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FROM THE MARGINS TO PACESETTING: THE PLACE OF THE ELDERLY IN U.S. LEGAL HISTORY FROM A HISTORIAN'S PERSPECTIVE

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From the earliest settlement of the New World until the Civil War, elderly men and women constituted a miniscule proportion of the white population. Not that the elderly were invisible; Americans adopted "Uncle Sam," complete with whiskers and a funny costume, as their national symbol in the early years of the Republic. Still, most older people found themselves at the margins of society. There were few age-specific laws and conventions that regulated the behavior or the rights of the old ones.

Times have changed. Currently, those over the age of eighty-five have represented the fastest growing segment of the populace.[1] Two-thirds of all gains in life expectancy, in fact, occurred during the twentieth century.[2] Were demography destiny, this phenomenon alone would account for the recent interest in elder law, not to mention the proliferation of age-related regulations and entitlements. Other factors have made the elderly pacesetters as the United States' population as a whole grows older. With the invention of retirement, and subsequently the creation of part-time employment after retirement, a welter of pension options in the public and private sector has arisen, all of which are subject to legal scrutiny. Advocates lobby for the rights of grandparents to visit and raise their grandchildren. Old-age interest groups press for increases in age-based entitlements. Age is one category used to

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1. FED. INTERAGENCY FORUM ON AGING RELATED STATISTICS, OLDER AMERICANS 2000: KEY INDICATORS OF WELL-BEING (2000), *available at* http://www.agingstats.gov/chartbook2000/population.html.

2. W. ANDREW ACHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 182 (1986) [hereinafter ACHENBAUM, SOCIAL SECURITY].

determine who receives access to medical and social services. Controversies over the right-to-die are a major concern of senior citizens and their families since most people today die after attaining the biblical age of three-score and ten.

This essay reconstructs the history of old age in the United States with an eye to the passage and implementation of laws affecting the place of the elderly in the marketplace, family circle, and other institutions. It surveys the privileges and responsibilities of older Americans as senior citizens. The narrative makes two points. First, there have always been laws that have benefited and constrained aging Americans, but for most of the United States' history, "old age" *per se* was not a specific criterion. Second, just as the most dramatic demographic changes have occurred in recent decades, so too has the proliferation and expansion of laws affecting the elderly, often with paradoxical consequences.

LITTLE PREFERENTIAL TREATMENT OF THE ELDERLY BEFORE THE CIVIL WAR

Most of the people who crossed the Atlantic to British territory were adults in their prime accompanied by their children. Unless they had virtually nothing to lose, elderly men and women usually were unwilling to abandon their property and neighbors. The risks were too great. Some did venture forth, however. At sixty-four, James Chilton was the oldest person on the Mayflower; a tailor by trade, Chilton was accompanied by his wife and thirteen-year-old daughter.[3] Two other men, Moses Fletcher, a blacksmith, and William Brewster, a printer, were in their mid-fifties.[4] The next oldest was John Tilley, age forty-nine.[5] Most of the adult passengers were in their twenties and thirties.[6] Two three-year-olds made the voyage, and Oceanus Hopkins was born on board.[7]

Similar age-specific migration patterns persist throughout

3. Patricia Scott Deetz & James F. Deetz, *The Plymouth Colony Archive Project, Passengers on the Mayflower: Ages & Occupations, Origins & Connections*, (2000) http://etext.lib.virginia.edu/users/deetz/Plymouth/Maysource.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

the colonial era. It was men in their prime by and large who received permission from the Crown to lead groups who sought economic opportunities and freedom to worship as they chose. Only a few older men and women were among the adventurers who founded Jamestown or joined William Penn and Lord Calvert in escaping religious persecution. Unwilling migrants also tended to be young. Slave traders put a premium on vigor, not on years of experience; hence the price placed on most Africans exported to British North America was based on their capacity to work long hours and to breed many children.

Some migrants, disappointed that they did not find gold-lined streets, shortly returned to England. Those who remained grew older with the sheer passage of years if they were lucky enough to survive bouts of Malaria, attacks by Native Americans, extremes in temperature, and the primitive conditions. Life expectancy at age twenty in the New World, actually, was not much different from that in Britain and other northern European countries in the seventeenth and eighteenth centuries.[8] Even so, according to the New Republic's first census in 1790, the median age of the population was sixteen.[9] The British settlements that eventually formed the United States literally and figuratively were dominated by the young and middle-aged.

Because the elderly constituted only one to two percent of the population, they played an important but marginal role in the British colonies and during the early years of the Republic.[10] The majority engaged in agricultural pursuits. When physical labor became too arduous, elders kept the books and managed their sons and hired hands. In an overwhelmingly rural nation, age was associated with experience. So Father Simkins regularly instructed readers of the *Farmer's Almanac* where to plant crops and how to care for farm implements, although the advice was

8. *See* W. ANDREW ACHENBAUM, OLD AGE IN THE NEW LAND: THE AMERICAN EXPERIENCE SINCE 1790, 2 (1978) [hereinafter ACHENBAUM, OLD AGE].

9. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, 19 ("Median falls in the open-ended age group, 16 years and over, which includes 50.3 percent o the white male population.").

10. Barry Edmonston, *Using U.S. Census Data to Study Population Composition*, 77 N.D. L. REV. 711, 739 (2001).

actually penned by a young man.[11]

Similarly, older men generally continued to practice their chosen professions until they died. The virtues and wisdom ascribed to advancing years enabled them to keep their pulpits and teaching posts and to attract legal clients. Some elders were known for their accomplishments in their trades, others for their business acumen. The aged played a role in politics that far exceeded their voting bloc. The "young" men of the revolution included senior citizens such as Benjamin Franklin, Thomas Jefferson, and John Adams who spoke out on political issues long after they left the White House. Septugenarians served as chief wardens of the ports of Philadelphia and Boston and as key officials in South Carolina.[12] As late as 1839, eleven of the twenty-one highest ranking naval officers were over the age of sixty.[13]

White men had more options than other people in late life. Older women rarely worked for money; they tended to manage households. Worn out slaves were sometimes "freed" to fend for themselves, but generally they were protected by their kin. Black elders served leadership roles in the Black community.

Superannuation on grounds of health generally determined employment status in late life. There were a few exceptions. Some states followed a 1780 constitutional precedent from Massachusetts that required justices of the peace to renew their licenses every seven years; this measure was designed to guard against incompetency, not to discriminate against age.[14] Seven states did impose upper age limits on holding judicial office.[15] New York lawmakers, recalling the difficulties when its chief justice turned senile on the bench, prescribed in its 1777 constitution that no one over the age of sixty could serve on the state's supreme court or be the chief judge at the county level.[16] New Hampshire, in 1792,[17] Connecticut, in 1819,[18] and Maryland,

11. ACHENBAUM, OLD AGE, *supra* note 8, at 19.

12. *Id.*

13. *Id.* at 20.

14. *See*. FRANCIS NEWTON THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1906 (1909).

15. ACHENBAUM, OLD AGE, *supra* note 8, at 21.

16. THORPE, *supra* note 14, at 2647.

17. *Id.* at 2486.

in 1851, followed suit, though they set the ceiling at seventy years old.[19] When they were admitted to statehood, Alabama, in 1819,[20] Missouri, in 1820, and Maine, in 1820, did likewise.[21] These are the only instances of mandatory retirement in the United States prior to the Civil War, and many of these measures were repealed. In short, elders had to work as long as they could in order to survive. At the time, there were no known provisions designed to assist those who became disabled or incapacitated in the second half of life. Old-age pensions did not exist. The aged were not yet designated as a disadvantaged work-force category.

Prior to the Civil War, older people in need were not treated differently than younger men and women who were unable to care for themselves. Migrants to the British territories across the Atlantic incorporated the provisions of the Elizabethan Poor Law of 1601, which subsequently was revised in minor ways by colonial legislatures. Parents were responsible for caring for their children and grandchildren. Children were to provide for their needy parents and grandparents. If families lacked the means to assist kin, the local community was to step in and care for those who were deemed deserving of care under the law. The Elizabethan Poor Law imposed punitive measures: vagrants were warned away from villages so as not to become a burden on residents; able-bodied persons unwilling to work could be put in the stockade; and masters were to discipline their slaves or indentured servants if they did not conform to communal expectations.

Private initiatives complemented local laws. Members of the elite often left money for orphans, faithful servants, or some community project. The Order of Odd Fellows, a British society, opened its first lodge in the United States in 1819 to assure benefits for those who could not work regularly;[22] lodges excluded Blacks from membership. Neighbors generally assisted the "worthy" elderly poor in their midst by providing them with food and firewood or boarding them in someone's

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18. *Id.* at 543.

19. *Id.* at 1727-28.

20. *Id.* at 107.

21. THORPE, *supra* note 14, at 2159.

22. Sovereign Grand Lodge, Independent Order of Odd Fellows, http://www.ioof.org/odd_fellows.htm (last visited Aug. 16, 2005).

home.

In due course, communities levied taxes to pay for public assistance while taking steps to limit their liability. In 1642, the Plymouth Colony adopted a tax schedule and began to refine with greater stringency its definition of "outsiders" who potentially might become public charges.[23] New York stipulated that strangers could only remain in a town for one night before their presence was reported to constables.[24] Newport, New York City, and Boston required sea captains to furnish passenger lists to authorities.[25] In the wake of the Glorious Revolution of 1688, colonial governments endeavored to systematize municipal and county rules. A 1692 act passed by the Massachusetts Bay Province, modeled on the 1601 Elizabethan Poor Law, made families legally and morally responsible for giving assistance to poor and infirm members of their network.[26] By 1860, eighteen of the thirty-three states had adopted similar measures, although none of these laws specifically identified the needs of the aged.[27]

Some jurisdictions between 1607 and 1860 offered institutional support to men and women who happened to be old, but such relief was not perceived as old-age assistance *per se*. Wards for the mentally ill were established in the Pennsylvania Hospital in 1756 and in Williamsburg, Virginia in 1773.[28] Christ Church in Philadelphia used a bequest in 1769 to house indigent women, typically widows of clergy, but records show that in addition they cared for women in their forties.[29] Populous communities built almshouses to care for all sorts of people in need such as orphans, the deaf and blind, the disabled, the insane, and sometimes the criminal and the old. In 1824, New York required each county to erect a poorhouse, a pattern emulated in several states, especially those in the northeast quadrant of the New Republic.[30] Almshouse officials sometimes were abusive to residents; they rarely treated epileptics

23. WALTER A. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 17 (1974).

24. *Id.* at 21.

25. *Id.*

26. ACHENBAUM, OLD AGE, *supra* note 8, at 76.

27. *Id.*

28. TRATTNER, *supra* note 23, at 24.

29. CAROLE HABER, BEYOND SIXTY-FIVE 160, n. 59 (1983).

30. TRATTNER, *supra* note 23, at 55.

differently from the lame and the blind, and superintendents tolerated filth.[31]

So despicable were conditions in poorhouses that antebellum reformers advocated that special institutions be erected for particular segments of the population, notably orphans, the deaf, and the dumb. In the 1830s, progressive legislatures endeavored to create prison facilities that would prayerfully reform the incarcerated.[32] No such initiatives were advanced for those over the age of sixty, even though they constituted between sixteen to twenty-five percent of the poorhouse inmate population.[33]

Despite a request from Thomas Paine and Alexander Everett in 1790 to provide nationally funded annuities for the elderly, the federal government did not deal with issues of old-age dependency head on. Some older people, however, qualified for federal assistance through veterans' programs. Disability pensions were provided in 1789 for Revolutionary War veterans,[34] but it is unlikely that few men over sixty would have qualified because most men who served as soldiers were between the ages of eighteen and forty. In 1818, Congress granted pensions or free land to veterans who had served for at least nine months.[35] By then, the target population had gray hairs. Demand was so overwhelming that eligibility rules were tightened; those accepting federal pensions had to relinquish claims to other pensions and had to demonstrate their need for support. These measures reduced the number of applicants. With the passage of time and as death reduced the pool of eligible persons, Congress liberalized provisions by adding widows to the rolls. Less than four percent of the population over sixty-five nonetheless qualified for military pensions in 1840.[36] This same pattern of delaying the inception of pensions, imposing restrictions, and then expanding coverage applied to

31. *See* DAVID WAGNER, THE POORHOUSE (2005).

32. TRATTNER, *supra* note 23, at 56; *see* DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM 180-205 (1971).

33. ACHENBAUM, OLD AGE, *supra* note 8, at 80 (calculation based on U.S. Bureau of the Census data from 1910).

34. *Id.* at 84.

35. *Id.*

36. *Id.*

veterans of the War of 1812 and the Mexican American war.[37] In addition, the federal government appropriated funds to build a U.S. Naval Home in 1833 and a U.S. Soldiers' Home eighteen years later.[38]

The elderly were marginal members of the New Republic eligible for provisions that were age-irrelevant. This "mainstreaming" had the advantage of ensuring that the "worthy poor" had access to some means of support when they became superannuated. The truly vulnerable, including old slaves, Catholic widows, and those with no savings or kin nearby, rarely qualified for assistance. They had to rely on their own wits and the generosity of strangers. At the same time, the nation invested far more in educating and caring for children. Antebellum Americans felt that the future lay with the rising generation, not the old.

OLD-AGE DEPENDENCY BEGINS TO BECOME A PROBLEM, 1861-1929

Wartime exigencies signaled a new trend in the United States; people perceived advanced age as an impediment to gainful employment. The federal government, in December of 1861, required any naval officer below the rank of vice admiral to resign from his commission upon reaching age sixty-two.[39] Periodically during the remainder of the nineteenth century, the Navy set criteria to allow sailors to retire on half pay because of age or infirmity, after twenty years of service.[40] Federal judges were permitted, although not required, to retire at age seventy with a pension equivalent to their current pay if they had served on the bench for ten years.[41] An act to promote the efficiency of the Revenue-Cutter service in 1902 required all officers to retire at age sixty-four.[42] Where the experience of older men was once esteemed, late life now seemed to be a period of obsolescence. In 1920, the U.S. Civil Service Commission instituted a

37. *Id.*

38. ACHENBAUM, OLD AGE, *supra* note 8, at 84.

39. 39 Stat. 579 (1916).

40. ACHENBAUM, OLD AGE, *supra* note 8, at 48-49.

41. 39 Stat. 135 (1878).

42. Act to Promote the Efficiency of the Revenue Cutter Service, ch. 501, sec. 4, 32 Stat. 100 (1902).

retirement plan for nearly all federal government employees.[43]

Municipalities emulated the federal government. In the early years of the twentieth century, cities began to offer age-based pensions to teachers, police officers, and firemen. Similarly, states, in the spirit of benevolence or efficiency, gave their bureaucrats the option to retire at a certain age after fulfilling a requisite number of years of service.

A comparable trend occurred in the private sector; British models served as templates for U.S. businesses. In 1875, the American Express Company promised workers over the age of sixty some compensation upon retirement; actual receipt of pensions depended upon propitious economic conditions.[44] Nine years later, the Baltimore and Ohio Railroad stipulated that the minimum age for retirement was sixty-five and ten years of service.[45] Manufacturing companies slowly followed suit; their plans varied in provisions and promises. Some firms wanted to secure the loyalty of young workers through their productive years. Others saw retirement pensions as part of "welfare capitalism," like building or subsidizing homes for the working-class. Still others sought to increase productivity by rewarding vitality.[46] Only eight other companies followed the transportation companies' example before 1900.[47] Twenty-three firms established mandatory retirement policies between 1901 and 1905; twenty nine more did so before 1910.[48] Ninety-nine companies established programs by 1915.[49]

Age-based retirement programs gained acceptance in corporate America as managers came to disesteem the value of aging workers. "It is well understood nowadays that the practice of retaining on the pay-roll aged workers who can no longer render a fair equivalent for their wages is wasteful and demoralizing,"[50] explained F. Spencer Baldwin, an economics professor at Boston University in 1911. Baldwin noted:

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43. ACHENBAUM, OLD AGE, *supra* note 8, at 121.

44. *Id.* at 49.

45. *Id.*

46. *See* STEPHEN SASS, THE PROMISE OF PRIVATE PENSIONS 36 (1997).

47. ACHENBAUM, OLD AGE, *supra* note 8, at 49.

48. *Id.*

49. *Id.*

50. F. Spencer Baldwin, *Retirement Systems for Municipal Employees*, 38 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6 (1911).

> In the first place, there is the direct loss involved in the payment of full wages to workers who are no longer reasonably efficient, and in the second place, there is the direct loss entailed by the slow pace set for the working force by the presence of worn-out veterans, and the consequent general demoralization of the service.[51]

Men over sixty-five were not the only victims of age discrimination. Industrial accidents, especially in the manufacturing and transportation sectors, disabled workers in their prime who thereafter had to depend on collections from their peers and occasional gratuities from their former employers. New technologies displaced laborers and craftsmen in their mid-forties. Women and newly freed African Americans faced a double jeopardy in seeking jobs after fifty. Once unemployed or underemployed, it was hard for older workers to regain ground. Options grew more and more limited with each passing year.

Reduced financial resources affected the place of the old in the household. More than seventy-five percent of all men between the ages of sixty and seventy remained heads of household.[52] With advancing years, the proportion of men who lived with a child, in-law, or sibling increased. According to an 1895 Massachusetts survey, roughly ten percent of all native-born men over eighty and thirteen percent of their foreign-born peers lived with strangers or in institutions.[53] Gender differences mattered; only one-third of all women over sixty were listed as heading a household.[54] But older women were more likely to take up residence with a family member than were older men.

The threat, and in many cases the reality, of old-age dependency forced local communities and state governments to rethink provisions that still mainly rested on the Elizabethan Poor Laws. Thirty-two states required family members to take care of kin of any age in need.[55] No jurisdiction specified what

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51. *Id.*

52. Laurence A. Glasco, Ethnicity and Social Structure (1973) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with author).

53. ACHENBAUM, OLD AGE, *supra* note 8, at 76.

54. *Id.* at 77.

55. *Id.* at 76.

children owed their aging parents until litigation forced the issue. An Indiana court ruled that a son could not be held responsible for his parents' well-being because that state had no law governing family responsibilities toward impoverished relatives.[56] At the other extreme, Kentucky, Ohio, and Colorado imposed criminal charges on those who refused to care for their needy elders.[57] These statutes were never enforced. Thus, variations existed from state to state in distinguishing in family law between old-age dependency in general and poverty in general.

Disparities existed in other domains of old-age welfare. California repealed an 1883 act that defrayed some of the costs of caring for the elderly in private institutions when cases of fraud were uncovered.[58] Efforts to enact old-age relief in several jurisdictions died in the legislature. Arizona managed to pass such a measure in 1914, but it was quickly ruled unconstitutional.[59] Even progressive states, like Massachusetts, felt that old-age pensions would prove far too expensive for the purpose they would serve; accordingly, in 1915 Massachusetts made it a criminal offense not to care for destitute parents.[60]

In light of the prevailing belief that old-age poverty was not yet a serious problem, it is little wonder that going "over the hill to the poorhouse" terrified older people everywhere. States and benefactors throughout the Nineteenth Century continued to remove children, juvenile delinquents, criminals, and the physically and mentally ill and place them into specialized institutions. As a result, the percentage of almshouse residents who were old soared. By 1910, roughly forty-five percent of all native-born and seventy percent of all foreign-born inmates were at least sixty years old.[61] While the proportion of older poorhouse residents rose, it is worth noting that only two percent of all older Americans actually lived in an almshouse at any given time.[62] Nevertheless, in response to the trend, Homer Folks, the Commissioner of Public Charities in New York City,

56. *Id.*

57. *Id.*

58. ACHENBAUM, OLD AGE, *supra* note 8, at 83.

59. *Id.*

60. *Id.*

61. *Id.* at 80 (calculation based on U.S. Bureau of the Census data from 1910).

62. *Id.*

converted his poorhouse in 1903 into the Home for Aged and Infirm.[63] Elsewhere, legal officials began to transfer senile elders from almshouses to state hospitals because they judged senility to be a psychiatric disorder. Name changing and shuffling did not alter the image of the poorhouse; the almshouse served a necessary function, but it still was dreaded as a last resort.[64]

Fortunately, there were alternatives to the almshouse, especially after the Civil War. Faith-based congregations, unions, and local communities erected private asylums to care for their poor and infirm elders. Nearly two-thirds of the 1,200 benevolent old-age homes operating in 1939 were founded between 1875 and 1919.[65] While philanthropies remained far more committed to promoting education and the care of youth, a few organizations made important initiatives to deal with the vicissitudes of age.

Insurance companies and mutual benefits societies began selling old-age annuities. In 1905, the Carnegie Foundation for the Advancement of Teaching set aside $10 million to provide funds for college professors in the United States and Canada who retired at age sixty-five.[66] Though unions were more interested in bread-and-butter issues that lured younger people into their ranks, a few unions authorized appropriations for superannuated workers. One union permitted members to commute their death benefits in order to maintain themselves at advanced ages.[67] Fraternal orders, which previously had focused mainly on Tuberculosis and creating youth camps, built homes and offered other kinds of relief. Doctors provided service to lodges at minimal cost. Some lodges, including ones that African Americans joined, opened hospitals as part of their aim to reach across the generations.[68]

Ironically, given the federal government's reluctance to deal with the problem of old-age dependency, the most generous support during the period went to Civil War veterans who happened to be old. Pressured by members of the Grand Army

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63. ACHENBAUM, OLD AGE, *supra* note 8, at 80.

64. *Id.*

65. *Id.* at 82.

66. *Id.*

67. *See* MURRAY WEBB LATIMER, TRADE UNION PENSION SYSTEMS 8, 13-26 (1932).

68. ENCYCLOPEDIA OF SOCIAL WELFARE HISTORY IN NORTH AMERICA 248 (John M. Herrick & Paul H. Stuart eds., 2005).

of the Republic, retirement benefits were granted to senior military personnel, officers, and soldiers. The number of pensioners increased nine fold between 1886 and 1910, which meant that more than one-quarter of all older Americans received veterans' benefits.[69] A 1912 amendment granted benefits to any veteran over the age of sixty-two who had served for ninety days.[70] Disbursements, which swelled from $60 million to $160 million during the same period, ultimately consumed one-quarter of the federal budget.[71] The National Home for Disabled Veterans officially became an institution for aged and infirm soldiers. At its peak, the Home in Dayton provided shelter and services for 7,000 elderly residents, who dressed in uniform as if still under arms.[72]

Without underestimating the significance of the veterans programs, two points are worth noting. First, the benefits went only to the victors. Confederate soldiers and most African Americans who fought in the Civil War did not qualify. Hence Southern states, already ruined by the ravages of war, had to go deeper into debt in order to provide their military personnel pensions and medical care. Second, although Congress was generous to veterans of war, few legislators drew an analogy that would enable them to endorse relief for veterans of industry. But there were signs of change. In the early Twentieth Century, several states enacted mothers' pensions to enable poor single mothers to stay home and raise their children.[73] "Deserving" widows often qualified for this benefit. Meanwhile, social scientists and physicians in the first decades of the Twentieth Century were laying the groundwork for change. Lee Welling Squier's *Old Age Dependency in the United States* in 1912 provided the first book-length treatment of old-age pauperism. Two years later, Dr. I. L. Nascher compiled *Geriatrics,* which argued that senescence was a natural process affected by environmental circumstances.

After World War I, U.S. citizens extended existing ideas and practices concerning how to cope with economic insecurity in

69. ACHENBAUM, OLD AGE, *supra* note 8, at 84.

70. *Id.*

71. *Id.*; SASS, *supra* note 46, at 12.

72. ACHENBAUM, OLD AGE, *supra* note 8, at 84.

73. Herrick & Stuart, *supra* note 68, at 449.

late life. By 1929, there were 140 industrial plans in place; firms covered nearly one million workers, granting $6.7 million to more than 11,000 retirees.[74] Most of these plans were operated by the nation's biggest and most profitable corporations. Unions disbursed more than $3 million to roughly 11,000 retired workers.[75] A few progressive firms, such as General Electric and Eastman Kodak, allowed retirees known for their creativity to use their facilities in their leisure years.[76] These are important steps, but they must not be overestimated. Corporate America still imposed stringent eligibility requirements and did not guarantee benefits. Thus, there still was no universal coverage, and old-age pensions were gratuities.[77]

Similarly, traditional measures flowered in the realm of family relations and institutional forms of coping with old-age dependency. Several states imposed civil and criminal penalties on children who did not live up to their moral obligation to care for their parents' troubles, but this practice was hardly universal. The Bureau of Labor Statistics reported that there were 1,270 old-age homes in 1929, most catering to clientele of a particular faith, class, ethnicity, gender, or race.[78] Labor organizers, academics, authors of government surveys, social workers, and commentators in the media deplored the patchwork arrangement. They urged state legislators to be more pro-active.

States did try to respond, but they achieved mixed success. Old-age pension laws passed by Colorado, Nevada, Montana and Wisconsin in their 1923 and 1924 sessions but were inoperative because none required counties to put the measures in effect.[79] Pennsylvania's supreme court nullified the Commonwealth's old-age assistance plan one year after its enactment on technical grounds.[80] Six states, however, enacted pension laws by the end of 1928.[81] Once again, it is the parochial variations in provisions that merit attention. Some jurisdictions

74. U.S. BUREAU OF LABOR STATISTICS, CARE OF AGED PERSONS IN THE UNITED STATES 3 (1929).

75. *Id.*

76. ACHENBAUM, OLD AGE, *supra* note 8, at 121.

77. *See* SASS *supra* note 46, at 54.

78. ACHENBAUM, OLD AGE, *supra* note 8, at 121.

79. *Id.* at 122.

80. *Id.*

81. *Id.*

imposed income and/or property limits, but three established no means tests. Poor states disbursed little; some jurisdictions provided senior citizens one dollar per day. That most states did nothing underscores the lack of a uniform approach to the problem of old-age dependency. In this context, the federal veterans program remained the most important source of old-age relief. In 1929, more than four-fifths of all pensioners were receiving veterans' benefits; eighty percent of all funds disbursed came from this single source.[82]

THE ORIGINS AND GROWTH OF OLD-AGE ENTITLEMENTS

On the eve of the Great Depression, nearly sixty percent of all men over sixty-five and eight percent of all women over sixty-five were gainfully employed.[83] Thanks to changes in the tax code, which induced large manufacturing and commercial enterprises to establish retirement plans, about one in seven workers were eligible for pension benefits.[84] Eligibility ages and years of service varied greatly. Public pensions were available to selected bureaucrats even in Alaska and the Indian territories.[85] Record amounts of disability insurance were sold, and roughly one-third of the labor force had access to medical coverage underwritten by firms, unions, and fraternal orders.[86] Though few older Americans had acquired substantial savings or property, roughly fifteen percent relied on assets to make ends meet.[87] American self-reliance and welfare capitalism created the semblance of a safety net, albeit one with holes in it. African Americans and women of all races rarely had access to any of these provisions.

The Great Depression ripped the elderly's safety net. As the overall unemployment rate reached twenty-five percent, the extent of unemployment among older workers was greater yet.[88]

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82. U.S. BUREAU OF LABOR STATISTICS, *supra* note 74, at 3.

83. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 14.

84. *Id.* at 15.

85. *Id.*

86. *Id.* (citing U.S. Department of Labor Bulletin no. 12).

87. Marjorie Shearon, *Economic Status of the Aged*, SOCIAL SECURITY BULLETIN, March, 1938, at 6.

88. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 16 (citing Federal Emergency Relief Administration Monthly Report (Feb. 1936)).

Employers preferred to give work at greatly reduced wages to younger men raising families. Firms that folded could not grant pensions; forty-five plans covering 100,000 employees were discontinued between 1929 and 1932 alone.[89] Some railroad workers received "payroll saving" retirements until the Depression deepened and companies had to make draconian cuts to stay in business.[90] Trade unions were in a similar bind. Bankrupt municipalities and state governments could not honor pension commitments. Savings were lost as nearly 5,000 banks with assets exceeding $3.2 billion failed.[91] Children of aged parents found it difficult to care for their young, much less to deal with the added burden of feeding their elders.

Franklin Delano Roosevelt dealt with the plight of the elderly after he had sought to reshape virtually every other sector of the economy. Fifteen major pieces of legislation, including the Agricultural Adjustment Act, the Tennessee Valley Authority Act, the Unemployment Relief Act, and the National Industrial Recovery Act, were enacted during his first 100 days in office. Pressure from the Townsendites, who demanded that older people receive $200 per month on the condition that they exit the labor force and spend the pension within the month, surely moved the President to act.[92] Other factors were at play. Roosevelt had overseen, as governor of New York, the passage of the most progressive old-age relief program in the Nation. He could count on a cadre of academics, bureaucrats, and labor and business leaders to craft legislation that would satisfy the Supreme Court, placate Southern Democrats, build on precedents such as mothers' pensions and the Federal Emergency Relief Act, and avoid of the stigma of "welfarism."

SOCIAL SECURITY

The 1935 Social Security Act became the centerpiece of the New Deal, and the foundation of the nation's welfare state. Significantly, Title I gave grants to states for old-age assistance. To reduce future costs, Title II created an old-age insurance

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89. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 17.
90. SASS, *supra* note 46, at 92.
91. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 16.
92. SASS, *supra* note 46, at 94.

program so that workers could set aside funds for their retirement. Other titles made provisions for the blind, dependent and handicapped children, maternal and child welfare, public health programs, especially in rural areas, and the unemployed. In addition to establishing financial mechanisms to raise revenues for old-age insurance and unemployment compensation, the Act also created a Social Security Board to monitor developments and make recommendations for improving social insurance.

Several points concerning the original old-age titles are pertinent to this article. First, the architects of the 1935 Act did not borrow age sixty-five from Bismarck. Instead, based on a survey of state old-age pensions, corporate retirement plans, and programs in other countries, the Committee on Economic Security, which crafted the legislation particulars, thought that sixty-five seemed to be a reasonable compromise, with sixty and seventy being the other two options; it was neither too generous nor too stingy. Although Congress had no idea how many persons would qualify for relief, they estimated half of the older population, they provided an opportunity in Section 2 of Title I for anyone denied old-age assistance "an opportunity for a fair hearing."[93] Old-age assistance was no longer a gratuity. As long as individuals met specific age, residency, and needs requirements imposed by the state and approved by the federal government, they were assured benefits.

EFFECT

Title I affected the finances and health care of the nation's elderly poor, though not necessarily as intended. Most state legislatures changed the language of their old-age "relief" programs to conform to the language of "assistance" adopted in the 1935 Act. The wording of the new legislation, moreover, encouraged the creation of proprietary rest homes by hastening the demise of almshouses because inmates could not receive benefits. Unfortunately, those who required long-term care typically remained in poorhouses. Finally, the architects of Title I had anticipated that states would match the fifteen dollars promised by the federal government for indigent elders. Some

93. 42 U.S.C.A. § 302 (West 2003).

states, unwilling to give benefits to African Americans, chose not to enroll in the program. Benefits varied from jurisdiction to jurisdiction. The average Mississippian in 1936 received $3.92 per month compared to the $31.36 per month that the average Californian over age sixty-five received.[94]

Similarly, old-age insurance benefits would be granted to every "qualified" individual "entitled to receive" them.[95] Here, the term stipulated a process for determining whether an individual qualified under the program or not; no specific dollar amount was guaranteed. With Title II of the 1935 Social Security Act, older Americans had entered into the age of entitlements.

Title II was actually superseded before it ever went into effect. In the face of an economic downturn and more contributions than anticipated, FDR decided to accelerate the disbursement of old-age insurance funds. So, on the advice of an advisory council, the 1939 amendments to the Social Security Act advanced the date that older workers could receive retirement checks from 1942 to 1940, and the amendments extended coverage to seamen as well as bank and loan association employees. Most significantly, the beneficiary pool was extended from individual workers to aged widows, elderly wives, widows with children, dependent children, surviving children, and, in some instances, the parents of workers who had died. Congress chose not to increase contribution rates to cover these additional beneficiaries. Thus, the 1939 Act put a greater weight on the "adequacy" of provisions rather than the "equity" of benefits.

This decision still shadows current debates over Social Security. Those who think that social insurance resembles private insurance argue that Old Age and Survivors Insurance (OASI) went bankrupt with the passage of this amendment. Those who are confident that the federal government will honor its commitments, especially since millions of workers contributed to the system, think otherwise. The future course of Social Security depends on whether lawmakers take the 1935 or 1939 version of Title II as the starting point of the historical baseline.

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94. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 27.

95. Federal Old-Age Benefits, ch. 531, sec. 202, 49 Stat. 620 (1935).

LIBERALIZATION OF OLD-AGE ENTITLEMENTS

Although anticipated increases in Social Security benefits and coverage were postponed during World War II, an era of unprecedented affluence made it possible to broaden old-age entitlements in both the private and public sectors thereafter. The federal government typically took the lead in liberalizing programs for the aged. Policymakers adopted an incrementalist strategy to expand coverage and benefits. Thus, the 1950 amendments increased benefits by seventy-seven percent, the largest ever, and covered farm and domestic laborers as well as federal employees not participating in the Civil Service Retirement System.[96] Disability provisions added in 1954 and 1956 were designed to serve as pre-retirement plans.[97] The purpose of liberalizing such measures was to prevent dependency rather than to eliminate poverty. As Social Security's architects had anticipated, old-age assistance rolls declined as the system matured; by 1951, more money was distributed to Title II beneficiaries than those eligible for Title I.[98]

Meanwhile, the private sector took advantage of every change Congress made to Social Security. A 1948 National Labor Relations Board ruling, among other court decisions, made pension plans subject to collective bargaining.[99] Negotiations with the United Mine Workers and United Auto Workers started a pension boom in corporate America. Ordinary Americans, meanwhile, became more security conscious than ever; they bought term-life insurance and annuities to supplement their anticipated Social Security benefits. Over time, Social Security amendments made it possible for women, in 1956, and men, in 1961, to retire early with actuarially reduced monthly payments. With overwhelming bipartisan support, Congress periodically extended mandatory coverage to employees while raising average monthly benefits. Most companies redesigned their retirement plans accordingly. For the first time in U.S. history, most middle aged white workers could anticipate life after work

96. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 39.

97. *See id.* at 43-44.

98. *See* Wilbur J. Cohen, *Income Maintenance for the Aged*, 279 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 154-163 (1952).

99. ACHENBAUM, OLD AGE, *supra* note 8, at 148.

with enough funds to enjoy themselves. These truly were the golden years.

At the same time, public intellectuals of the 1950s, such as John Kenneth Galbraith and Michael Harrington, were urging the federal government to do more to reduce poverty, to provide opportunities for minorities and women, and to improve conditions in rural America. Older Americans at first were not targeted as a major priority.[100] Mention was made of old-age poverty at election time, to be sure. The Kerr-Mills Medical Assistance for the Aged Program in 1960 earmarked funds for those non-indigents who could not pay for necessary medical care.[101] John F. Kennedy was receptive to fresh ideas but did not live long enough to enact health-care legislation for the elderly or to restructure the nation's economic security system to benefit older Americans.[102] It fell to Lyndon Baines Johnson to enact a welter of legislation worthy of a "Great Society." The War on Poverty and various civil-rights acts were great legislative achievements, but, in their original intent, they did little for older people.

THE JOHNSON ADMINISTRATION

The banner year for older Americans proved to be 1961. Building on recommendations from the 1961 White House Conference on Aging, congressional hearings, and ideas from the American Medical Association, Johnson signed into law Medicare as Title XVIII of the Social Security Act.[103] Part A covered the hospitalization costs of Social Security beneficiaries; Part B was a voluntary, supplementary plan to cover medical treatment and equipment. As an analogy to Title I, Medicaid, which became Title XIX, provided medical coverage and long-term care to indigent men and women of all ages, but it was primarily intended to benefit the aged. Signing these measures in the presence of Harry S. Truman, Johnson felt that he was fulfilling a dream of FDR, who was advised not to put health measures in the 1935 Social Security Act.

100. *See* W. ANDREW ACHENBAUM, SHADES OF GRAY 93-94 (Little Brown, 1983).

101. *Id.* at 94.

102. *See* SASS, *supra* note 46, at 193.

103. *See generally* Amendments to Title II of the Social Security Act, Pub. L. No. 87-64, 72 Stat. 1013 (codified as amended in scattered sections of 42 U.S.C.).

Then Johnson went a step further than his predecessors by signing into law the Older Americans Act.[104] The measure in Title I promised, among other things, that a new Administration on Aging (AOA) would ensure an adequate income in retirement, the best possible physical and mental health, suitable housing, participating in and contributing to meaningful activity, efficient community services, immediate benefit from proven research knowledge, and freedom, independence, and the free exercise of individual initiative in planning and managing their own lives.[105] The language was as grandiose as the funding was limited, yet it signaled a turning point in old-age history. The federal government was making the elderly pacesetters. As other aspects of the Great Society withered to pay for the war in Vietnam, the Department of Health, Education, and Welfare maintained the AOA's demonstration projects, training grants, state agencies on aging, and formula grants to states for community services. Thus, in word and deed, older Americans emerged as the true beneficiaries in the heyday of American liberalism.

THE NIXON ADMINISTRATION

The elderly even benefited from Richard Nixon. As Republicans and Democrats sought votes from senior citizens, they engaged in a bidding war to liberalize Social Security. On June 30, 1972, amid shouts of "Vote, Vote," Congress authorized a twenty percent increase in benefits for Social Security recipients.[106] Rather than wait for lawmakers to increase benefits, Congress stipulated that whenever the Consumer Price Index rose by three percent, a cost-of-living-adjustment (COLA) would be made to Social Security benefits.[107] Four months later, President Nixon signed a five billion dollar bill, which gave Medicare benefits to 1.7 million disabled Americans under the age of sixty-five, raised pensions for widows and widowers, and

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104. 42 U.S.C.A. § 3001 (West 2003).

105. *Id.*

106. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 58 (citing Marjorie Hunter, *20% Social Security Rise is Voted by Both Houses; Nixon Approval in Doubt*, N.Y. TIMES, July 1, 1972, at 1).

107. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 58.

liberalized skilled nursing home coverage.[108] By combining various Social Security assistance programs notably for the aged and the blind into a Supplemental Security Income (SSI) program, Nixon effectively established a national floor eliminating the inequities that had existed under state-run programs.[109] Together, these measures embodied every idea that the 1934-1935 report of the Committee on Economic Security had recommended.

This was not all. States and the federal government gave men and women over sixty-five exemptions when they filed their income taxes and allowances when they sold their primary residences. The private sector proved generous too. Upon proof of age, which varied from fifty to seventy, senior citizens could get discounts on travel, public transportation, restaurant meals, prescriptions, and other goods and services. The upper end of the human life course was becoming as age-graded as the school system. Age seemed to be a neutral and fair way to give benefits to some people and not others. As the political and consumption power of older Americans became more evident, the "gray lobby" offered golden opportunities to those who wanted to reach the elderly market.

CUTBACKS AND DELAYS IN OLD-AGE ENTITLEMENTS

In the early 1970s, Washington continued to respond favorably to calls to protect the elderly. Hence, Congress in 1973 approved an eleven percent increase in Social Security benefits.[110] A year later, Gerald Ford signed the Employee Retirement Income Security Act (ERISA), which established vesting and funding standards for corporate retirement plans, one of the few pieces of legislation he did not veto.[111] Those who were not covered by their employers could establish Individual Retirement Accounts (IRA). The Department of Labor established the Pension Benefit Guaranty Corporation to ensure that employers could honor their pension liabilities, which by 1993 exceeded $1.5 trillion.[112] Congress also created the National Institute on Aging with

108. *Id.*

109. *See id.* at 58-59.

110. *Id.* at 63.

111. SASS, *supra* note 46, at 221.

112. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 63; SASS, *supra* note 46, at 2.

intramural support and extramural resources to sponsor research on Alzheimer's disease and to investigate basic processes of aging.

Countervailing forces, however, came into play. In the wake of Vietnam and Watergate, the U.S. political economy changed. Richard Nixon laid the foundations for limiting the growth of old-age entitlements when, under the banner of the New Federalism, he tried to reduce the scope and scale of Washington's involvement in allocating funds for the elderly by devolving responsibility to the states. Alarmed that the 1972 Social Security amendments put the program's future at risk, Jimmy Carter's secretary of Health, Education, and Welfare proposed cuts totaling $600 million, largely by tightening eligibility criteria for disability insurance.[113] Medicare and Medicaid were put under the aegis of the Health Care Financing Administration. Stalwarts, mainly liberal Democrats, denounced these proposals and created "Save Our Security" to protect older Americans' current and projected benefits. Carter did not get all that he wanted, but the episode underscored, in the words of one congressional leader, that "there are not going to be any more easy votes on Social Security."[114]

THE REAGAN ADMINISTRATION

Ronald Reagan went beyond Richard Nixon's rhetoric, and declared that "government was the problem." A neo-conservative political ideology supplanted the principle of liberal incrementalism that dated back to the New Deal. Hence the 1983 Social Security amendments, designed to secure Baby Boomers' retirement, raised taxes and cut benefits in order to shore up finances. Meanwhile the Reagan administration took other steps that imposed bureaucratic obstacles to expanding old-age entitlements. The Administration on Aging received less discretionary funds and Area Agencies on Aging were strapped. Thereafter, it became harder and harder to propose legislation that would ensure older Americans great financial security and better access to health care. The President's initiative was bolstered by changing perceptions of age. While

113. ACHENBAUM, SOCIAL SECURITY, *supra* note 2, at 68.

114. *Id.* at 70 (quoting Representative Albert Ullman).

old age had been viewed as a problem in the depths of the Great Depression, now the media portrayed older Americans as "greedy geezers," willing to squander their children's future in self-indulgent ways.

Sometimes the elderly's behavior seemed to justify the new, constrained politics of aging. The Medicare Catastrophic Coverage Act of 1988 seemed to be a promising way of coping with major health crises in late life, but President George H. W. Bush insisted that the program be self-financing. So in an era of economic austerity, Congress required Medicare beneficiaries, who generally had private coverage to pay for huge hospital costs, to foot the bill for less fortunate senior citizens. When affluent members of the aged cohort realized what was happening, they balked. Congress repealed the measure one year later.[115]

President Clinton failed to navigate a comprehensive health insurance plan through Congress because the plan he proposed was too complicated and expensive. Assuming that something was better than nothing, the gray lobby pushed for prescription-drug coverage for those elders who could not afford expensive medications. Liberals and moderates denounced the bill that passed in 2004, claiming that it benefited insurance companies, pharmaceutical firms, and private health plans more than the intended target.

President George W. Bush has made the privatization of Social Security the major item on his agenda for his second term. Even if his efforts fail, they underscore a fundamental shift in the politics of age. Social Security is no longer a sacred cow. It has become a golden calf. The shift is ironic because Social Security is the nation's most successful welfare program. Roughly two-thirds of all older Americans would have incomes below or slightly above the poverty line without Social Security. To gut a program that works hardly makes sense, but age-based policymaking may no longer be the most efficacious way to address the genuine needs of the nation's most heterogeneous population. We have reached a watershed in old-age history.

115. W. ANDREW ACHENBAUM, OLDER AMERICANS, VITAL COMMUNITIES (forthcoming 2005).

CONCLUSION

A paradox pervades the current status of older Americans under the law. The U.S. legal system is riddled with more age-based criteria than any other time in our history. Yet, old age has become, in the words of the late gerontologist Bernice Neugarten, "less a criterion of anything."[116] For the last two decades of her life, Neugarten urged researchers, policymakers, as well as health and social-services managers to address need, not age. The advice makes increasing sense in a society that is aging rapidly, yet no longer has the wherewithal to be all things to all people. Should we focus on race, gender, ethnicity, geographical locale, or some indication thereof? Should we construct indices of functionality rather than deny or grant access to coverage on the basis of chronological age? We are not facing an either/or choice. Our early history offers a sobering lesson to those who would scrap age as a criterion entirely; older people often get lost in the crowd when they are mainstreamed with other needy people. So the challenge before us is to acknowledge the diverse needs of late life without ignoring the genuine troubles and opportunities that present themselves at advanced age.

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116. Bernice L. Neugarten, *The End of Gerontology*, 10 CENTER ON AGING 1, 1 (Spring 1994).

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