28, 2022), <https://www.cbpp.org/research/federal-budget/where-do-our-federal-tax-dollars-go>.

⁷¹ *Id.*

⁷² *How is Social Security Financed?*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> (last visited Oct. 26, 2022) (explaining that the contributions are made up to a taxable maximum cap).

⁷³ SOC. SEC. ADMIN., SSA'S FY 2021 AGENCY FINANCIAL REPORT: MANAGEMENT'S DISCUSSION AND ANALYSIS 28 (2021), <https://www.ssa.gov/finance/2021/Managements%20Discussion%20and%20Analysis>.

⁷⁴ *Id.*

“Social Security’s financing is not projected to be sustainable over the long term with the tax rates and benefit levels scheduled in current law.”⁷⁵ Given that ominous forecast, any proposed reform that adds dollars to the expense side of the Social Security ledger will face stern opposition because of uncertainty about the future viability of the program as a whole.

The recent projection of insolvency in 2034 may be stark, but “[w]e’ve long heard warnings that the Social Security program . . . could one day run out of money.”⁷⁶ The *Daily Press* in Newport News, Virginia, for example, informed its readers in 1975 that “the Social Security system will run out of money by 1980 or a little later,”⁷⁷ which obviously was a tad bit off the mark. For its part, the SSA has repeatedly warned that the Social Security trust fund would run out of money in its recent fiscal reports. More specifically, the SSA’s current prediction of insolvency in 2034 does not substantially differ from its 2016, 2017, 2018, 2019, or 2020 projections that predicted insolvency in 2034 or 2035.⁷⁸ While insolvency in the year 2034 suggests that the program is at bankruptcy’s door, the consistency of the SSA’s last six projections suggests that there is “a problem, but not a crisis.”⁷⁹ To that end, policymakers routinely recognize the risks to the Social Security system and make necessary adjustments; “the program has always paid full benefits.”⁸⁰ So rather than signaling soon-to-be financial ruin, the recent prognosis offers “a good time to step back and try to make Social Security more effective” by reassessing

⁷⁵ *Id.*

⁷⁶ Paula Span, *Social Security Runs Short of Money, and Ideas Fly on How to Repair It*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/health/social-security.html>.

⁷⁷ Donald Lambro, *Your Social Security*, DAILY PRESS (Newport News, Va.), Apr. 6, 1975, at A6. Interestingly, this specific prediction can be found in newspapers from around the country. *See, e.g.*, UPI, *Hard Times for Social Security*, ROCHESTER DEMOCRAT & CHRON., Apr. 6, 1975, at 14A; Donald Lambro, *Social Security Faces Snowballing Deficits*, CEDAR RAPIDS GAZETTE, Apr. 6, 1975, at 4A; UPI, *Social Security in Financial Trouble*, NEW MEXICAN, Apr. 6, 1975, at A5.

⁷⁸ SOC. SEC. ADMIN., SSA’S FY 2016 AGENCY FINANCIAL REPORT: MANAGEMENT’S DISCUSSION AND ANALYSIS 36 (2016), <https://www.ssa.gov/finance/2016/Complete%20MD&A.pdf> (predicting 2034); SOC. SEC. ADMIN., SSA’S FY 2017 AGENCY FINANCIAL REPORT: MANAGEMENT’S DISCUSSION AND ANALYSIS 33 (2017), <https://www.ssa.gov/finance/2017/Complete%20MD&A.pdf> (estimating 2034); SOC. SEC. ADMIN., SSA’S FY 2018 AGENCY FINANCIAL REPORT: MANAGEMENT’S DISCUSSION AND ANALYSIS 31 (2018), <https://www.ssa.gov/finance/2018/Complete%20MD&A.pdf> (estimating 2034); SOC. SEC. ADMIN., SSA’S FY 2019 AGENCY FINANCIAL REPORT: MANAGEMENT’S DISCUSSION AND ANALYSIS 32 (2019), <https://www.ssa.gov/finance/2019/Complete%20MD&A.pdf> (projecting 2035); SOC. SEC. ADMIN., SSA’S FY 2020 AGENCY FINANCIAL REPORT: MANAGEMENT’S DISCUSSION AND ANALYSIS 38 (2020), <https://www.ssa.gov/finance/2020/Complete%20MD&A.pdf> (estimating 2035).

⁷⁹ *See* Span, *supra* note 76.

⁸⁰ *Id.*

outdated features of a program that serves almost 90% of Americans over sixty-five years of age.⁸¹

B. Rough Balance in the System

Opponents of reform not only argue that distributing a final payment for the month of death is too costly, but also that the existing payout framework provides a “rough balance in the system for not paying benefits for the month of death.”⁸² Although a beneficiary does not receive a check for month-of-death benefits, the beneficiary receives a check for the first month of eligibility regardless of when eligibility commences during that first month.⁸³ An individual who becomes entitled to a first distribution during the last week of May, for example, will receive a first benefit check in June that represents the accumulated benefits for the entire month of May. If that individual dies during the last week of May in a subsequent year, the individual will not receive a benefit check for the month of May in June because the individual failed to survive the entire month of May. In theory, then, the first month’s overpayment is counterbalanced by the last month’s nonpayment, thereby achieving a “rough balance in the system.”

The balance between paying benefits for the first month of eligibility and withholding a month-of-death benefit might be described as “rough,” but only in the broadest sense of the word. The “rough balance” justification breaks down as beneficiaries live longer because the theoretical equipoise in the system assumes a constant payment throughout the entire payment period. The dollar value of benefit payments from a beneficiary’s first to last payment, however, is not static. To the contrary, payments are subject to annual increases “to offset the corrosive effects of inflation on fixed incomes.”⁸⁴ The annual modifications of benefits payments, called Cost-of-Living Adjustments (“COLAs”), are “based on the annual increase in consumer prices” and increase a prior year’s benefit payment by a specific percentage determined by the SSA.⁸⁵ An individual who became eligible in 2009 for a monthly benefit payment of \$1011.40, the average payment during that year, will receive \$1296.21 in 2022

⁸¹ See *id.* (quoting Richard Johnson of the Urban Institute).

⁸² CONG. RSCH. SERV., *supra* note 68, at 2.

⁸³ *Id.*

⁸⁴ *The Story of COLAs*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html#colas> (last visited Oct. 15, 2022).

⁸⁵ *Id.*

after applying the relevant COLAs to the benefits for the intervening years.⁸⁶ Because today's sixty-five-year old person can expect to live approximately another twenty years,⁸⁷ the cumulative effect of COLAs increases the disparity between the first and last payment and skews any possible balance in the system.

In the real world, the “rough balance in the system” is nowhere to be found as survivors grapple with the absence of month-of-death benefits or a SSA demand to return deposited monies. The family of one beneficiary who passed away a mere four hours and fifty-six minutes before the end of the month questioned why their loved one was ineligible to receive payment for the final month of life because the deceased had

lived a quiet life after [serving in] the war—he obeyed the law, paid his taxes, voted, gave to those less fortunate than he, and rarely had an extra dollar after his families [sic] needs were met. In many ways the country [he] had honored and fought for cheated him in life, and now, it has repaid his loyalty by also cheating him in death.⁸⁸

More vividly, another survivor deemed mandatory return of Social Security payment deposited after the month of a beneficiary's death as a “ghoulish practice.”⁸⁹ For survivors who must manage a deceased beneficiary's estate, mandatory repayment is an inexplicable post-mortem debit that is far outweighed in the balance by the deceased's contributions during life.

C. Administrative Expenses

While forwarding a month of payment is a direct cost because of the transfer of funds, administrative expenses represent indirect costs that have impeded past reform efforts. According to supporters of the current policy, “there is little appreciation for the administrative difficulties (and potential costs) involved in determining who should receive the deceased beneficiary's benefits for the month of death.”⁹⁰ Prior to issuing a final payment for the month of death, the SSA would have to determine who should receive the payment and split the payment among multiple takers if necessary.⁹¹ Determining the appropriate

⁸⁶ The calculation is as follows: 2009—\$1011.40, 2010—\$1011.4(0%) = \$1011.40, 2011—\$1011.4(3.6%) = \$1047.81, 2012—\$1047.81(1.7%) = 1065.62, 2013—\$1081.6(1.5%) = \$1099.98, 2014—\$1099.98(0%), 2015—\$1099.98.

⁸⁷ *Fact Sheet—Social Security*, *supra* note 26; *Actuarial Life Table*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/STATS/table4c6.html> (last visited Oct. 30, 2022) (using 2017 data).

⁸⁸ 142 CONG. REC. E1305 (daily ed. July 17, 1996) (Statement of Rep. Holden) (alterations in original).

⁸⁹ See 143 CONG. REC. S11765 (daily ed. Nov. 5, 1997) (Statement of Senator Stowe, n.10).

⁹⁰ CONG. RSCH. SERV., *supra* note 68, at 2.

⁹¹ *Id.*

taker of a final distribution would be a “labor-intensive process” that would require expenditures on par with processing initial applications for benefits.⁹² In other words, the processes needed to identify the beneficiary of a final month-of-death payment would consume time, energy, and money that would be better devoted to other agency tasks.

Twenty-first century concerns about the administrative costs of identifying the takers of a beneficiary's month-of-death benefits are puzzling because current law pays a benefit to the probable recipients of a month-of-death benefits payment. At present, the SSA provides a one-time lump-sum death payment of “an amount equal to three times” a deceased beneficiary's base insurance amount “or an amount equal to \$255, whichever is smaller,” to specific survivors of a deceased beneficiary.⁹³ After the SSA determines the appropriate taker(s) of the one-time lump-sum death benefit, the cost of identifying the taker(s) of a month-of-death payment is sunk in many, and probably most, cases because the takers are identical. The \$255 one-time lump-sum benefit is forwarded to surviving spouses or children and those are the individuals most likely to receive a month-of-death benefits payment.⁹⁴ Presumably, the SSA would not duplicate the process of identifying payees of month-of-death benefits after identifying takers of the lump-sum death benefit or vice versa. Thus, any added administrative expense is likely to be *de minimis* if a month-of-death payment is to be transferred directly to a beneficiary's survivors.

Any objection to reforming Section 202 based upon the administrative costs of identifying a recipient of month-of-death benefits is further diminished by reference to the original Social Security Act of 1935. Under Section 203 of the 1935 Act, the SSA was required to forward any amount owed because of underpayment to a deceased beneficiary's “estate.”⁹⁵ Indeed, Section 205 of the original 1935 Act is entitled “Amounts of \$500 Or Less Payable to Estates.”⁹⁶ If the administrative obstacle to reform is identifying survivors to receive a deceased beneficiary's last benefits check, then one solution to minimize the cost would be to advance a month-of-death payment to a deceased beneficiary's estate as prescribed in 1935. Given the advances in technology, distributing a

⁹² *Id.*

⁹³ 42 U.S.C. § 402(i) (2018); *If You Are the Survivor*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/survivors/ifyou.html> (last visited Oct. 29, 2022).

⁹⁴ *But see* CONG. RSCH. SERV., *supra* note 68, at 2 n.4 (“If a lump-sum benefit is payable under current law, the process of determining the proper payee[s] would be less difficult. Other cases would require more thorough investigation.”). However, no explanation of this increased difficulty is provided. *See id.*

⁹⁵ Social Security Act of 1935, Pub. L. No. 74-271, § 203, 49 Stat. 620, 623-24.

⁹⁶ *Id.*

final payment to a beneficiary's estate should be less, and certainly no more, costly in the twenty-first century than it was before World War II.

III. MODIFYING THE SSA'S MONTH-OF-DEATH RULE

Since President Roosevelt signed the original Social Security Act into law in 1935, Congress has amended the Act on multiple occasions to meet the public's evolving needs. For example, the Social Security Amendments of 1954 created a disability insurance program and a 1965 amendment offered health care insurance to individuals aged sixty-five years and older, which we know today as Medicare.⁹⁷ Despite these important updates, the SSA rule that prohibits paying month-of-death benefits has defied modification for more than eight decades. Instead of the "rough balance" between the first month's overpayment and the month of death's nonpayment, the SSA payment scheme should better correlate benefits with days of eligibility. Recognizing the stumbling blocks that impeded prior reform initiatives, altering Social Security's payment scheme by prorating benefits must address the financial cost and administrative burdens associated with the proposed change. The following sections highlight the feasibility of prorating first and last month payments, the manageable cost of prorated payments, and the limited administrative burden of reform.

A. *Prorating First and Last Month Payments*

Instead of paying a month-of-death benefit based upon whether a beneficiary dies during the first or last half of a month, which involves overpayment unless death occurs on the fifteenth or last day of a month,⁹⁸ a twenty-first century statutory reform should fine-tune the nexus between distributions and eligibility. To calibrate the payment schedule, a final distribution for month-of-death benefits could be prorated according to the dates of eligibility and cessation. The first benefit check would represent benefits accruing from the first day of eligibility through the last day of the first month of eligibility. An individual who becomes eligible on the eighth day of the month would receive a payout for the remaining days of the first month of eligibility, which would be 20/28 (or 21/29 during Leap Year), 22/30, or 23/31 of a full month's benefits payment. Thereafter, each monthly distribution would amount to a full month's payment for each full month of the beneficiary's life. At the beneficiary's death, the SSA

⁹⁷ *Historical Background and Development of Social Security*, *supra* note 16.

⁹⁸ *See supra* notes 82–87 and accompanying text. A half or full benefit payout for the month of death if beneficiary dies on the third or the sixteenth of a month seems unjustified because such payments represent overpayments. In the former case, a deceased beneficiary would receive twelve days of benefits after death. In the latter, a beneficiary would receive fourteen or fifteen days of post-mortem benefits.

would distribute a payment representing the benefits accrued during the proportion of the month that the beneficiary survived thereby retaining eligibility. If a beneficiary died on the eighth day of a month, the SSA would forward 8/28 (8/29), 8/30, or 8/31 of a full benefits payment to the beneficiary's survivors or estate. Compared to the "rough balance" offered by the current payment scheme, prorating payments on the front and back end of a beneficiary's eligibility better reflects the actual sums owed to a beneficiary.

Beyond the numbers on paper, prorating a month-of-death check is likely to generate less animus in the minds of survivors as compared to the blunt force mechanism of returning all benefits for a beneficiary's final month of life. If the SSA deposits a check for full month of death benefits prior to receiving notice of a beneficiary's death, survivors are likely to want to keep any deposited monies to pay a deceased beneficiary's debts. But, once informed that a portion of the money must be returned, survivors will be more apt to understand a rule that requires them to return money that exceeds the actual amount owed to the beneficiary—even if begrudgingly—as compared to refunding all deposited money under Section 202.⁹⁹ Few, if any, survivors comprehend the necessity or fairness of forfeiting an entire month of benefits simply because an individual failed to survive the last "0.0038314 percent" of the month.¹⁰⁰

B. Cost of Prorated Payments

Programmatic change that increases spending should be advanced with caution, but a final payment for the month of death is unlikely to hasten the demise of the program because any added expense represents a fraction of the total outlay for Social Security. The Congressional Research Service's estimate that a final full payment for the month of death would increase spending by \$1.6 billion represented 0.4% of the estimated expenses of the trust fund in 2002.¹⁰¹ Extrapolating that data to the modern day, \$1.6 billion in 2002 is approximately

⁹⁹ Overpayments and underpayments are addressed under current Social Security regulations. See 42 U.S.C. § 404 (2018). Overpayment often involves SSI benefits, but retirement benefits can be reduced to satisfy an overpayment debt. See SOC. SEC. ADMIN., PUBL'N NO. 05-10098, OVERPAYMENTS (2022), <https://www.ssa.gov/pubs/EN-05-10098.pdf> ("[W]e will withhold the full amount of your benefit each month, unless you request a lesser withholding amount and we approve your request.").

¹⁰⁰ See 142 CONG. REC. S5946 (daily ed. June 6, 1996) (statement of Sen. Snowe).

¹⁰¹ *Fast Facts & Figures About Social Security, 2002*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2002/fast_facts02.html (last visited Oct. 15, 2022). The percentage was calculated by dividing the estimated increase associated with paying a benefit for the month of death by the estimated outgoing amount from the trust fund for 2002. *Id.* The calculation is 1.6 billion/393.7 billion, which equals 0.4%. *Id.*

\$2.5 billion in 2022,¹⁰² which would represent approximately 0.3% of the total benefit disbursements from today's Social Security trust fund.¹⁰³ Without question, these quick and dirty estimates are imprecise. Nevertheless, adding a last payment for the month of death is unlikely to add a significant percentage to the annual amount of Social Security expenditures.

Social Security's feared financial crunch in 2034 may generate opposition to month-of-death benefits even if the additional cost is fractional; however, the SSA has regularly identified remedial measures that could be implemented to avoid depleting Social Security's trust fund. The SSA has suggested that the government could modify the employer/employee tax structure of the program, reduce expenditures elsewhere in the federal budget, or raise taxes to counter any future monetary shortfall.¹⁰⁴ Some of the proposals, such as raising taxes, are likely to be political dynamite, but others might receive a warmer public reception. Public and political sentiment might, for example, support curtailing benefits for high-wage earners,¹⁰⁵ which would preserve assets for those in greater need or fund a month-of-death payment. Furthermore, the taxable maximum cap for Social Security, which subjects only the first \$147,000 of an individual's annual income to Social Security taxes, might be worth revisiting.¹⁰⁶ Capping income subject to Social Security tax, in effect, decreases a high-income earner's effective tax rate; therefore, "the burden of paying for Social Security rests on those who make the least."¹⁰⁷ In the end, Congress has an array of tools at its disposal to plan a sustained future for the Social Security program that includes a month-of-death benefits payment.

¹⁰² See *Inflation Calculator*, INFLATION TOOL, <https://www.inflationtool.com/us-dollar/2002-to-present-value?amount=1600000000&year2=2022&frequency=yearly> (last visited Oct. 15, 2022).

¹⁰³ SOC. SEC. ADMIN., FY 2021 FINANCIAL REPORT: FINANCIAL SECTION 45 (2021), <https://www.ssa.gov/finance/2021/Financial%20Section.pdf>. The disbursements from the trust fund were included on the SSA's FY 2021 report. *Id.* The amount from the table equaled \$986,398 million, and the calculation was \$2.5 billion divided by \$986,398 million. *Id.*

¹⁰⁴ *Id.* at 94-96.

¹⁰⁵ See Span, *supra* note 76 ("Money-saving measures could include reducing benefits for high earners and trimming the number of years that workers collect benefits by raising eligibility ages."); see also, e.g., Stuart M. Butler, Opinion, *It's Time to End Social Security for the Rich*, BROOKINGS (Apr. 5, 2016), <https://www.brookings.edu/opinions/its-time-to-end-social-security-for-the-rich/>.

¹⁰⁶ *Why Do High-Income Earners Stop Paying the Social Security Payroll Tax?*, CTR. FOR ECON. POL'Y & RSCH., <https://cepr.net/calculator/when-do-high-income-earners-stop-paying-the-social-security-payroll-tax/> (last visited Oct. 15, 2022).

¹⁰⁷ *Id.*

C. Administration Burden

For the last thirty-three years, Social Security's administrative expenses have been less than 1% of total trust fund expenditures—and transferring a final month-of-death payment is unlikely to increase that percentage to any significant degree. In fact, distributing a final benefits payment to a beneficiary may involve less cost than forwarding survivors' benefits to spouses, children, or a decedent's estate because the check can be deposited directly into a deceased beneficiary's bank account without identifying survivors.¹⁰⁸ As a general matter, the SSA receives notice of a beneficiary's death in the form of a Statement of Death, Form SSA-721, filed by a funeral director.¹⁰⁹ Once notice of death is received, the SSA either stops a benefits payment before distribution or notifies a bank if payment has already been made, after which the bank will return any benefits linked to a beneficiary's month of death.¹¹⁰ As an alternative to standard practice, the SSA could simply deposit a prorated check in a deceased beneficiary's bank account and take no further action. The final prorated check would represent the amount of money owed to a deceased beneficiary for month-of-death benefits; therefore, returning deposited money is unnecessary in most cases. In short, depositing a prorated check in a deceased beneficiary's account simply continues the status quo delivery mechanism thereby avoiding the administrative hassle of returning money to the SSA.

Like the continuity offered by depositing a final prorated check in a deceased beneficiary's bank account, applying a prorated schedule should not significantly add to the SSA's administrative costs in the form of computational expenses. Indeed, the SSA currently performs a multitude of calculations throughout the year. Beneficiaries enter the program at different times because eligibility varies by birthdate. As a result, the SSA is constantly performing initial base payment computations based upon a factors like lifetime earnings,

¹⁰⁸ *Social Security Direct Deposit*, SOC. SEC. ADMIN., <https://www.ssa.gov/deposit/index.htm> (last visited Oct. 30, 2022) (“Federal law mandates that all Federal benefits payments—including Social Security and Supplemental Security Income benefits—must be made electronically.”). A decedent's bank account is often left open for post-mortem deposits and subsequent retrieval by the SSA pursuant to the mandatory return rule. See Rachel Hartman, *How to Report a Death to Social Security*, U.S. NEWS (June 9, 2021), <https://money.usnews.com/money/retirement/social-security/articles/how-to-report-a-death-to-social-security> (quoting financial planning consultant David Freitag).

¹⁰⁹ SOC. SEC. ADMIN., OMB NO. 0960-0142, FORM SSA-721, STATEMENT OF DEATH BY FUNERAL DIRECTOR (2021), <https://www.ssa.gov/forms/ssa-721.pdf>. For information regarding the role of funeral directors and homes, see *Facts for Funeral Homes*, SOC. SEC. ADMIN. (July 13, 2017), <https://www.ssa.gov/phila/PDF/funeralhomes.pdf>.

¹¹⁰ See SOC. SEC. ADMIN., PUBL'N NO. 05-10077, *supra* note 7, at 11. If the money has been spent, a deceased beneficiary's account will show a negative balance.

timing of retirement, and employer pension benefits.¹¹¹ Furthermore, the SSA applies COLAs to increase all individual base payments on an annual basis based upon the increase in Consumer Price Index.¹¹² In conjunction with the determination of the initial payment or a monthly base payment after applying the COLA, the prorated payment formula would inject a total of two operations at two distinct times into the system. The first prorated payment tacks an additional fractional multiplier to the determination of the initial base payment for the first month of eligibility while a similar fractional operation is utilized for the month-of-death payment. Given the assembly line of computations routinely conducted by the SSA, adding two fractions to the initial and final payment calculus should neither be too great a challenge nor cost prohibitive for the SSA.¹¹³

Assuming, *arguendo*, that prorating payments increases administrative expense, the SSA is well-suited to minimize any added administrative burden because it has successfully managed costs associated with newly developed programs in the past. During the 1970s, state-administered welfare programs were “complex and inconsistent, with as many as 1,350 administrative agencies involved and payments varying more than 300% from State to State.”¹¹⁴ To eliminate jurisdictional variation, Congress created the Supplemental Security Income (SSI) program to provide individuals who were elderly, blind, or disabled with cash payments to pay for food, housing, and shelter.¹¹⁵ Instead of creating a new agency to steward the congressional mandate, Congress housed the new program within the SSA “because of its reputation for successful administration of the existing social insurance programs.”¹¹⁶ Furthermore, the SSA had a “nationwide network of field offices and large-scale data processing and record-keeping operations;”¹¹⁷ therefore, it was the “logical choice” to

¹¹¹ SOC. SEC. ADMIN., PUBL’N NO. 05-10070, YOUR RETIREMENT BENEFIT: HOW IT IS FIGURED (2022), <https://www.ssa.gov/pubs/EN-05-10070.pdf>. For the specific calculation of the insurance amount, see 42 U.S.C. § 415 (2018).

¹¹² *History of Automatic Cost-of-Living Adjustments*, SOC. SEC. ADMIN., <https://www.ssa.gov/pressoffice/automatic-cola.htm> (last visited Oct. 15, 2022). The COLA for 2023 is 8.7%. See *Cost-of-Living Adjustment (COLA) for 2022*, SOC. SEC. ADMIN., <https://www.ssa.gov/cola/> (last visited Oct. 30, 2022).

¹¹³ While a possibility exists that the SSA will deposit a full payment before notice of a beneficiary’s death and trigger the necessity of returning funds, the beneficiary’s account will retain a fractional payment accrued during life, which can subsequently be used to satisfy the beneficiary’s debts.

¹¹⁴ See *Historical Background and Development of Social Security*, *supra* note 16.

¹¹⁵ *Supplemental Security Income Home Page—2022 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/> (last visited Oct. 30, 2022).

¹¹⁶ *Historical Background and Development of Social Security*, *supra* note 16.

¹¹⁷ *Id.*

merge the spectrum of state initiatives under the federal roof.¹¹⁸ If the SSA could successfully integrate three million persons on state welfare programs into the SSI program in the 1970s, it should be able to handle modern administrative details associated with prorating Social Security benefits according to the dates of eligibility and death. To that end, the administrative costs of prorating distributions could be less than those associated with the SSI conversion because prorating payments involves adjusting two payments and not a new administrative framework to be developed from the ground floor.

CONCLUSION

In August 1939, President Roosevelt remarked that the newly minted amendments to the 1935 Social Security Act represented a “tremendous step forward” by providing “family security instead of only individual old-age security.”¹¹⁹ Indeed, the 1939 Amendments “transformed Social Security from a retirement program for workers into a family-based economic security program.”¹²⁰ Eighty-three years later, the “rough balance” between the first and last payments contemplated by the 1939 Amendments may still promote family security during a beneficiary’s life, but that security dissipates upon a beneficiary’s death. Withholding a month-of-death benefits payment not only threatens financial hardship upon a deceased beneficiary’s survivors, but also imposes a mental tax as survivors try to satisfy the reimbursement requirement. Rather than withholding a final payment *in toto*, the SSA should prorate the first and last benefits payments to reflect the amounts accrued at the beginning and end of a beneficiary’s eligibility. Prorating first and last benefits payments not only positions the “rough balance” nearer equipoise, but also better promotes the “family security” contemplated by the 1939 Amendments.

¹¹⁸ *Id.*

¹¹⁹ *FDR’s Statements on Social Security*, *supra* note 35.

¹²⁰ *Legislative History—1939 Amendments*, *supra* note 30.