

Chicago-Kent College of Law

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Health Care Allocation for the Elderly: Age Discrimination by Another Name?

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HEALTH CARE ALLOCATION FOR THE ELDERLY: AGE DISCRIMINATION BY ANOTHER NAME?

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I hate the men who would
 prolong their lives
 By food and drinks and
 charms of magic art
 Perverting nature's course
 to keep off death.
 They ought, when they
 no longer serve the land,
 To quit this life, and clear
 the way for youth.**

I. INTRODUCTION

The costs of health care in America continue to soar¹ even as millions of people either go without needed medical attention, or at best receive services inadequate in quantity and quality.² Moreover, there appears to be no foreseeable imminent abatement of

** Euripides, *Suppliants* 1109, quoted by [pseudo-] Plutarch in *A Letter of Condo-
 lence to Appollonius*, 110C, in 2 PLUTARCH'S MORALIA 153 (F. Babbitt trans. 1928).

1. In 1965 national health expenditures totaled \$41.9 billion—5.9% of the gross national product (GNP). Total health expenditures had risen by 1986 to \$458.2 billion, which was 10.9% of the GNP. By 1990 the total is expected to be \$647.3 billion, or 12% of the GNP; and by the year 2000 the total is predicted to be almost \$1.53 trillion—15% of the GNP. 1 SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1987, S. Rep. No. 291, 100th Cong., 2d Sess. 178 (1988) [hereinafter DEVELOPMENTS IN AGING].

2. "[A]ccess to care is limited for millions of citizens — most notably working families of modest income, the very poor, members of racial and ethnic minorities, and people who live in very rural and inner-city communities." 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SECURING ACCESS TO HEALTH CARE VOL. ONE: REPORT 49 (1983). See also Rosenblatt, *Rationing "Normal" Health Care: The Hidden Legal Issues*, 59 TEX. L. REV. 1401, 1404 (1981) [hereinafter Rosenblatt]. Almost 37 million Americans were without health insurance in 1985. U.S. GAO REPORT TO THE CHAIRMAN, SENATE COMM. ON FINANCE, HEALTH INSURANCE—AN OVERVIEW OF THE WORKING UNINSURED 10 (1989). "As income increases, so does the percentage of people with health insurance." *Id.* at 19.

According to a Louis Harris & Associates survey reported in the New York Times, 7% of the people surveyed—a group projected to reflect the views of about 18 million people—said that they did not receive what they perceived as needed medical care in 1988 because of financial reasons. Hevesi, *Polls Show Discontent With Health Care*, N.Y. Times, Feb. 15, 1989, at 8, cols. 1-4 (nat'l ed.).

those factors that have been generating steadily escalating expenditures. Population growth, increasing labor and supply costs, and the constant development and rapid subsequent diffusion of expensive technological innovations have led the rise in costs in the recent past,³ and they guarantee more of the same for the near future, at least.

There are a limited number of ways to respond to these allied problems of inflating expenses and inadequate care. None, moreover, is entirely, or even substantially, satisfactory. One course is to accept the inevitability of regularly rising dollar amounts as the price of simply maintaining the present system, and do nothing to improve the situation for the unserved and underserved. However, this perpetuation of inequity likely is politically untenable, and almost certainly ethically unacceptable.⁴

A more aggressive approach is to spend billions of added dollars to enhance access to health care for those now excluded, and further billions to improve and increase the care now provided to those who are receiving some, but not enough, medical attention. But even if such a massive increase in public and private spending were economically feasible in a theoretical sense, the actual willingness of the public to pay likely is not unbounded.⁵ Accordingly,

3. Schwartz, *The Inevitable Failure of Current Cost-Containment Strategies*, 257 J. A.M.A. 220, 221 (1987) [hereinafter Schwartz].

4. Lester Thurow, an economist, has observed: "[A]n egalitarian distribution of health care is one of the factors that creates social solidarity, a feeling of community, and the nonmonetary attachments that bind a society together." Thurow, *Learning to Say "No,"* 311 NEW ENG. J. MED. 1569, 1571 (1984) [hereinafter Thurow]. But see Smeeding, *Artificial Organs, Transplants and Long-Term Care for the Elderly: What's Covered? Who Pays?*, in *SHOULD MEDICAL CARE BE RATIONED BY AGE?* 140, 153 (T. Smeeding ed. 1987):

[C]ertain treatments that are not proven cost-effective *should be* rationed largely by ability to pay. If so, the elderly with enough resources to cover such treatments as heart or liver transplants will be able to afford them. It seems that this type of two-tier health care system might be acceptable and even desirable considering rational allocation of public health care resources.

Id. (Lest Smeeding be misconstrued by virtue of my selective quotation, I should note that while he supports wealth-based allocation of certain types of health care, he would not support a two-tier system based on who can pay with regard to "effective and necessary medical care." *Id.*)

5. Obviously, there is no sure way to predict how much the American public is willing to bear by way of supporting health care through private, as well as public, funding. Robert Binstock has expressed one view:

[I]f steps can be taken to reassure us that physicians, hospital corporations, medical equipment manufacturers, pharmaceutical companies, and medical malpractice lawyers are not receiving more than their "fair share" of health expenditures, then our hunger to contain health care costs may be satiated. Under such circum-

cost containment efforts, such as utilization review, modified reimbursement schedules, and the promotion of more efficient forms of medical practice, gain in economic and political urgency.⁶ These, however, arguably offer only limited prospects for savings.⁷ More-

stances—which may be extremely difficult to bring about—Americans may very well want the best available care for everyone, even if they have to pay for it through taxes, as well as directly from their own pockets, and by trading off salaries and wages for employee-benefit health insurance premiums . . .

. . . [T]here is no inherent reason why 11, 12, 13 percent or more of our gross national product can not be expended on health care . . . [A]fter 20 years of socialization to the “rights” or “entitlements” provided through Medicare and Medicaid it could well be that Americans—reassured that they are not paying for waste and excesses—will not want to impose a ceiling on health care expenditures and/or be willing to acquiesce to the rationing practices that such a ceiling would impose.

Binstock, *The Oldest Old: A Fresh Perspective or Compassionate Ageism Revisited?*, 63 MILBANK MEMORIAL FUND Q. HEALTH & SOC’Y 420, 442 (1985). In contrast, Thurow has written:

Although there is no magic formula for determining a precise limit on what a country can afford to spend for health care, there is a limit. Every dollar spent on health care is a dollar that cannot be spent on something else. No set of expenditures can rise faster than the gross national product forever. At some point, health-care expenditures must slow down to the rate of growth of the gross national product.

Thurow, *supra* note 4, at 1569.

6. Cost containment is not synonymous with rationing. For example, a cost-driven reduction in the incidence of unnecessary hospitalization would be an expression of cost containment efforts. It would not necessarily reflect, or accomplish, rationing of health care. See Reagan, *Health Care Rationing: What Does It Mean?*, 319 NEW ENG. J. MED. 1149, 1150-51 (1988).

7. This is not to say that there is not considerable money to be saved. In a recent study of utilization review programs, it was found that such programs resulted in a reduction of 12.3% in hospital admissions; a reduction of 8% in in-patient days; and an 11.9% drop in hospital expenditures. Over all, total medical expenditures were reduced by 8.3%. Feldstein, Wickizer & Wheeler, *Private Cost Containment: The Effects of Utilization Review Programs on Health Care Use and Expenditures*, 318 NEW ENG. J. MED. 1310, 1312-13 (1988). The chairman of the Chrysler Corporation’s health care committee recently argued, in an editorial page article in the New York Times, that “the evidence is now overwhelming that at least 25 percent of the money Americans spend on health care is wasted.” Califano, *Billions Blown on Health*, N.Y. Times, Apr. 12, 1989, at 19, cols. 2-5 (nat’l ed.). He further maintained that “those wasted billions would be more than enough to fill the gaps and provide all the health- and long-term care our people need.” *Id.*

On the other hand, one of the leaders in addressing health care resource allocation issues contends that cost containment efforts, which have been focused on reducing unneeded days of hospital care, can produce only short-term savings, and that health care expenditures soon will continue to spiral upwards. He argues that “the essence of cost containment hinges on limiting the introduction and diffusion of beneficial new technology . . .” Schwartz, *supra* note 3, at 223. See also DEVELOPMENTS IN AGING, *supra* note 1:

[O]ptimistic reports on cost containment efforts aside, . . . it may be possible that health care expenditures actually may be escalating faster than in the 1970’s. According to Uwe Reinhardt, one of the nation’s leading health economists, Ameri-

over, whether the amounts saved are large or small, cost containment efforts promise constraints that may well compromise, to a troubling and perhaps even unacceptable degree, the quality of care provided.⁸

In fact, efforts to expand some services and financial coverage, as well as efforts to resist expansion, are—along with the correlative allocative choices these efforts entail⁹—already being pursued

cans have been fooled into thinking that cost hikes are moderating. Reinhardt points to the fact that, "relative to the overall consumer price index, the prices of health services rose much more rapidly after 1980 than they did in the late 1970's."

Id. at 182 (footnote omitted).

8. The Senate Special Committee on Aging expressed this concern:

Even more disturbing than the possibility that we have not yet harnessed spiraling health costs is the fear that existing cost containment initiatives may be exacting a toll in other parts of the health care delivery system. Pressures to reduce costs and make health care delivery more efficient may actually reduce access to and diminish the quality of health care.

DEVELOPMENTS IN AGING, *supra* note 1, at 182. See also Morreim, *Cost Containment and the Standard of Medical Care*, 75 CALIF. L. REV. 1719, 1721-24 (1987); Morreim, *Cost Containment: Challenging Fidelity and Justice*, 18 HASTINGS CENTER REP., Dec. 1988, at 20, 21; Schwartz & Aaron, *Health Care Costs: The Social Tradeoffs*, 1 ISSUES SCI. & TECH., Winter 1985, at 39, 41.

In *Wickline v. State*, 183 Cal. App. 3d 1175, 228 Cal. Rptr. 661 (1986), the plaintiff unsuccessfully argued that the third party payor was liable because its cost containment program had caused her to receive allegedly inadequate medical care. The court nicely set forth the stakes involved in prospective utilization review cost containment programs:

In the cost containment program in issue in this case, prospective utilization review, authority for the rendering of health care services must be obtained before the medical care is rendered. Its purpose is to promote the well recognized public interest in controlling health care costs by reducing unnecessary services while still intending to assure that appropriate medical and hospital services are provided to the patient in need. However, such a cost containment strategy creates new and added pressures on the quality assurance portion of the utilization review mechanism. The stakes, the risks at issue, are much higher when a prospective cost containment review process is utilized than when a retrospective review process is used.

A mistaken conclusion about medical necessity following retrospective review will result in the wrongful withholding of payment. An erroneous decision in a prospective review process, on the other hand, in practical consequences, results in the withholding of necessary care, potentially leading to a patient's permanent disability or death.

228 Cal. Rptr. at 663. The court concluded that the third party payor was not involved in the questioned doctor's decision, so it could not be held responsible for Wickline's harm, even assuming that the doctor's decision had been made negligently.

9. It is easier to make policy decisions in the abstract than it is to apply a particular policy to a specific individual, as Professor Blumstein has observed:

The existence of the "life-saving imperative" is most acute "whenever government is obviously placed in a position to undertake a specific lifesaving effort." Where government's role is more attenuated, "the destructive symbolic effect of

in varying degrees.¹⁰ But ultimately, no matter which course is attempted,¹¹ it seems safe to predict that many people will not se-

its identification with specific human suffering" is easier to avoid. Thus, it is useful to draw a distinction between government's role in dealing with *identifiable* lives and *statistical* lives.

Blumstein, *Rationing Medical Resources: A Constitutional, Legal, and Policy Analysis*, 59 TEX. L. REV. 1345, 1353 (1981) (footnote omitted) (emphasis in original) (quoting Havighurst, Blumstein & Bovbjerg, *Strategies in Underwriting the Costs of Catastrophic Disease*, 40 LAW & CONTEMP. PROBS., Autumn 1976, at 122, 140, 143) [hereinafter Blumstein]. As to another type of administrative problem, see Kilner, *Age as a Basis for Allocating Lifesaving Medical Resources: An Ethical Analysis*, 13 J. HEALTH POL., POL'Y & L. 405, 409 (1988).

10. The steadily rising expenditures for health care attest to the fact that we indeed are spending more and more. Whether this spending is achieving a more egalitarian distribution of care is another question, an affirmative answer to which certainly is much more problematic.

Cost containment entails a number of efforts. The Medicare prospective payment system (PPS) entails the payment to hospitals of fixed amounts that correspond to the average costs of specific diagnoses. DEVELOPMENTS IN AGING, *supra* note 1, at 181. There are 473 diagnosis-related groups (DRGs) used to categorize patients for reimbursement purposes. If a hospital can treat a patient at less cost than that allocated to the DRG into which the patient fits, the hospital retains the excess moneys. Alternatively, the hospital must absorb the loss if the actual cost of treating the patient exceeds the DRG amount. *Id.* In the private sector there are hundreds of cost management companies engaged in identifying unnecessary or overly costly medical procedures and in other efforts aimed at controlling medical costs paid for by employers and/or employer-supported employee health plans. Kramon, *Taking a Scalpel to Health Costs*, N.Y. TIMES, Jan. 8, 1989, § 3, at 1, cols. 2-5, 9, cols. 1-4.

Rationing also is occurring, both overtly and covertly; as an economist who has focused particularly on health care distribution issues writes:

Rationing of health care is not a novel idea. Rationing deals generally with the way in which health care is distributed We ration (distribute) health care all the time: by entitlement (to private or public insurance); by queue (in the case of most types of organ transplants and other procedures where demand exceeds supply); by third party decision (e.g., relatives, courts of law, hospital review boards); and perhaps, most of all, by willingness and ability to pay (since entitlement to high quality medical care and access to organ transplants is positively correlated with wealth, income, and social position[,]) by all of which we mean ability to pay).

Smeeding, *supra* note 4, at 142. A dramatic example of rationing has been the general preclusion of heart transplants for persons older than 50 or 55. See 1 OFFICE OF RESEARCH AND DEMONSTRATIONS, HEALTH CARE FIN. ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SERV., THE NATURAL HEART TRANSPLANTATION STUDY: FINAL REPORT 8-18 (1985). The age of acceptance of heart transplant candidates has been going up, at least at some hospitals; in a survey of 18 hospitals, 10% of the 1987 heart recipients were 60 or older. U.S. GAO REPORT TO THE CHAIRMAN, SUBCOMM. ON HEALTH, COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, HEART TRANSPLANTS—CONCERNS ABOUT COST, ACCESS, AND AVAILABILITY OF DONOR ORGANS 26 (1989) [hereinafter GAO REPORT]. See generally Silver, *From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care*, 37 CATH. U.L. REV. 993 (1988) (examining various forms of rationing already in use).

11. This is not intended to be a complete list; nor, obviously, is it a detailed review of

cure, either with their own economic resources, through reimbursement by third party payors, or by means of publicly funded programs, all the medical care they will need or want. More specifically for my concern here, the interests of the elderly are implicated in all of these scenarios entailing efforts to deal with financial and resource availability problems, and these interests will come even more to the fore as the problems become more acute. For, while in and of itself the increase in the numbers of older Americans¹² should account in percentage terms for only a very small portion of the growth in future medical expenditures,¹³ in absolute dollar terms enormous amounts currently are being expended on health care for the elderly.¹⁴ And rising labor and sup-

the numerous proposals for addressing health care financing and allocation issues. A number of proposals for change and/or reform have been made. See, e.g., Enthoven & Kronick, *A Consumer-Choice Health Plan for the 1990s: Universal Health Insurance in a System Designed to Promote Quality and Economy* (pts. 1 & 2), 320 NEW ENG. J. MED. 29, 94 (1989); CENTER FOR HEALTH POL'Y & MGMT., JOHN F. KENNEDY SCH. OF GOV'T, *MEDICARE: COMING OF AGE—A PROPOSAL FOR REFORM* (1986); Himmelstein, Woolhandler & the Writing Comm. of the Working Group on Program Design, *A National Health Program for the United States: A Physicians' Proposal*, 320 NEW ENG. J. MED. 102 (1989).

12. In 1987 people 65 years of age and older totalled 29.8 million, or 12.3% of the United States population. This represented an increase of 4.3 million, or 17%, since 1980. In contrast, the under-65 population grew by 6% in the same time period. It is expected that by 2030 there will be about 66 million persons age 65 and over, representing 21.8% of the populace. AMERICAN ASS'N OF RETIRED PERSONS, *A PROFILE OF OLDER AMERICANS: 1988*, at 1-2 (n.d.). Those 85 and over are growing in numbers at a particularly fast pace:

In 1985, about a third of the elderly population were between the ages of 65 and 69 Another 27 percent were between 70 and 74, and nearly one in ten (9.4 percent) were 85 and older. Between now and 2010, the elderly population is expected to grow by 10.6 million people; most of this growth (5.9 million) will occur in the 80 and older groups

U.S. GAO REPORT TO THE CHAIRMAN, SUBCOMM. ON INTERGOVERNMENTAL RELATIONS AND HUMAN RESOURCES, COMM. ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES, *AN AGING SOCIETY—MEETING THE NEEDS OF THE ELDERLY WHILE RESPONDING TO RISING FEDERAL COSTS* 10-11 (1986). See also Rosenwaike, *A Demographic Portrait of the Oldest Old*, 63 MILBANK MEMORIAL FUND Q. HEALTH & SOC'Y 187, 188-89 (1985).

13. According to Schwartz, "the anticipated growth in the proportion of older people between now and the year 2000 . . . will not be an important contribution [to rising hospital costs]; it can be calculated that they will increase costs by only 0.2 percentage points a year." Schwartz, *supra* note 3, at 221, citing Fisher, *Differences by Age Groups in Health Care Spending*, 1 HEALTH CARE FIN. REV., Spring, 1980, at 65-90.

14. Persons 65 and over account for one-third of the total personal health care expenditures in the United States. SENATE SPECIAL COMM. ON AGING, *AGING AMERICA—TRENDS AND PREDICTIONS 1987-88* EDITION 125 [hereinafter *AGING AMERICA*]. Per capita spending for the elderly had risen to \$4,200 by 1984; in that year total personal health care expenditures for the elderly were \$120 billion. *Id.* One-third of this was paid for by direct payments to providers or through insurance premiums. *Id.* Medicare paid for 49% of the total; Medicaid paid for approximately another 13%. *Id.* at 128-29.

ply costs, as well as the proliferation of new and expensive technological advances, assure even greater future expenditures of medical dollars on the old. Moreover, since we have made a particular commitment in the United States to the public funding of medical care for the elderly, while relying on private resources as the primary source of support for the non-old,¹⁵ the moneys spent on health care for old people have an especially high public and political profile.

One particularly dramatic facet of a mounting focus on the old in this health care context is a number of proposals for reducing, and even precluding, the provision of medical care to the aged. Daniel Callahan, an ethicist, has attracted an enormous amount of attention by urging the exclusion from access to life-extending care

With a greater prevalence of chronic conditions than in the population at large, older persons use medical personnel and facilities more frequently than younger persons. On the average, persons 65-plus visit a physician eight times compared to five visits by the general population. They are hospitalized approximately twice as often as the younger population, stay 50 percent longer and use twice as many prescription drugs.

Health care utilization is greatest in the last year of life and among the oldest of the old. According to the recent work of Lawrence Branch at Harvard Medical School, those 85 and older have a three-fold greater risk of losing their independence, seven times the chance of entering a nursing home, and two-and-a-half times the risk of dying compared to persons 65 to 74 years of age.

Id. at 111 (footnote omitted). Callahan reports the following:

Between 1980 and 2040, the following increases have been projected for those over 65: a 157-percent increase in physician visits, a 197-percent increase in days of hospital care, a 278-percent increase in the number of nursing-home residents, and a 159-percent increase in personal health expenditures (in constant 1980 dollars). Even more striking, and a reflection of the expected increase in chronic illness among the very old, is the 265-percent increase in physician visits by those 75 and over, the 291-percent increase in days of hospital care, and the 318-percent increase in nursing-home residents for the same age group.

D. CALLAHAN, SETTING LIMITS—MEDICAL GOALS IN AN AGING SOCIETY 227 (1987) (citing Rice, *The Medical Care System: Past Trends and Future Projections*, 6 N.Y. MED. Q. 1, 46 (1986)) [hereinafter CALLAHAN]. The Senate Special Committee on Aging reported the growth in health expenditures for the elderly with no less dramatic statistics:

In 1970, Medicare and other federal health programs accounted for only 1.4 percent of GNP, but by 1986, federal health spending had risen to 3.0 percent of GNP. With no change in current law, federal expenditures on health care are projected to increase to more than six percent of GNP by 2030. In short, if health care costs are not brought under control, federal spending on health care will equal, or even surpass, federal spending on retirement income within the next 50 years.

AGING AMERICA, *supra*, at 159.

15. Meyer & Moon, *Health Care Spending on Children and the Elderly*, in *THE VULNERABLE* 171, 176 (J. Palmer, T. Smeeding & B. Torrey eds. 1988) [hereinafter Meyer & Moon].

of those who have more or less achieved a "full and natural life span"—a point in one's life that he vaguely locates at around the late 70's or early 80's.¹⁶ Norman Daniels, a philosopher, has put forth a theoretical distributive framework for health care that allows for the possibility of some rationing in old age.¹⁷ Robert Veatch, another ethicist, has proffered what he terms a justice-based formula, which allows the assigning of priority to persons who need some kinds of health care in inverse proportion to their ages—i.e., the older one is, the less care one may secure.¹⁸ Timothy Smeeding, an economist, has advocated a two-tier system whereby those who cannot afford it may properly be denied care that is not cost effective.¹⁹ Numerous others have joined the debate, as well.²⁰

These ethicists, philosophers, economists, and experts of other ilk do not have any unique competence for uncovering an assuredly right resolution to the financial and distributive difficulties of the American health care system. (Nor, presumably, would they claim

16. CALLAHAN, *supra* note 14, at 77.

17. See N. DANIELS, *JUST HEALTH CARE* 111-12 (1985) [hereinafter DANIELS]. This framework proceeds from the empirically verifiable datum that each individual who experiences a normal life span moves across time from one age group to another. Daniels hypothesizes a rational individual who is assumed to have available a fair share of resources, and who is able to choose how to allocate these resources over his or her lifetime. In this hypothetical construct, examination can be made of how much of these resources the individual would allocate to health care. And further examination can focus on what kinds of health care, at what stages of one's life, this rational allocator would choose. Daniels has worked through his construct in a number of publications. See, e.g., N. DANIELS, *AM I MY PARENTS' KEEPER?* (1988); Daniels, *Justice between Age Groups: Am I My Parents' Keeper?* 61 *MILBANK MEMORIAL FUND Q. HEALTH & Soc'y* 489 (1983); Daniels, *Equal Opportunity, Justice, and Health Care for the Elderly: A Prudential Account*, in *ETHICAL DIMENSIONS OF GERIATRIC CARE* 197-221 (S. Spicker, S. Ingman & I. Lawson eds. 1987).

18. Veatch, *Justice and the Economics of Terminal Illness*, 18 *HASTINGS CENTER REP.*, Aug.-Sept. 1988, at 34.

19. Smeeding, *supra* note 4, at 153.

20. See, e.g., Avorn, *Benefit and Cost Analysis in Geriatric Care: Turning Age Discrimination into Health Policy*, 310 *NEW ENG. J. MED.* 1294 (1984); Battin, *Age Rationing and the Just Distribution of Health Care: Is There a Duty to Die?*, 97 *ETHICS* 317 (1987); Clark, *The Social Allocation of Health Care Resources: Ethical Dilemmas in Age-Group Competition*, 25 *THE GERONTOLOGIST* 119 (1985); Francis, *Poverty, Age Discrimination, and Health Care*, in *POVERTY, JUSTICE, AND THE LAW* 117 (G. Lucas, Jr. ed. 1986); Kilner, *Age as a Basis for Allocating Lifesaving Medical Resources: An Ethical Analysis*, 13 *J. HEALTH POL., POL'y & L.* 405 (1988); Moody, "Natural" Limits to Health Care (Book Review), 2 *MED. HUMANITIES REV.* 31 (1988); Somerville, 1. "Should the Grandparents Die?": Allocation of Medical Resources with an Aging Population, 14 *LAW, MED. & HEALTH CARE*, Sept. 1986, at 158. See also Blumstein, *supra* note 9, at 1345; Rosenblatt, *supra* note 2, at 1401; Uddo, *The Withdrawal or Refusal of Food and Hydration as Age Discrimination: Some Possibilities*, 2 *ISSUES L. & MED.* 39 (1986). Cf. THE BROOKINGS INSTITUTION, *Rationing of Medical Care for the Critically Ill* (1989).

such.) Lawyers—*qua* lawyers—likewise have no singularly dispositive insights to offer. The expertise of attorneys, after all, lies primarily in working with materials—constitutions, statutes, and the like—which reflect policy choices generally made on nonlegalistic bases, and devised by others. Still, there is a useful body of specialized data that attorneys can bring to the debate. This is the corpus of constitutional, statutory, and regulatory provisions involving situations in which an anti-age discrimination ethic comes into conflict with the wishes of actors—employers, banks engaged in extending credit, educational programs, and so on—seeking to make choices based, in whole or in part, on the ages of the people with whom they deal. Examination of the ways in which these conflicts have been handled leads to some relevant insights for addressing the problems occasioned by a limited and precious resource—i.e., health care—being consumed in particularly large measure by those at the far end of the age spectrum.

Several preliminary caveats are in order. First, I make no claim that the data are uniquely revelatory of solutions which hitherto have eluded those who have been directly confronting the problems posed by strained health care resources and the large demands for them made by the elderly. Second, I have no intent to chart with close, technical precision the doctrinal twists and turns of the equal protection clause,²¹ the Age Discrimination in Employment Act of 1967, as amended (ADEA),²² or other statutes, as well as cases, dealing with age discrimination. That effort has been undertaken elsewhere.²³ Third, my primary concern is not the whole array of legal issues that may be associated with health care resource distribution systems, but rather the more focused matter of the intersection of allocative schemes with the particular interests of the elderly. Accordingly, I do not intend to address non-age related matters such as the procedural due process issues which may be triggered by rationing in general.²⁴

Before turning to my specific focus—the analogical guidance

21. U.S. CONST. amend. XIV, § 1.

22. 29 U.S.C. §§ 621-34 (1982 & Supp. V 1987).

23. See 1-3 H. EGLIT, AGE DISCRIMINATION (1981 and annual supplements) [hereinafter EGLIT].

24. For a discussion of some of the procedural issues raised by rationing, see Blumstein, *supra* note 9, at 1357-77. Obviously, if I believed that there were dispositive constitutional or legal barriers to allocative decisions in general, there would be little point in excising for analysis the particular, albeit major, case of the elderly. In fact, given the current

afforded by the treatment of age discrimination concerns in non-health care contexts—I want to highlight a more general theme that I think helps to place in relevant context the health care debate: to wit, the declining role of the elderly as political and popular icons.

II. THE WANING PREFERRED POSITION OF THE ELDERLY

Twenty years ago—even ten—old people held the political and popular high ground. Generally perceived as physically fragile, personally benign, and financially needy, they were able to evoke a surge of support which translated into Medicare,²⁵ the Older Americans Act of 1965,²⁶ and a number of other beneficial federal enactments.²⁷ Thus, as Robert Binstock observed in his recounting of the development of what he has termed “compassionate ageism”:²⁸ “[B]y the late 1970s, if not earlier, American society had learned the catechism of ageism very well and had expressed it through a variety of ageist-based governmental programs and objectives.”²⁹

state of constitutional doctrine, I do not see such constitutional barriers to either preferring, or disadvantaging, older people, as I discuss below. Nor are there any absolute statutory barriers.

25. Health Insurance for the Aged Act, Pub. L. No. 89-97, tit. I, 79 Stat. 290 (1965) (codified throughout 26 U.S.C., 31 U.S.C., 42 U.S.C., and 45 U.S.C.).

26. Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (1965) (codified at 42 U.S.C. §§ 3001, 3002, 3011, 3012, 3021-3025, 3031, 3032, 3041, 3042, 3051-3053, 3056, 3057).

27. At the beginning of 1979 there were at least 48 major federal programs designed to benefit the elderly. SELECT COMM. ON AGING, U. S. HOUSE OF REPRESENTATIVES, 95TH CONG., 2D SESS., *FEDERAL RESPONSIBILITY TO THE ELDERLY* 2-3 (Comm. Print 1979). “Others, using a narrow definition of the term ‘program,’ have listed as many as 134.” Neugarten, *Policy for the 1980s—Age or Need Entitlement?*, in *AGE OR NEED? PUBLIC POLICIES FOR OLDER PEOPLE* 19, 25 (B. Neugarten ed. 1982).

One can also measure the federal commitment to the elderly in terms of dollars. Of course, one must take care to avoid lumping together dissimilar government activities. It is true that approximately \$269.5 billion in federal spending directly benefited older Americans in federal fiscal year 1986. *AGING AMERICA*, *supra* note 14, at 156. But of this total 54% was accounted for by Social Security benefits, which the elderly themselves have helped to fund. *Id.* at 154. Medicare and Medicaid accounted for another 27%. *Id.* About 12% of the total consisted of disability compensation and pension benefits for veterans, former federal employees, and their survivors 65 years of age and older. *Id.* at 156. Only 4% of the total was attributable to means-tested programs—e.g., Supplemental Security Income benefits, energy assistance, food stamps, etc. *Id.* And only 1% went to programs of general benefit, such as social, nutrition, and employment services authorized by the Older Americans Act. *Id.*

28. Binstock, *The Aged as Scapegoat*, 23 *THE GERONTOLOGIST* 136, 140 (1983) [hereinafter Binstock].

29. *Id.* As to the political strength of advocates for the elderly, see C. ESTES, *THE*

Somewhat paradoxically, during this same period a different image—albeit one likewise producing advantage for the elderly—also gained popular currency. Older workers came to be seen as vigorous, able men and women whose continuing competence made unjustifiable their subjection to age discrimination in the workplace—particularly its most invidious manifestation: mandatory retirement. In this instance the federal response—the ADEA—initially was a limited one, since protection was extended only to those between the ages of 40 and 65.³⁰ But greater success was in the offing. First, the Act was amended in 1978 both to protect federal employees from age 40 on, and to bring within the statute's ambit private sector employees between the ages of 65 and 70.³¹ And eight years later, in 1986, the age cap for most private sector employees was abolished.³² (Resistance to age bias developed in other contexts as well. Several additional federal statutory proscriptions of age discrimination were adopted: the Age Discrimination Act of 1975 (ADA);³³ an amendment to the Equal Credit Opportunity Act in 1976;³⁴ a ban contained in the Urban Mass Transportation Act;³⁵ and others.³⁶)

AGING ENTERPRISE (1979); H. PRATT, *THE GRAY LOBBY* (1976); see also Lammers, *Congress and the Aging*, in *AGING: PROSPECTS AND ISSUES* (R. Davis 3d ed. 1981).

30. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

31. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), (b)(3), 92 Stat. 189-90 (codified at 29 U.S.C. § 631 (1982 & Supp. II 1984)).

32. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

33. 42 U.S.C. §§ 6101-6107 (1982 & Supp. V 1987).

34. The amendment, adding age to the list of criteria which lenders are barred from relying upon, was added by the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C. §§ 1691-1691f (1982 & Supp. V 1987)).

35. 49 U.S.C. §§ 1600-1621 (1982 & Supp. V 1987). The amendment, added by the Federal Public Transportation Act of 1978, Pub. L. No. 95-599, tit. III, 92 Stat. 2689, is codified at 49 U.S.C. § 1615(a)(1).

36. A number of statutes incorporate, albeit not entirely without complexity, the ADA. See 42 U.S.C. § 6727(a), a part of the Public Works Employment Act of 1976, 42 U.S.C. §§ 6701-6736 (1982 & Supp. V 1987); see generally 1 ERLT, *supra* note 23, § 8.04. See also 20 U.S.C. § 1232i(b) (1982), a provision of the General Education Provisions Act, 20 U.S.C. §§ 1221-1234e (1982 & Supps. I, II, IV, V, 1983, 1984, 1986, 1987); 1 ERLT, *supra* note 23, § 8.05. See also 42 U.S.C. § 6870(a) (1982) (dealing with the Department of Energy); 1 ERLT, *supra* note 23, § 8.06. See also 42 U.S.C. § 5057(a) (1982 & Supp. II 1984), dealing with VISTA, the Peace Corps, and other volunteer programs; see generally 1 ERLT, *supra* note 23, § 8.07. Other bans include 42 U.S.C. § 5151 and § 5174(d) (1982), both parts of the Disaster Relief Assistance Act of 1974, 42 U.S.C. §§ 5121-5202 (1982); see generally 1 ERLT, *supra* note 23, § 8.08. See also 36 U.S.C. § 391(b)(6) (1982), a provision of the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-396 (1982); see generally 1 ERLT, *supra* note 23, § 8.09.

Despite (or perhaps because of) these successes, today there are a number of intimations that the notion that the elderly need and/or deserve some special measure of popular support is on the wane. One telltale sign is the increasing frequency of group-directed negative commentary in the popular media. For example, a prominent financial columnist for the leading Chicago newspaper wrote in 1987: "I have nothing against the over-65 gang. Indeed, I hope to make it there myself one day. But it seems to me that this group has become too politically potent and developed too much of an 'entitlement' attitude for the country's own good."³⁷ Within the past few years the elderly were portrayed in one magazine article as "[t]aking America [t]o [t]he [c]leaners,"³⁸ and the author of another recent article asserted: "Simply put, in economic terms we are consuming our children . . . [T]he real cause of the problem [is]: The old are getting richer at the expense of the young."³⁹ Still another popular journal writer reviewed what he perceived to be a growing number of restrictive laws imposed on young people in such contexts as access to contraceptives and to alcohol and concluded that the demographics have "produced a significantly older population, making the youthful minority more susceptible to discrimination."⁴⁰ In a related vein, the largest advocacy group for seniors—the American Association of Retired Persons (AARP)—has garnered popular media depiction as a narrow, self-serving organization driven by parochial needs and economic greed.⁴¹

Such expressions of antipathy in the print media either support, or are manifestations of, a larger theme that is attracting both popular and academic attention: intergenerational conflict. For example, a recent author predicted, in somewhat strident but

See also 12 U.S.C. § 3015(a)(4) (1982), a provision of the National Consumer Cooperative Bank, 12 U.S.C. §§ 3001-3050 (1982 & Supp. IV 1986); see generally 1 EGLR, *supra* note 23, § 8.10.

37. Neikirk, *The Over-65 Gang is Overpowerful*, Chicago Tribune, Nov. 29, 1987, § 7, at 3, col. 1.

38. Longman, *Taking America To The Cleaners*, 14 WASH. MONTHLY, Nov. 1982, at 24. See also Fairlie, *Talkin' 'Bout My Generation*, 198 THE NEW REPUBLIC 19 (March 28, 1988).

39. Chakravarty & Weisman, *Consuming Our Children?*, 142 FORBES, Nov. 14, 1988, at 222.

40. Carpenter, *The New Anti-Youth Movement*, 240 THE NATION, Jan. 19, 1985, at 40.

41. See, e.g., Schurenberg & Luciano, *The Empire Called AARP*, 17 MONEY, Oct. 1988, at 128, 129 [hereinafter Schurenberg]. See also Collins, *As Nation Greys, a Mighty Advocate for Aged Flexes its Muscles*, N.Y. Times, Apr. 2, 1987, 19, 21, at C1, col. 1 (reporting criticisms by others of the AARP).

powerful terms, a "war between young and old."⁴² And a leading conservative newspaper columnist echoed this prognostication: "Our country has known bitter conflicts, between North and South, farm and city, labor and management. The approaching conflict between young and old could be the most brutal of them all."⁴³ To make matters worse, a racial and ethnic dimension to this possible generational battle has been suggested. The former head of the National Institute on Aging expressed in a newspaper interview the fear of "ageist-racist politics where an aging white population spurns school-age minority people, and the working minority populations respond by asking why they should pay taxes to support a bunch of white people who never did anything for our kids?"⁴⁴

Admittedly, there is a goodly dose of hyperbolic rhetoric in some of these commentaries. I recognize, further, that giving attention to these questions of intergenerational inequity, and the potential conflict flowing from intergenerational rivalry, may have the unfortunate consequence of highlighting issues already unduly inflated by superficial media attention. Nonetheless, there is too much of substance here to dismiss or ignore. Indeed, the leading professional organization for gerontologists—the Gerontological Society of America—has been so concerned that it recently sponsored a lengthy rebuttal to the conflict theme, wherein the authors urge recognition of a "common stake in family efforts and public policies, or intergenerational transfers," binding the old and the young.⁴⁵ Similarly, a leading foundation addressing issues concerning the elderly has attempted to refute the growing—and in its view, erroneous—perception of old people as a group whose finan-

42. P. LONGMAN, *BORN TO PAY—THE NEW POLITICS OF AGING IN AMERICA* 2 (1987).

43. Kilpatrick, *Will the Future Bring War Between Young, Old?*, *Wis. St. J.*, Oct. 7, 1984.

44. *With an Aging Society Comes Politics of Age*, *Chicago Tribune*, Dec. 17, 1987, § 5, at 1. In a study commissioned by the United States Department of Labor, the Hudson Institute undertook to make projections regarding the American work force in the year 2000. HUDSON INSTITUTE, *WORKFORCE 2000, WORK AND WORKERS FOR THE 21ST CENTURY* (1987). The authors of the study estimated that the economy would need 25 million entrants to the labor force by the year 2000 and predicted that most of these would be nonwhite, female, or immigrant workers. *Id.* at xix-xx. Thus, whereas at the time of the study's publication native white males constituted 47% of the labor force, only 15% of the entrants to the labor force between 1987 and 2000 will be made up of such individuals. *Id.* at xiii.

45. R. KINGSON, B. HIRSHORN & J. CORNMAN, *TIES THAT BIND—THE INTERDEPENDENCE OF GENERATIONS* 10 (1986).

cial needs have been satisfied, and perhaps even sated.⁴⁶

Recent federal legislative developments offer tangible—as opposed to merely rhetorical—signals that real, rather than just vaguely sensed, changes in generational relationships indeed may be afoot. I am referring to laws which have been enacted that either impose burdens upon the elderly, or at least curtail advantageous treatment.⁴⁷ In 1983 legislation was enacted to impose, for the first time, a tax on Social Security benefits, in this case benefits received by individuals whose incomes exceed \$25,000 and couples whose joint income exceeds \$32,000.⁴⁸ Thereby, those older individuals who are deemed to have sufficient financial resources are required to return to the Treasury as tax dollars some of the federal dollars extended to them as benefits. In the same year benefits for current Social Security beneficiaries were cut by virtue of a six-month delay in the cost-of-living increase;⁴⁹ this “marked the first time in the program’s 48-year history that Social Security benefits were cut across-the-board.”⁵⁰ In addition, another provision of the 1983 enactment raised the age of eligibility for full benefits in

46. VILLERS FOUNDATION, *ON THE OTHER SIDE OF EASY STREET: MYTHS AND FACTS ABOUT THE ECONOMICS OF OLD AGE* (1987) [hereinafter VILLERS FOUNDATION]. There is very little in the academic legal journals directly dealing with generational relations. Environmental law issues have generated some discussion, given that one imperative which drives efforts to preserve and protect natural resources and the environment today is the desire and need to have them available for later generations. See, e.g., Gjerdingen, *Intergenerational Condemnation*, 21 TULSA L.J. 419 (1986); Note, *A Ghost of Christmas Yet To Come: Standing to Sue for Future Generations*, 1 J.L. & TECH. 67 (1986); Comment, *Toward a Better Understanding of Intergenerational Justice*, 36 BUFFALO L. REV. 165 (1987).

47. I am not contending that there is a unidirectional flow of events here. Clearly, older people have not lost every battle. Indeed, the 1986 amendment that removed the age 70 cap from the ADEA confirms this. Refer to note 32 *supra* and accompanying text. Moreover, it is important to point out that the negative legislative developments noted in the text concern older people of relative economic well-being, and so perhaps one must temper this discussion of changing perceptions regarding the old with the thought that perceptions are changing primarily with regard to the economically comfortable elderly. One further note, however: as discussed *infra* notes 59-66 and accompanying text, increasingly the old generally are—and are seen as being—in relatively good economic shape. Thus, the past distinction that validly could be made between the large group of the elderly generally, and a much smaller segment consisting of economically comfortable older people, has become blurred. (Admittedly, this blurring, whereby all old people have come to be viewed as not being in economic need, can be challenged as being an ill-advised development. Refer to note 65 *infra* and accompanying text.)

48. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 80-81.

49. *Id.* at 72.

50. Zedlewski, *The Increasing Fiscal Burden on the Elderly*, in PUBLIC POLICY INSTITUTE, AARP, SOCIAL SECURITY AND ECONOMIC WELL-BEING ACROSS GENERATIONS 140 (J. Gist ed. 1988) [hereinafter *Zedlewski*].

small increments so that by 1999 one will not become eligible until attaining age sixty-seven.⁵¹

Significant changes in the Medicare program, aimed at curtailing expenses, also have been adopted in recent years. These, too, have served to impose increased financial burdens on older people or, to state the matter more accurately, these changes have diminished the extent to which Medicare relieves older people of responsibility for their medical expenses.⁵² In 1988 the Medicare Catastrophic Coverage Act⁵³ was adopted to expand financial coverage (albeit with serious gaps) under Medicare for the costs of catastrophic illnesses. While on the one hand this can be viewed as legislation advancing, rather than contracting, the interests of the elderly, the full expense of the program is borne by Medicare-eligible individuals, who must pay increased premiums, as well as a surtax based on their income taxes, for this new protection. This represents a significant change in direction, inasmuch as Medicare-eligible persons hitherto had not been expected to fully fund the costs of the care provided to them.

As a consequence of the tax on Social Security benefits, the Medicare surtax imposed by the 1988 law, and the reduction in benefits that follows when Social Security beneficiaries under age seventy earn in excess of \$8,880 annually,⁵⁴ the tax posture of the elderly, as compared to that of the young, apparently has changed for the worse.⁵⁵ Moreover, it has been argued that changes made

51. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 107-08.

52. Zedlewski, *supra* note 50, at 148-55.

53. Pub. L. No. 100-360, 102 Stat. 683 (1988), amending 42 U.S.C. §§ 1395(a)-(xx) (1982 & Supp. V 1987).

54. 42 U.S.C. § 403(b) (Supp. V 1987); 42 U.S.C.A. § 403(f)(3) (West Supp. 1989). One dollar of benefits is lost for every two dollars earned over the exempt amount. *Id.* at § 403(f)(3). While this 'tax' does penalize Social Security recipients who work, and so in that sense can be viewed as a burden, it is a burden that has been imposed for many years, and so it should not be characterized as a manifestation of latter-day reaction against the financial success of the elderly. Moreover, in fact the dollar minimum regularly has been raised, and each increase in the minimum that can be earned without triggering the loss of Social Security dollars can be viewed as an affirmative measure benefiting older workers. (Of course, there are factors other than altruism at work here, such as the desire to keep older people in the work force.) Thus, this aspect of the declining favorable tax posture of the elderly does not, standing alone, entirely fit into the scenario I am setting forth in the text, and even arguably refutes it. As I noted earlier, however, I am not making a case (nor could I) that all political and social developments are moving in just one direction. Refer to note 47, *supra*.

55. Goodman, *The Aged: Sidelined by Taxes*, N.Y. Times, Apr. 14, 1989, at 23, cols. 2-4.

by the Tax Reform Act of 1986⁵⁶ to some extent "changed the balance in tax liability for older persons relative to the young," so that [i]n general, older people will pay more in income taxes, while the young will pay less."⁵⁷

A variety of explanations no doubt play a role in what appears to be a likely incipient revisionist treatment of seniors in America.⁵⁸ For one, the elderly as a group have enjoyed a generally enviable record of economic progress in recent years. The average Social Security benefit rose 57% in real terms between 1970 and 1986.⁵⁹ The median adjusted income for families headed by persons age sixty-five and over rose 54% during this period, while families headed by individuals under age twenty-five experienced a 15% drop in median adjusted income.⁶⁰ During the 1970-1986 period the adjusted poverty rate for elderly units decreased from

56. Omnibus Budget Reconciliation Act of 1986 Pub. L. No. 99-509, tit. VIII, §§ 8001(c), 8071, 8073(a), Tit. IX, § 9307(c)(1),(2), 100 Stat. 1951, 1964, 1965, 1995 (codified throughout 26 U.S.C.).

57. Zedlewski, *supra* note 50, at 161.

On the one hand, the elimination [by the 1986 Tax Reform Act] of the additional tax exemption for the elderly and the lowering of the medical deduction will be sources of concern for some elderly taxpayers. On the other, increases in the personal exemption and the additional increase in the standard deduction will provide clear tax advantages.

Most likely, the new rules will have a mixed effect on the elderly. Some may be dropped from the tax rolls, while others may pay additional taxes. Some may pay reduced taxes, while others may pay the same as before.

DEVELOPMENTS IN AGING, *supra* note 1, at 110. See generally J. GIST, THE IMPACT OF TAX REFORM ON LOW INCOME OLDER WOMEN i-v (AARP Pub. Pol'y Inst. 1988).

58. There admittedly is some inexactitude involved in characterizing these various changes as constituting burdens imposed on the old by the young, because these changes ultimately will play themselves out on the presently young when they themselves are older. (Indeed, the perception that since we all become old—absent the worse alternative of death—we all ultimately will suffer the economic, political, and other disabilities accompanying old age is one that underlay the Supreme Court's refusal in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976), to hold that old age constitutes a suspect classification. Refer to note 94 *infra* and accompanying text. It is also a perception particularly underlying Daniels' distributive scheme. Refer to note 17 *supra* and accompanying text. Still, some element of age-based differentiation attaches to these developments, and so they deserve note because, even though they may not demonstrate an active conflict here and now between identifiable old and young individuals, they do illustrate a more diffuse change in attitude regarding the old generally.)

59. CONGRESSIONAL BUDGET OFFICE, TRENDS IN FAMILY INCOME: 1970-1986, at 50 n.6 (1989) [hereinafter CBO]. To say that the economic lot of the elderly has improved is not to say that the improvement was not very much needed and deserved. "In 1960, one in every three older Americans was poor—a rate of poverty twice that of nonelderly adults." AGING AMERICA, *supra* note 14, at 56.

60. CBO, *supra* note 59, at 36. "The median adjusted family income increased 14% for those between 55 and 64 and 28% for those in the 35 through 54 age range." *Id.* at 37.

46% to 20% for unrelated individuals and from 14% to 4% for childless families.⁶¹ In contrast, "46% of single mothers with children and 7% of married couples with children were poor in 1986, both rates virtually unchanged from 16 years earlier."⁶² And there is more:

[P]eople 55 and over control about one-third of the discretionary income in the U.S. and spend 30% of it in the marketplace, roughly twice that of households headed by persons under 35 Americans 55 and over purchase close to 80% of all commercial vacation travel . . . and a disproportionate share of many other non-essential commodities as well.⁶³

Thus, there is considerable empirical support for a "new stereotype of the affluent elderly."⁶⁴ While there also are data establishing that this stereotype, like all such simplistic caricatures, errs considerably,⁶⁵ the stereotype nonetheless has strength—in part, ironically, because advocacy organizations for older people have themselves helped to create this image of the "affluent elderly."⁶⁶

Another factor likely involved in the diminishing quantum of sympathy evoked by the elderly is the comparatively recent societal recognition of older men and women as able-bodied and able-minded workers who ought not to be subjected to discrimination on the job. This change in societal views, which undergirded the ADEA amendments noted earlier, likely has helped engender a more general rejection of the perception of the elderly as ineffectual and dependent. And perhaps further undermining the imagery of victimization is the fact that despite older workers having won legislative protection from discrimination, most of them nonetheless opt for early, not later, retirement.⁶⁷ Empathy presumably

61. *Id.* at 28.

62. *Id.*

63. Minkler, *Gold in Gray: Reflections on Business' Discovery of the Elderly Market*, 29 *THE GERONTOLOGIST* 17, 18 (1989) [hereinafter Minkler].

64. *Id.*

65. *Id.* See also VILLERS FOUNDATION, *supra* note 46.

66. See Minkler, *supra* note 63, at 19. See also Schurenberg, *supra* note 41, at 144: "AARP is in the paradoxical position of arguing before Congress that the elderly are too poor to be taxed more on Social Security benefits while boasting to advertisers that the average net worth of [AARP's] *Modern Maturity* [magazine] readers is higher than \$159,000."

67. A 1978 survey reported that almost two-thirds of retirees had left work before age 65. L. HARRIS & ASSOC., 1979 *STUDY OF AMERICAN ATTITUDES TOWARDS PENSIONS AND RETIREMENT* 21 (1979) [hereinafter Harris Survey].

In 1986, 88.9 percent of men age 50 to 54 and 62 percent of women in this age

comes a little harder when the majority of sixty- and sixty-one-year-olds are departing their jobs for lives free of work, even if for many of them their departures are generated by factors other than hedonistic gratification.⁶⁸

Expensive government programs in a time of enormous annual federal budget deficits further erode the sympathetic response to the depiction of dependency that has been so critical to the success of the elderly.⁶⁹ The financial burdens imposed on the working population by these programs and deficits likely have had some negative impact on altruistic inclinations. This is a particularly likely consequence of the commonly held belief that today's young workers will not reap anywhere near the financial benefits from the Social Security system when they retire as current retirees are receiving.⁷⁰

group were in the labor force. By age 60 to 64, only about 55 percent of men and 33 percent of women were with the labor force. Among those 70 and older, only about 10 percent of men and four percent of women were in the labor force.

AGING AMERICA, *supra* note 14, at 85. See also DEVELOPMENTS IN AGING, *supra* note 1, at 131.

68. There are conflicting views in this regard. Parnes reports that declining health in fact accounts for a large proportion of retirements prior to age 65, and an even larger proportion of retirements prior to age 62. Parnes, *The Retirement Decision*, in THE OLDER WORKER 115, 143 (M. Borus, H. Parnes, S. Sandell & B. Seidman eds. 1988). However, it also has been reported that "[d]irect evidence . . . indicates that most workers retire for reasons other than poor health." Ruhm, *Why Older Americans Stop Working*, 29 THE GERONTOLOGIST 294, 295 (1989).

69. See Binstock, *supra* note 28, at 140.

70. While some public perceptions of the Social Security system are not necessarily accurate (for example, the Social Security trust fund is in much better financial shape than many seem to think, even though there undeniably are potential problems down the road, see, e.g., H. AARON, B. BOSWORTH & G. BURTLESS, CAN AMERICA AFFORD TO GROW OLD? PAYING FOR SOCIAL SECURITY (1989)), this perception, at least, appears to be on target. Heclo has written:

[P]ast and current retirees have been receiving Social Security benefits far in excess of what they have ever contributed. This has been an enviable and inevitable result of being in on the early stages of a pay-as-you-go system, when more workers were being brought into the system and were paying payroll taxes to finance benefits for a relatively small number of beneficiaries That windfall has been declining gradually for some time, and we are just now at the beginning of a period when the pace of its disappearance is going to accelerate. If this is true for average income earners, it is doubly true for higher-income groups. . . . Clearly, we are entering a time when the return for higher-income earners will worsen significantly compared with the return for the typical worker. . . . [Thus,] the benefit bonanza that surely has helped make compulsory social insurance popular is now a steadily diminishing asset, especially for well-heeled Americans whose voices count for much in our political system.

Heclo, *Generational Politics*, in THE VULNERABLE 381, 395 (J. Palmer, T. Smeeding & B. Torrey eds. 1988).

A fourth, related aspect of all this is the case made by some that it is particularly the children of America who are paying for the improved welfare of the elderly: inadequate educational services, blighted housing, and insufficient or totally nonexistent health care all can be connected, the argument goes, to the inordinately large amounts of resources captured by oldsters.⁷¹ Thus, one sympathetic group—children—is seen as being pitted against another group whose claims to popular and political support are already being questioned on other grounds.

A changing, more negative, image of older Americans gains added dimension when one looks to the costs and allocation of health care in America. Approximately \$458 billion in public and private funds—about 11% of the gross domestic product—was spent in 1986 to provide health care services.⁷² Even so, millions of Americans went underserved or completely unserved.⁷³ And what brings this all around to the issue of generational relations is the fact that a very significant portion of health resources is expended on those age sixty-five and over:

In 1978, the most recent year for which data are available, per capita health care spending through the public sector was 15.6 times as high for the elderly as the young. In 1986 about three-fourths of the \$100 billion spent on health care by the federal government aided persons aged 65 and older, whereas only about 5 percent of the total was spent on children.⁷⁴

While there is no assurance that these percentage distributions as between young and old consumers of health care will remain the same in the future, we do know from demographic projections that the numbers of elderly men and women will continue to swell. The present population of 29 million men and women over age 65—about 12% of the United States population—will rise to 66

71. Refer to note 145 *infra*.

72. DEVELOPMENTS IN AGING, *supra* note 1, at 178.

73. Ability to pay not surprisingly is a critical factor in determining the provision of health care. In the United States private health insurance is a primary payment mechanism. Yet between 31 and 37 million people have no health insurance at all. Meyer and Moon, *supra* note 15, at 179. Moreover, "a substantial number of people in the insured working population are underinsured; often, their insurance policies lack protection against catastrophic illness." *Id.*

74. Meyer & Moon, *supra* note 15, at 175-76. Refer to note 14 *supra*. This is not to say that the elderly are anywhere close to having achieved adequate protection from unaffordable expenses. Indeed, "although all the elderly are covered by Medicare, the program covers only half of all health outlays." Meyer & Moon, *supra* note 15, at 180.

million, or almost 22%, by the year 2030.⁷⁵ We also know that older people utilize medical personnel and facilities more frequently than do other individuals.⁷⁶ Consequently, we can expect enormous increases in absolute dollar terms for health care provided to older men and women.

While the existence today, or the imminent arrival, of a discrete measureable diminution in the social and political status of the elderly in America may be speculative propositions, the foregoing data do support the perception of the elderly as being a group whose popularity is on the wane. And issues concerning health care financing and distribution may well constitute both causes and symptoms in this scenario. Part of the developing retreat from the enormous public and political good will the aged have mustered over the past several decades certainly reasonably might be attributed to the troubling problems of cost and allocative choices posed by the very large consumption of health dollars and resources by the old. Conversely, part of the explanation for the increased questioning of oldsters' consumption of health care may be the generalized decline in the sympathetic imagery of the aged—a decline manifested by concerns about health care financing and distribution.⁷⁷

75. AMERICAN ASS'N OF RETIRED PERSONS, *A PROFILE OF OLDER AMERICANS: 1988*, at 1-2 (n.d.).

76. AGING AMERICA, *supra* note 14, at 111. While we do not really have a good grip on the question of comparative health status, Meyer & Moon, *supra* note 15, at 185-88, we do know that older people have a higher incidence of chronic illness. AGING AMERICA, *supra* note 14, at 97. Refer to note 14 *supra*.

77. I do not want to construct a scenario built upon exaggeration, and so I must caution that my suggestion that the political and popular stance of the elderly is in decline is one which can be refuted by numerous particular examples. The elderly are, to put it in somewhat crass terms, still winning more than they are losing. Nonetheless, there are signs of a negative trend. This is not to say that in 20 years the elderly are going to be scorned and oppressed. It is to say, however, that the political successes are likely to come harder, and the victories are likely to be more muted.

Rarely are the old and the young overtly pitted against one another in the political process. This makes particularly notable a recent legislative development at the federal level where such a contest openly surfaced. The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, amended Title VIII of the Civil Rights Act of 1968, the federal Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (1982 & Supp. V 1987). The 1968 legislation had addressed discrimination in housing based on race, color, and national origin; the 1988 amendments added handicapped persons as a protected class and further added a prohibition of discrimination based on familial status—i.e., the characteristic of having a child, or children, under age 18. The problem attendant upon this latter change in the Act was that it imperiled the survival of so-called senior citizen, or retirement, communities, which bar families with young children, as well as younger adults. This threat to such communities was

clearly recognized, and it engendered—at least so far as can be gleaned from the utterances of the legislators who spoke during the House and Senate debates—a clear desire to protect their survival. This desire was expressed, as well, in the committee report accompanying the House version of the legislation:

The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizen[s] in retirement-type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs.

COMM. ON THE JUDICIARY, FAIR HOUSING AMENDMENTS ACT OF 1988, H. R. REP. NO. 711, 100TH CONG., 2D SESS. 21 (1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2173, 2182.

It proved difficult to devise an exemption that would protect only retirement communities, while not enabling other adults-only housing arrangements—i.e., young singles-dominated condominium complexes, and condominium complexes and apartment buildings populated by middle-aged empty-nesters—to elude the strictures of the statute. As a result, the exemption from the proscription on discrimination was steadily broadened. Congressman Edwards, the manager of the House bill, recounted the process:

During the life of this bill, this exemption has undergone refinements. We went from exempting “bona fide retirement communities” to creating a detailed exemption of [sic] either where all the residents of the community are 62 or older, or where at least 90 percent of the units have at least one person 55 or older and the community provides significant facilities and services to meet their physical or social needs.

The Senate[-]passed bill further refines and clarifies the second part of this standard, by requiring at least one person 55 or older per unit. In determining whether a community qualifies for this exemption, the Secretary of HUD is required to develop regulations including at least the following factors: First, that at least 80 percent of the units are occupied by persons 55 or older; second, the publication of and adherence to policies and procedures which demonstrate an intent to provide housing for persons 55 or older; and third, the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons. If the provision of facilities and services is not practicable, then the community must provide important housing opportunities for older persons.

134 CONG. REC. H6,498 (Aug. 8, 1988) (statement of Rep. Edwards).

The very enactment of legislation that posed a direct threat to older people—or, more specifically, older people living in certain residential settings—can be seen as an indication that the political sanctity of the elderly is on the decline. (A number of states already had enacted legislation protecting families with children to some extent. *See* 1 EGLI, *supra* note 23, § 13.04. Thus, the 1988 federal legislative action cannot be given too much credence as a symptom of a sudden change in attitudes). While ultimately the interests of elders were protected to a very considerable extent, the effort to secure that protection was a protracted one. Moreover, even though the version of the legislation finally enacted into law contains broad protection for retirement communities, it is still possible that some seniors' housing complexes which hitherto could have excluded children now will be unable to do so.

As to the legal issues associated with retirement communities, see generally Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977); 1 EGLI, *supra* note 23, §§ 13.11-13.17; Holmes & Brown, *The Age Restricted Residence: Legitimate Exclusionary Zoning for the Future*, 13 LOY. L.A.L. REV. 921 (1980); Travalio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295 (1979).

III. THE LAW AS A MEDIATOR BETWEEN THE YOUNG AND THE OLD

A comparative analysis of social systems generally,⁷⁸ and legal systems particularly, no doubt could be especially useful for a full-blown study of intergenerational relations. Taking a more focused tack, one might look to a number of areas of American law—decedents' estates issues, aspects of property law, juvenile's rights under the Constitution, and others—as constituting overt or implicit facets of the means by which relations between generations are fashioned and controlled. My intent here, however, is to proceed on a narrower track, looking to discrete situations in the American legal system where age discrimination, or "ageism,"⁷⁹ is openly, formally asserted to be an intolerable vice (or at least one to be only reluctantly and cautiously allowed) when choices are being made about who gets what, and when he or she gets it. My aim is to seek some insights applicable by way of analogy to assessing the age-based allocation of health care resources—a context in which there is not yet any formally expressed consensus, articulated in statutory or regulatory form, regarding the use of age as a decisionmaking criterion.

Whether one frames the matter as involving "age discrimination" per se is beside the point. "Discrimination," after all, is a neutral term. Many laws, policies, customs, and decisions discriminate in the sense that they differentiate between one person and another, or between one entity and another. The negative connotations associated with the word "discrimination" come into play only when a correlative normative determination is made that a certain instance of distinguishing between person *A* and person *B*, or group *A* and group *B*, is improper. The real issue, then, is whether a given allocative criterion—in this instance age—should evoke praise (or at least acceptance) or condemnation when used as a determinant of who is to receive health care. No certain answer presents itself. But there are some recurrent, general themes when an anti-age discrimination principle is asserted in the context of competing demands for a scarce resource. And while these

78. The use of age as a determinant of status and its attendant rights and responsibilities is common to all cultures. See 3 M. RILEY, M. JOHNSON & A. FONER, *AGING AND SOCIETY* 402 (1982).

79. "Ageism" is defined as "discrimination against people on the basis of age; specifically, discrimination against, and prejudicial stereotyping of, older people." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 35 (2d ed. 1983). As to the terminology of ageism see Nuessel, *The Language of Ageism*, 22 THE GERONTOLOGIST 273 (1982).

themes have not received any particular legal analysis in the health care context, they have generated attention and evoked legal energy in other settings. Those experiences are apposite here.

A. *The "You've Had Yours, Now It's My Turn" Theme*

There is a notion, implicitly or explicitly set forth in some of the discussion concerning health care resource allocation, that older people at some point reach a stage at which they have an obligation to surrender their claims to societal support. Over time they have received their due measures of personal fulfillment, economic opportunity, and public resources and now, in their later years, their proper roles are to step aside so that those who are following them through life's course in turn may enjoy the same benefits.⁸⁰

This theme, it turns out, already has struck a particularly resonant chord in the employment setting. Employers are subject to pressures to redistribute scarce resources—i.e., jobs, particularly high level ones—from those of advanced years to the young, while they have had to be attentive to avoiding the perpetration of age discrimination. These competing concerns have engendered both constitutional and statutory responses.

1. *The Constitutional Context*

There was a period of time—the 1970s and, to a much lesser extent, the early 1980s—when victims of age discrimination repeatedly looked to the United States Constitution for redress. While most of the cases involved mandatory retirees, challenges to age-based decisions also were made by a variety of other grievants: over-age athletes complaining of maximum age limits barring them from high school competition;⁸¹ parents protesting public school policies excluding under-age children from kindergarten;⁸² disappointed prospective law enforcement officers too old to satisfy state

80. This is a theme articulated—explicitly or implicitly—in some respects by CALLAHAN, *supra* note 14, as well as by DANIELS, *supra* note 17, and Veatch, *supra* note 18. See also Brock, *Justice and the Severely Demented Elderly*, 13 J. MED. & PHIL. 73, 76-77 (1988).

81. See *Blue v. University Interscholastic League*, 503 F. Supp. 1030, 1033 (N.D. Tex. 1980).

82. See *Hammond v. Marx*, 406 F. Supp. 853 (D. Me. 1975).

laws setting youthful age requirements for hiring;⁸³ restrictive college students unwillingly limited to living in dormitories;⁸⁴ and others.⁸⁵ The great majority of cases involved equal protection claims. The plaintiffs contended that their age-based differential treatment violated either the fourteenth amendment's equal protection clause,⁸⁶ which applies to state and local governmental bodies, or the comparable equal protection guarantee⁸⁷ read into the fifth amendment's due process clause,⁸⁸ which applies to actions by the federal government.

Ordinarily, a court confronted with an equal protection claim uses a very relaxed rationality analysis, whereby the plaintiff must prove by a preponderance of the evidence that the challenged law or policy is irrational. In almost every instance this leads to rejection of the plaintiff's claim; as the courts have applied the rationality standard, just about any law—no matter how benighted or flawed—can be found to have some conceivable rational basis.⁸⁹ To prevail, then, a plaintiff proffering an equal protection claim must convince the court that more rigorous scrutiny is due. Some plaintiffs have succeeded: classifications based on race and national origin are deemed to be suspect and so will evoke very stringent judicial examination. This entails the defendant's having to prove that it has a compelling interest justifying its legislation or regulation and that the means used, i.e., the challenged classification, is necessary to achieve that interest.⁹⁰ Fundamental interests or rights, which are few in number and whose defining characteristics are obscure, likewise elicit strict equal protection scrutiny.⁹¹ In either in-

83. See, e.g., *McMahon v. Barclay*, 510 F. Supp. 1114 (S.D. N.Y. 1981).

84. See *Poynter v. Drevdahl*, 359 F. Supp. 1137 (W.D. Mich. 1972).

85. See generally 1 ERLIT, *supra* note 23, §§ 2.16, 15.13-15.

86. U.S. CONST. amend. XIV, § 1.

87. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

88. U.S. CONST. amend. V.

89. As Justice Marshall observed in his dissent in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976): "[T]he mere rationality test . . . when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld."

90. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (national origin).

91. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court set forth a definition of sorts:

[T]he key to discovering whether [something, such as] education [,] is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel [, which is fundamental]. Rather, the answer lies in assessing whether there is a right to education explicitly

stance, virtually no law can survive this rigorous judicial examination.⁹²

Very few age discrimination plaintiffs succeeded even prior to the Supreme Court's decision in *Massachusetts Board of Retirement v. Murgia*⁹³ in 1976, and once that ruling was handed down the prospects for an age discrimination victim's prevailing on constitutional grounds became virtually nil. *Murgia* involved a state law that required state police officers to retire at age fifty. Understandably, the plaintiff sought to convince the Court that it should apply strict scrutiny, the basis for doing so being the statute's use—so it was argued—of a suspect classification. By an eight to one vote, the Court rejected this argument:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities [O]ld age does not define a "discrete and insular" group, in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.⁹⁴

Applying minimum rationality analysis, the Court concluded that the age fifty retirement requirement rationally, albeit not necessarily wisely, served the purpose identified by the state for the law, i.e., protection of the public by assuring the physical preparedness of its police force:

or implicitly guaranteed by the Constitution.

Id. at 33-34. The right to travel interstate is recognized as a fundamental right. *See Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). So, too, is access to the franchise free from economic barriers and from barriers based on the lack of the voter's interest in the election deemed fundamental for equal protection purposes. *See, e.g., Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 625-30 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966). Access by criminal defendants to the lower courts free from economic barriers also is a fundamental right for equal protection purposes. *See Douglas v. California*, 372 U.S. 353, 357 (1963).

92. Statutes and regulations analyzed under the compelling interest test have survived Supreme Court examination on only two occasions. *See Korematsu v. United States*, 323 U.S. 214, 216-18 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100-01 (1943). These decisions both arose out of the World War II program of internment of Americans of Japanese descent, and are likely explicable in light of the national security concerns they involved.

93. 427 U.S. 307 (1976).

94. *Id.* at 313-14 (citation omitted).

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."⁹⁵

There was nothing on the face of the *Murgia* opinion to suggest that the Court understood the dispute before it as a struggle between the young and the old (or even the middle-aged). Undoubtedly, as superannuated officers were forced out at fifty, younger officers moved up in the hierarchy and even younger job applicants then had a chance to secure jobs with the police force; the Court did not rely, however, on this job progression scenario to explain or justify its ruling. So, unless one were to attribute to the Court a hidden agenda—and there is no particular warrant for doing so—it seems best to take the decision for what it appears to be: an unreflective response to data that—given the minimal scrutiny the mere rationality test entails—established to the Court's satisfaction a nexus between public safety and physically able (i.e., young) police officers. And whatever the flaws in the Court's resistance to recognizing age, or at least old age, as a classification criterion triggering intensive scrutiny—and there indeed are flaws⁹⁶—*Murgia* set the constitutional stance that continues to firmly hold sway in the courts.⁹⁷

95. *Id.* at 316 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

96. See Eglit, *Of Age and the Constitution*, 57 CHL[-]KENT L. REV. 859, 884-91 (1981).

97. Notwithstanding the arguable defects in the reasoning of the *Murgia* Court, in hindsight it appears that the practical consequences of the ruling probably were not particularly negative ones for older people in general. First, despite numerous academic and popular articles in the 1970s and early '80s condemning mandatory retirement, and notwithstanding the political rhetoric deploring the practice, mandatory retirement policies probably never exerted much actual control over older workers. Prior to the effective eradication of mandatory retirement (at least with regard to employers employing 20 or more employees for 20 or more weeks of the year) by the 1978 and 1986 amendments to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987) (refer to notes 31-32 *supra* and accompanying text), there were varying estimates as to how many workers were subject to age-based mandatory retirement. It was estimated in 1977 that about 30.6 million workers—about one-third of the work force—were potentially subject to such retirement. SELECT COMM. ON AGING, U.S. HOUSE OF REPRESENTATIVES, MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS, 95th Cong., 1st Sess. 6 (Comm. Pub. No. 95-91 1977). But most workers left their jobs prior to reaching age 65,

The Court's next, and only other, major constitutionally grounded confrontation with mandatory retirement followed *Murgia* by three years. *Vance v. Bradley*⁹⁸ involved a group of former and present Foreign Service officers who challenged a federal statute requiring them to retire at age sixty. They argued that the statute violated the equal protection component of the fifth amendment's due process clause, since younger federal employees were not subject to a like requirement. In justifying the law the government argued that it served the salutary purpose of creating predictable promotion opportunities, which in turn spurred morale and stimulated superior performance in the ranks by ensuring that ambitious officers who were not yet sixty years old would have the opportunity to move up in the hierarchy.

By another eight-to-one vote the Court again ruled against the retirees. It had no problem with the make-room-for-the-young justification undergirding the statute:

Congress was intent not on rewarding youth *qua* youth, but on stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service. Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through . . . early retirement does not play an acceptable role in the process.⁹⁹

even when mandatory retirement was legal. See Harris Survey, *supra* note 67, at 21. See also Ruhm, *supra* note 68, at 295. Often considerations other than such policies accounted for the early departure of American workers from the work force. See Parnes, *supra* note 68, at 142. Thus, the *Murgia* Court apparently did not take a position clearly at odds with the desires of those most affected, i.e., older workers.

Second, mandatory retirement served as a useful lightning rod to which advocacy groups could point in making their case that the elderly are victims who have suffered at the hands of American society and who therefore need and deserve redress, not only in the employment context, but generally. Thus, the vice of mandatory retirement functioned as a useful organizing tool, and it would not have been available for such use had the *Murgia* court ruled otherwise.

In any event, the *Murgia* decision likely had the beneficial consequence of spurring advocacy groups to greater effort, with the result being the legislative amendments that have statutorily outlawed mandatory retirement in much of the American workplace.

There is a very large body of legal literature dealing with mandatory retirement. A recent work that addresses a number of the issues involved in considering the genesis, application, and propriety of the practice is M. LEVINE, *AGE DISCRIMINATION AND THE MANDATORY RETIREMENT CONTROVERSY* (1988).

98. 440 U.S. 93 (1979).

99. *Id.* at 101.

Rejecting the plaintiffs' contentions that it was unfair to impose only on those sixty and over the burden created by a desire to ensure promotion opportunities, and that it would be better to devise some alternative enabling the retention of capable veterans, the Court asserted:

Even were it not irrelevant to the [minimum rationality] equal protection analysis appropriate here that other alternatives might achieve approximately the same results, the compulsory retirement age assures room at the top at a predictable time; those in the ranks know that it will not be an intolerable time before they will have the opportunity to compete for maximum responsibility.¹⁰⁰

In theory, Congress annually could have expanded the size of the Foreign Service so that for every advancing officer there would have been a position to fill. Pragmatically, however, that presumably was neither financially feasible, nor would it have made sense organizationally, since a perpetually inflating bureaucracy was not needed, nor would it have been workable. Thus, Congress chose to use age as the basis for determining whether one could, in the instance of an officer who had secured a top level position, retain his or her job. Likewise, age was used as the basis for determining whether one who had not obtained one of the few senior positions could hang on until he or she finally qualified. Some older officers, then, had an opportunity, but one with a clearly identified terminal date, to enjoy a precious resource, i.e., a senior job, while others never even obtained that resource. In either instance, however, ultimately all older employees had to step aside so that their successors could move up in the ranks.

The American health system, like the Foreign Service, also is generally perceived as being cabined by cost and other constraints. There is only a limited amount of money and other resources to be expended, and these cannot support all the health care that is desired, or even needed. Thus, choices must be made.¹⁰¹ One basis for choosing, although certainly not the only one, is the criterion of advanced age, a criterion justified with the premise that elderly men and women supposedly have had in their pasts the opportunity to secure (or at least to try to obtain) health care resources and other societal benefits, and so it is appropriate and fair to now

100. *Id.* at 103 n.20.

101. Admittedly, this position is not indisputable. See Binstock, *supra* note 5.

expect them, or if needs be require them, to step aside so that others may have a like opportunity.

Murgia and *Vance* offer very little basis for arguing against the constitutionality of such a scheme. The two decisions demonstrate that in the employment setting, at least, the Supreme Court has had no problem with the notion that those who have accumulated too many years legitimately can be required to sacrifice a desirable government-created and -funded commodity—albeit one not fundamentally important for constitutional purposes—in order to make that commodity available for younger successors.

Of course, the two rulings were focused on public employees' claims to jobs. And certainly one could readily contend that the negative consequences flowing from the denial of medical treatment may be more devastating (indeed, they can be fatal) than are the adverse results typically attending the loss of employment. Nonetheless, the fundamental interest strand of equal protection case law seems largely beyond reach, just as it was for the public employee plaintiffs in *Murgia* and *Vance*. The case law does not support reading public financing of health care, or the direct provision of care by government to those in need, as fundamental interests, the withholding of which will trigger strict judicial scrutiny¹⁰²—at least so long as there is not a complete government-imposed barrier to access to health care. And this means that allocative schemes generally will survive equal protection challenge, given the negligible judicial role involved in applying the traditional minimum rationality test that applies absent a suspect classification or a fundamental interest being involved. This set of conclusions needs amplification; it is both equal protection and due process decisions that provide the necessary details.

The due process clauses of the fifth and fourteenth amend-

102. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317 (1980). See also Blumrosen, *supra* note 9, at 1377-81. Where the government has taken control of a person by incarcerating him in a prison, there would be an obligation to provide that individual with care needed for serious medical problems. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). It has been argued that restrictions on access to health care should be subjected to heightened scrutiny when attacked on equal protection grounds. See generally Mariner, *Access to Health Care and Equal Protection of the Law: The Need for a New Heightened Scrutiny*, 12 AM. J.L. & MED. 345, 371-78 (1986). (In the context of restrictions on the right of interstate travel or migration, a law will evoke strict scrutiny on equal protection grounds if it treats new arrivals to a jurisdiction less advantageously than longer term residents for purposes of eligibility for publicly funded health care facilities. See *Maricopa Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974). This decision rests on the fundamental right to travel, however; the Court did not embrace the notion of a fundamental right to health care.)

ments impose both substantive and procedural constraints on governmental action.¹⁰³ In the typical substantive due process case the challenged law, policy or decision will only evoke minimum rationality scrutiny and, as in the equal protection setting where the same standard is used, the plaintiff's defeat will thereby virtually be guaranteed.¹⁰⁴ On the other hand, a statute or governmental action that infringes upon a fundamental interest or right will elicit—as in the equal protection context—strict judicial scrutiny.¹⁰⁵ A group of cases involving abortion confirm that neither the financing nor provision of health care is such a fundamental interest.

In *Maher v. Roe*¹⁰⁶ the Court upheld in the face of an equal protection-based attack a Connecticut welfare regulation under which Medicaid payments were made for medical services related to childbirth, but were denied for nontherapeutic abortions. Similarly, in *Poelker v. Doe*¹⁰⁷ the Court held that the City of St. Louis committed “no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth, without providing corresponding services for nontherapeutic abortions.”¹⁰⁸ In *Harris v. McRae*¹⁰⁹ the stakes escalated; the federal statutory provision at issue withheld from states federal funds under the Medicaid program to reimburse the costs of medically necessary (as opposed to nontherapeutic) abortions “‘except where the life of the mother would be endangered if the fetus were carried to term.’”¹¹⁰ The Court simply required a showing that the authorization by Congress of “reimbursement for medically necessary services generally, but not for certain medically necessary abortions,” was rationally related to the government's goal of encouraging childbirth.¹¹¹

The Court's most recent abortion ruling, *Webster v. Repro-*

103. U.S. CONST. amend. V provides that no person shall “be deprived of life, liberty, or property, without due process of law” The same language appears in the fourteenth amendment. U.S. CONST. amend. XIV, § 1.

104. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 486-88 (1955).

105. Refer to note 91 *supra* and accompanying text.

106. 432 U.S. 464 (1977).

107. 432 U.S. 519 (1977).

108. *Id.*

109. 448 U.S. 297 (1980).

110. *Id.* at 325 n.27, quoting Pub. L. 94-439, § 209, 90 Stat. 1434 (1976).

111. 448 U.S. at 325.

ductive Health Services,¹¹² confirms the continuing vitality of the earlier decisions. This due process decision involved a law barring state employees from performing abortions not necessary to save the pregnant woman's life, and making it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother." ¹¹³ Invoking *Maier, Poelker* and *Harris*, the Court stated:

Having held that the State's refusal to fund abortions does not violate *Roe v. Wade*, [410 U.S. 113 (1973),] it strains logic to reach a contrary result for the use of public facilities and employees. If the State may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds," . . . surely it may do so through the allocation of other public resources, such as hospitals and medical staff.¹¹⁴

These decisions, while not speaking overtly or directly to the issue of health care per se, seem to go far in establishing that there is no constitutional impediment to a governmental body's refusing to fund medical procedures, or to its barring the use of publicly owned facilities and public employees for the provision both of elective and necessary health care, short of situations involving life threatening medical conditions. Indeed, given that the particular medical procedure at issue in the abortion cases is one that effectuates what the Court in *Roe v. Wade*¹¹⁵ established to be a fundamental right, i.e., the right of a woman to decide to abort, surely it follows that governmental support for care not tied to a fundamental right likewise can be denied. In sum, and as the Court asserted in *Deshaney v. Winnebago County Department of Social Services*,¹¹⁶ in a quotation approvingly cited in *Webster*:

"[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."¹¹⁷

112. 109 S. Ct. 3040 (1989).

113. *Id.* at 3051, quoting Mo. REV. STAT. § 188.215 (1986).

114. 109 S. Ct. at 3052, quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977).

115. 410 U.S. 113, 153 (1973).

116. 109 S. Ct. 998, 1003 (1988).

117. 109 S. Ct. at 3051.

There are two addenda to all this, however. First, none of the abortion cases spoke to governmental refusals to pay for, or to provide, lifesaving care. This was due to the particular statutes at issue: none of the laws went so far as to bar women at risk of death from receiving government support. However, *DeShaney*, which involved the failure of a state social worker to take steps to protect a child from an abusive home situation, with the ultimate result being the child's severe injury, strongly suggests the due process clauses would not be offended even by a refusal of government to pay for, or to provide, lifesaving care. (Indeed, if such a conclusion were not on point, every person with a life-threatening illness would have a claim on government aid—an eventuality that may have much to commend it in nonlegal terms, but one that certainly would take the Constitution far beyond its present contours.)

Second, on more than one occasion the Court in the abortion cases emphasized that the challenged governmental refusal to fund abortions, or the challenged governmental ban on the use of public facilities and employees for the performance of abortions, did not erect any barriers to a woman's seeking to terminate her pregnancy by aborting. Thus, the laws at issue in *Harris* and *Webster* were deemed constitutionally palatable because even though the withholding of governmental funding and facilities for abortion ran counter to the wishes of indigents seeking support, these individuals were not rendered incapable by the government of pursuing other, unsubsidized means of terminating their pregnancies (however unlikely their being able to afford such abortions might be).¹¹⁸ In line with this emphasis, the *Webster* Court hinted at a less hospitable constitutional reception were a woman confronted with a more insurmountable state-imposed barrier. The Court said that "[a] different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded."¹¹⁹ For it then would follow that a woman desiring an

118. The Court wrote in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989):

Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," . . . [448 U.S.] at 317 . . . , Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.

119. *Id.* at 3052 n.8.

abortion would be unable to find any available doctor or facility, given the state law that the Court was addressing (and which it of course ultimately upheld).

DeShaney, and the speculative and cryptic assertion in *Webster*, are particularly apposite to the question of constitutionality that lurks in proposals, such as that of Daniel Callahan, which entail affirmative cut-offs of life-extending medical care for the elderly.¹²⁰ Apparently, to use the abortion analogy, a provision barring reimbursement under Medicare or Medicaid for such care would be constitutionally tolerable so long as an individual in theory could purchase such care in the unsubsidized private medical marketplace (no matter that in actuality a person bereft of funds would not be able to afford the price charged). On the other hand, were a federal statute to be adopted barring *all* doctors and hospitals from providing such care,¹²¹ this arguably could trigger constitutional condemnation, even though regulation of health care ordinarily does not evoke more than minimal judicial scrutiny.¹²²

There is no existing judicial answer for this hypothetical scenario. What is more, such a response—if a court some day confronted a situation calling for its rendering—would be one of basically subjective dimension. Daniel Callahan, were he a Supreme Court Justice, presumably would not find a substantive due process barrier to the foreclosure of life-extending care to those who have reached advanced age. Others, however, could find government-mandated withholding of medical care to run counter to notions of ordered liberty or offensive to history and tradition—the standards, albeit vague ones, invoked in some substantive due process cases.¹²³ For these decisionmakers, it would follow that a due

120. Refer to note 16 *supra* and accompanying text.

121. Under Congress' enormously broad power derived from the Commerce Clause, United States Const., art. 1, § 8, see, e.g. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964), such a statute certainly could be justified as one regulating activity which has an affect on commerce.

122. Similarly, while there is no right to education, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), the *Rodriguez* Court indicated that a total denial of education due to a lack of a family's ability to pay for it for their child might trigger a negative judicial response. *Id.* at 25 n.60.

123. The Court in *Bowers v. Hardwick*, 478 U.S. 186, 191-192 (1986), wrote:

In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category [of rights qualifying for heightened judicial protection] includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431

process-based abrogation of an allocation law could be both warranted and seen as doctrinally consistent with case law in other due process-grounded contexts utilizing these standards as launching bases for decisionmaking.¹²⁴

In sum, there is room legitimately to conclude that age-based allocative schemes can pass constitutional muster under both due process and equal protection analysis. Certainly, this conclusion seems the legally proper (if not morally or ethically sound) one when the scheme takes the form of a refusal to provide funding for particular care, or for care for persons over a certain age. There is some slim basis for arguing, however, that affirmative rationing on the part of the state, whereby government reaches out to bar all medical professionals and facilities from providing care to the aged, would be of greater dubiousness, constitutionally.

We await the answers from the courts, even as members of other disciplines are focusing on these very issues and offering their answers, or at least useful questions.¹²⁵

U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

124. The Court has not yet definitively stated whether the eighth amendment's ban on cruel and unusual punishment can be applied in other than criminal contexts. See *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2913 (1989) ("Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily and perhaps exclusively to criminal prosecutions and punishments."). It would seem particularly doubtful that an eighth amendment claim could be pursued here, since the denial of care—while potentially leading to death—would not be a punishment imposed for wrongdoing.

125. Refer to notes 16-20 *supra* and accompanying text.

In addition to the substantive constraints which either actually or arguably flow from the due process clauses, these constitutional provisions also have a procedural dimension. Depending upon the particular language of a given statute or regulation which addresses the funding or operation of a health care program, an individual may be able to establish a personal entitlement such that his or her termination from that program, or a reduction in his or her benefits, will generate a viable claim to certain pretermination and/or post-termination procedures. Thus, a grievant may be able to successfully demand notice of the adverse action, a hearing, and a number of other procedures as necessary concomitants of the decision to terminate or reduce benefits or to bar participation. (The seminal case establishing the modern contours of procedural due process in the civil setting was *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 451-520 (3d ed. 1986)).

The problem for even the successful claimant is that procedural due process does not go to the question of the merits of the governmental decision made, but only to the manner in which the decision is arrived at. And it clearly does not follow that a decision rendered in a procedurally correct way will be one which meets the substantive needs and wants of the claimant who is seeking reinstatement to the program from which he or she was ousted, or preservation of the benefits which he or she otherwise would continue to receive but for their proposed reduction. Allocative schemes, then, which are challenged by elders who

2. *The Age Discrimination in Employment Act*

Even had *Murgia* and *Vance* been decided differently, most workers would not have directly benefited, inasmuch as equal protection (and due process) constraints extend only to discrimination perpetrated by governmental actors¹²⁶ and the large majority of workers in America are employed in the private sector. It is the Age Discrimination in Employment Act of 1967, as amended

claim that their particular selections for reduced or terminated care were made in procedurally defective ways will survive, even should the grievants prevail in their own particular cases. It is only a substantive assault which holds out the possibility—albeit a speculative one, at best—for consigning the allocation system per se to the constitutional dumpheap.

Apart from particularized decisions vis-a-vis individual program participants, there also can be across-the-board changes, effectuated either by legislative enactments or regulatory issuances, whereby programs are terminated or their funding is reduced. In such instances, individuals who suffer losses as a result of these changes generally will not be able to assert successful procedural due process claims. A distinction is drawn between a factual dispute—i.e., a dispute as to whether an aggrieved individual satisfies the standards set by a particular statute—and a policy, or law, dispute entailing the validity or wisdom of the standards themselves. For example, in *Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970), *remanded*, 439 F.2d 1092 (5th Cir. 1971), the court stated:

[W]here across-the-board cuts in funding necessitate wholesale reductions in benefits or changes in other programs such as social security benefits result in 'automatic' reductions or terminations, it would be a useless expenditure of money to hold hearings at the request of any number of recipients opposed to reductions dictated by the state or federal legislature, rather than by the facts governing eligibility of particular recipients.

Id. at 711. *See also* *Russo v. Kirby*, 453 F.2d 548, 551 (2d Cir. 1971); *Budnicki v. Real*, 450 F. Supp. 546, 556 (E.D. Pa. 1978). *See generally* *Blumstein*, *supra* note 9, at 1373-77. Thus, a procedural due process attack on an allocative system per se is not going to succeed; legislatures address arguments based on policy, while courts—at least in this corner of the law—abjure such a role.

126. Government action is a necessary predicate for the applicability of the provisions of the first eight amendments, as well as the fourteenth amendment. *See, e.g., NCAA v. Tarkanian*, 109 S. Ct. 454, 461 (1988). Neither government funding of a private recipient, nor government regulation of a private actor, will of itself suffice to subject that private entity to the constraints of these constitutional provisions. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1002-5 (1982) (nursing home that receives Medicaid payments on behalf of its residents, as well as government subsidies, and is subject to extensive governmental regulation, is not a state actor). Nor will a private actor's performance of a function that hitherto was not an exclusive prerogative of government subject the private actor to the strictures of the Bill of Rights or the fourteenth amendment. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); *Spencer v. Lee*, 864 F.2d 1376, 1381 (7th Cir. 1989) (*en banc*) (private physician and private hospital were not governmental actors when they committed a mentally disturbed person, pursuant to state statute authorizing such commitment). *Accord* *Hall v. Quillen*, 631 F.2d 1154, 1156 (4th Cir. 1980), *cert. denied*, 454 U.S. 1141 (1982) (neither attorney nor physician considered state actors, although appointed by court). *Contra* *Burch v. Apalachee Community Mental Health Serv., Inc.*, 840 F.2d 797, 803 (11th Cir. 1988) (*en banc*) (mental treatment facility was acting under color of state law since such law granted the facility the authority to commit patients).

(ADEA),¹²⁷ that serves as the primary vehicle today for dealing with age discrimination claims leveled against private (as well as governmental) employers and unions.

The statute proscribes age discrimination across a broad spectrum of actions and decisions made in the workplace: hiring; firing; job classifications; job referrals; determinations regarding compensation and the terms, conditions, and privileges attendant upon a particular job; exclusion from union membership; advertising; and retaliation by employers angered by workers who seek to assert their rights under the ADEA.¹²⁸ At the same time, however, the statute approves, by virtue of several exceptions, some uses of age and age-related criteria.¹²⁹

Insofar as the make-room-for-the-young theme is concerned, the ADEA presents a somewhat mixed legal prescription. As a general matter, the statute bars an employer from relying on the criterion of age to remove an employee who fits within the statute's coverage—i.e., an employee age forty or older—in order to replace him or her with a younger worker. This holds true, for the most part, even if the replacement is also within the ADEA's protected class. Thus, the statute will be violated if a fifty-five-year-old is fired for the purpose of making room for a forty-five-year-old, as well as if he or she is fired to allow the hiring of a thirty-five-year-old.¹³⁰ The ADEA, then, expresses in its basic thrust a commit-

127. 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987).

128. See generally 2 EGLIT, *supra* note 23, chs. 16-18.

129. The primary exceptions to the prohibitions of the ADEA are set forth in 29 U.S.C. § 623(f) (1982 & Supp. IV 1986):

It shall not be unlawful for an employer, employment agency or labor organization—

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . [who is at least 40] because of the age of such individual . . .

130. Some courts have required that in order for a *prima facie* violation to be established, the plaintiff must prove that he or she was replaced by someone under age 40. See,

ment to the notions that age is generally an inappropriate basis for employer decisionmaking, and that an older worker has no less valid a claim to his or her job (so long as he or she performs in a manner meeting the employer's legitimate expectations)¹³¹ than does a younger person. The raising of the Act's age cap from age sixty-five to seventy, in 1978,¹³² and its complete removal in 1986 in most instances,¹³³ further confirm the legal proposition that older workers ordinarily cannot legally be shunted aside.

On the other hand, there are some contrary statutory signals: employers may impose involuntary retirement on the basis of age vis-a-vis law enforcement officers and firefighters,¹³⁴ as well as—and far more importantly here—on two other groups of individuals. One group is made up of tenured college employees. They can be forced to retire at age seventy.¹³⁵ The other group of indi-

e.g., *Goldberg v. B. Green & Co.*, 836 F.2d 845, 849 (4th Cir. 1988); *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1495 (11th Cir. 1987); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977). Most courts, however, only require that the replacement be younger than the plaintiff, and so a *prima facie* violation can be established where a 50-year-old is replaced by a 42-year-old. *See, e.g.*, *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984). Even in those circuits in which the first, more rigorous position—i.e., the requirement that the successor be under 40—has been asserted, there are appellate court rulings taking the other tack. *See generally* 2 EGLIT, *supra* note 23, § 17.60.

In reduction-in-force cases no replacement need be made for a *prima facie* violation to be proven. *See, e.g.*, *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988). *See generally* 2 EGLIT, *supra* note 23, § 17.61.

131. *See, e.g.*, *Halsell v. Kimberley-Clark Corp.*, 683 F.2d 285, 291 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Golomb v. Prudential Ins. Co. of Am.*, 688 F.2d 547, 549 (7th Cir. 1982). *See generally* 2 EGLIT, *supra* note 23, § 17.59.

132. Refer to text accompanying note 31 *supra*.

133. Refer to text accompanying note 32 *supra*.

134. 29 U.S.C. § 623(i) (Supp. IV 1986). This provision was added to the ADEA in 1986 by the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. Its effect is to negate those cases involving the ADEA's bona fide occupational qualification exception, 29 U.S.C. § 623(f)(1) (1982 & Supp. V 1987), in which courts had invalidated mandatory retirement requirements imposed on police officers and firefighters. (Unfortunately, the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, also added a different subsection (i) to § 623. Thus, there are two § 623(i)'s.)

135. 29 U.S.C. § 631(d) (Supp. IV 1986). This provision was added to the Act by the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(a), 100 Stat. 3342, 3344. An earlier, similar provision had been adopted in 1978. At that time the age ceiling for protection under the ADEA was raised from 65 to 70, but a caveat allowed institutions of higher learning to continue imposing mandatory retirement at age 65. This provision had a built-in abbreviated life span, and so it expired in July, 1982. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(b), 92 Stat. 190. When the ADEA was amended in 1986 to remove the age 70 ceiling for employees in the

viduals can be ousted at age sixty-five; these are employees who hold "bona fide executive" or "high policymaking position[s]."¹³⁶

The exceptions regarding police and firefighters are understandable, albeit not necessarily correct, responses to a concern for ensuring the public safety. They reflect legislative doubt about the physical capabilities of older men and women to deal with the rigors of strenuous public safety jobs. The exceptions regarding seventy-and-over college employees—primarily professors, although they are not the only people who may be tenured—and high level older executives are explained by a different concern. The foreclosure of these individuals from the full protection¹³⁷ of the ADEA reflects acceptance of the view that in hierarchical institutions constructed in the typical pyramidal form, with a broad base of lower level workers and only a small apex of senior employees, upward mobility depends upon a continuing process of job openings being created in the upper ranks. Since older, advantaged employees may not be willing to terminate their careers, and since they may well be performing adequately (or better) and thus will not be susceptible to removal for cause, the ADEA—spurning its own ostensible commitment to eradication of age as a basis for employer decisionmaking—allows the forced ouster of these people because of age, after all. Thus, senior employees who have had their opportunity to savor the perquisites of elevated status reach a point, defined in terms of age, when they can be forced to leave so that younger people can assume their high positions.¹³⁸

private sector, the new caveat for university employees was adopted. It expires on December 31, 1993. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(b), 100 Stat. 3342, 3344. See generally 2 EGLR, *supra* note 23, § 16.05.

136. 29 U.S.C. § 631(c)(1) (Supp. IV 1986). See generally 2 EGLR, *supra* note 23, § 16.06.

137. While such individuals can be involuntarily retired on the basis of age, they are otherwise protected by the ADEA. Thus, should a university retain a 72-year-old professor as a member of its regular tenured faculty, that professor may not be subjected to discrimination in the terms, conditions, and privileges of his or her employment. Refer to note 128 *supra* and accompanying text.

138. It is true, however, that the proviso regarding tenured employees of institutions of higher education is scheduled to expire as of December 31, 1993, unless Congress acts to renew it. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(b), 100 Stat. 3342, 3344. Debate as to whether the out-at-70 provision should be made permanent has generated several articles in the legal literature. See Burton, *Tenured Faculty and the "Uncapped" Age Discrimination in Employment Act*, 5 YALE L. & POL'Y REV. 450 (1987); Finkin, *Tenure After an Uncapped ADEA: A Different View*, 15 J.C. & U.L. 43 (1988); Ruebhausen, *The Age Discrimination in Employment Act Amendments of 1986: Implications for Tenure and Retirement*, 14 J.C. & U.L. 561 (1988).

Obviously, the posture of the ADEA—which focuses on the discrete issue of employment discrimination—in no way either bestows or denies legal approbation vis-a-vis the different matter of health care resource distributive systems. But certainly the ADEA experience reveals that Congress is capable of choosing the young (or at least the comparatively young) over the old—even at the expense of compromising an express ostensible rejection of ageism. And *Vance*, while not dealing with the ADEA per se, leaves no doubt that this choice does not occasion constitutional pause.

3. Conclusion

In two contexts—litigation arising under the fourteenth amendment's equal protection clause, and legislation constructing a system of formal repudiation of ageism in the workplace—the demands of the young for *their* turn in obtaining a scarce and desirable resource, i.e., high level jobs, have clashed with the proposition that age discrimination is an intolerable vice. In both contexts, the antidiscrimination argument has failed. Concededly, neither *Vance v. Bradley*¹³⁹ nor the ADEA demand an affirmative response to the claim that competition for limited health care resources requires that the aged (as a group), who supposedly have had their share of opportunities (as a group) to seek the benefits of the American health care system, must step aside so that health resources now can be expended on those who have yet to traverse the same number of years. But both the constitutional case law and the statute do demonstrate that even when the issue of age discrimination has been carefully and pointedly posed, the persuasiveness of an appeal to an antidiscrimination ethic has been found wanting. This does not augur well for those who would contend that a like ethic condemns denying, or limiting, the allocation of health care resources to the old.

At the same time, however, the Court's abortion rulings set forth a tantalizing indication that allocative systems, whether based on age or some other nonsuspect criterion, may run afoul of the due process clauses if their reach is too broad. Thus, while age discrimination analogies offer support for the proponents of age-based limitations on the provision of health care, a different strand of legal analysis suggests the possibility—albeit a very speculative

139. 440 U.S. 93 (1979).

one at this juncture—for a constitutional brake on age-based rationing, at least in its most extreme form.

B. Preferential Treatment for the Elderly

I would venture that the last forty or so years of political and social dialogue have generated the notion that the elderly are victims—victims of economic disadvantage, unavoidable physical decline, and social opprobrium.¹⁴⁰ The latter is what in recent years has come to be denominated “ageism.”¹⁴¹ There is now, however, a growing, competing perception developing that the elderly are not only the beneficiaries of benign, rather than malign, bias, but that they in fact have benefited too greatly. This change flows in part, at least, from the fact that federal and state laws abound not with detriments, but rather with preferences for the elderly. Statutory provisions extend to people who have attained advanced years advantageous treatment of one kind or another that is denied to younger men and women, as well as children. For example—and only a minor one, at that—the federal Urban Mass Transportation Act includes a provision directing transit systems that receive federal funds to charge reduced fares for elderly persons traveling at nonpeak hours.¹⁴² (While the same provision also favors youngsters eighteen and under, those in between receive nothing.) By way of another example, a worker becomes eligible for Social Security retirement benefits only upon the attainment of age sixty-two.¹⁴³ A number of other federal programs accord advantageous treatment to the old, while the same treatment is not available to the non-old.¹⁴⁴

Some would maintain that such preferences either are no longer needed or deserved, or that, in any event, they unfairly and unwisely have resulted in society's failure adequately to serve the

140.

[C]ompassionate stereotypes concerning older persons . . . have permeated public rhetoric from the Townsend Movement until the late 1970s For four decades the friends of the elderly told us that they were poor, frail, socially dependent, objects of discrimination, and above all deserving— or, in the jargon of economists, victims of market failure, not individual failure.

Binstock, *supra* note 28, at 140.

141. Refer to note 79 *supra*.

142. 49 U.S.C. § 1604(m) (1982).

143. 42 U.S.C. § 402(a)(2) (Supp. IV 1986).

144. Refer to note 27 *supra*.

needs of the poor and of the young, particularly children.¹⁴⁵ This is the thrust of commentators such as the demographer Samuel Preston, who in a widely noted article published in 1984 contended that "in the family, in politics and in industry the growing number of older people and the declining number of children have worked to the advantage of the group that is increasing in size," with the result being that "[s]ince the early 1960s the well-being of the elderly has improved greatly whereas that of the young has deteriorated."¹⁴⁶ Granted, Preston hedged his assertions with language identifying "direct competition between the young and the old for society's resources" as only being a "possibility,"¹⁴⁷ and other crit-

145. See, e.g., Preston, *Children and the Elderly in the U.S.*, Sci. Am., Dec. 1984, at 44; See also Richman & Stagner, *Children: Treasured Resource or Forgotten Minority?*, in OUR AGING SOCIETY—PARADOX AND PROMISE 161 (A. Pifer & D. Bronte eds. 1986).

Former Governor Lamm of Colorado, who has been one of the leading political spokespersons calling attention to health care distributive issues, has written:

The relationship of health care costs to other programs is fascinating. In 1950, government spending for health care was 45 percent of what we spent on education. In 1984, it was equal to all the money spent by the federal government on education. Our whole fiscal system is tilting toward health care. This trend cannot continue if we want our children to have jobs.

Lamm, *Foreword to SHOULD MEDICAL CARE BE RATIONED BY AGE?* at xiii (T. Smeeding ed. 1987).

The National Association of Children's Hospitals and Related Institutions issued a report in March, 1989, addressing the inadequacies of health care provided to children in America. NATIONAL ASS'N OF CHILDREN'S HOSPITALS AND RELATED INSTS., *PROFILE OF CHILD HEALTH IN THE UNITED STATES* (1989). In the New York Times article recounting the publication of this report, United States Representative Patricia Schroeder was quoted as saying:

"When you look at the Federal dollar and how it's spent on medical care, a very high percentage of it is spent on the last few days of someone's life . . . It should not be either/or, and you should not pit one age group against another. But we've totally ignored one age group: children."

Johnson, *Children's Health Seen as Declining*, N.Y. Times, Mar. 2, 1989, at A21, col 1.

Meyer & Moon, without putting a judgmental coloration on their figures, write:

A disproportionate share of the U.S. public investment in health care over the past two decades has gone to the elderly. In addition to the rapid growth in Medicare outlays, Medicaid has tilted toward a program for the elderly in recent years. In 1982 children constituted 48 percent of all Medicaid recipients, but only 13 percent of all payments were for children's care . . . This may be a compassionate approach to the distribution of public sector health care resources, but it cannot be described as one that is targeted toward maximizing the productive capacity of our economy. Indeed, we provide no government help with health care outlays to many low-income workers who are on the edge of falling back on welfare. And the fact that we do not make basic preventive care available to many youth undoubtedly raises the odds against their later success in the labor market.

Meyer & Moon, *supra* note 15, at 192.

146. Preston, *supra* note 145, at 44.

147. *Id.* at 49.

ics likewise moderate their tones.¹⁴⁸ Still, it seems correct to conclude that there is a theme of growing political and social credibility that entails seeing the elderly as in fact securing preferential treatment at the expense of children.

In some contexts, certainly, "preference" is a red flag word. Even though there is today virtually no political or social cavil with the legal condemnation of laws preferring whites over nonwhites,¹⁴⁹ so-called benign discrimination, whereby racial minorities benefit from preference, is far more controversial.¹⁵⁰ In the age-defined context, programs have been created with the apparent underlying premise that the elderly, too, are a minority deserving of special help because they are in some way disadvantaged or deprived (albeit typically by their own disabilities, rather than by virtue of externally imposed mistreatment, which is a predicate to benign racial preferences).¹⁵¹ Examples include programs authorizing

148. Typically, those who contend that children have been shortchanged in terms of federal financial support hasten to deny the notion that they are attacking the old. Refer to Johnson, *supra* note 145 (Representative Schroeder's comments). Indeed, an alliance of national advocacy organizations for the young and old, entitled Generations United, formed in 1986 to propound the theme of working together for the betterment of both groups. 'Generations United' to Highlight Interdependence of Young and Old, OLDER AM. REP., Aug. 8, 1986, at 9.

149. In theory, even the separate but equal doctrine enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was premised on the notion that one race could not be accorded better treatment than another. In practice, of course, that is not the way American society was structured either before or after *Plessy*.

150. The entire body of case law concerning race-based benign discrimination, or affirmative action, is too large to review here. At the Supreme Court level the Court has dealt with preferences for minorities in several decisions, some addressing constitutional claims and some dealing with Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. V 1987). See, e.g., *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See also *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Gender-based preferences also have been addressed by the Court on several occasions. See, e.g., *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616 (1987); *Wengler v. Drug-Gists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

151. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989). Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. V 1987), an employer may adopt an affirmative action program to benefit women on the basis of female underrepresentation in the employer's work force, without the employer having to establish past discriminatory practices on its part or even any particularized societal discrimination against women. A manifest imbalance as between women working for the em-

financial favoritism for older people, such as the mass transit reduced fare program noted earlier, and grant programs targeted for older adults.¹⁵² Preferences are also embodied in laws providing different (and better) treatment of the old—for example, a state law criminalizing acts that would evoke lesser penalties, or no condemnation whatsoever, if perpetrated against young adults.¹⁵³ These programs have been created and these laws enacted with remarkably little negative response—at least so far as any formal recordation discloses.¹⁵⁴

ployer in a given position, and qualified women in the work force generally, is sufficient. *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 641-42 (1987). The same conclusion would seem to follow in Title VII racial cases. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 205-06 (1979), on which the *Johnson* Court relied. (In *Weber*, however, while there was no actual determination of prior discrimination by the employer as a predicate to its purportedly voluntary affirmative action program, the facts revealed that the employer was under considerable pressure—i.e., both the risk of loss of government contracts, and the risk of suit by some aggrieved black who would be able to point to damning statistics showing underrepresentation in the employer's work force—to take action. *Id.* at 198-99. Thus, while *Weber* superficially suggests that under Title VII an employer need not establish prior racial discrimination as a predicate to undertaking an affirmative action effort, one could read the case as in effect requiring some element of wrongdoing on the employer's part and thus not being as generous to affirmative action plans regarding race as is *Johnson* regarding gender. Particularly given the *J.A. Croson* Court's recent, much more restrictive approach to race-based affirmative action in the constitutional context, the strength of *Johnson* in the Title VII racial context is a question mark. See generally Eglit, *Title VII—A Statute of Wide-Ranging Influence*, in *TITLE VII AT TWENTY-FIVE* (M. Malin ed. 1989).)

152. Refer to note 27 *supra*.

153. See, e.g., ILL. ANN. STAT. ch. 38, para. 12-4(b)(10) (Smith-Hurd Supp. 1989) (aggravated battery exists when the person committing battery knows the victim is 60 years of age or older).

154. The legal slate is not entirely clean. There are a few instances in which preferences directed toward the elderly have generated negative responses recorded in some sort of legal context.

One area where there has been some attention focused on the issue of age discrimination involves air transportation. For years the Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified at 49 U.S.C. §§ 1301-1557 (1982)) [hereinafter FAA], extensively governed domestic and foreign air carriers. The agency charged with enforcement of the Act was the Civil Aeronautics Board (CAB). By virtue of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, the domestic airline industry was deregulated over a number of years, with the culminating event being the demise of the CAB on January 1, 1985. While the FAA's specific prohibition of discrimination—i.e., 49 U.S.C. § 1374(b), repealed by 49 U.S.C. § 1551(a)(2)(B) (Supp. III 1985)—no longer is on the books as a result of the 1978 Act, there remains a surviving guarantee that airlines provide "safe and adequate" service, 49 U.S.C. § 1374(a)(1) (1982), and this can be read as maintaining a bar to discriminatory practices.

Most discrimination claims that wound up in the courts did not involve age issues. Most of them, moreover, arose under the now-repealed section 1374(b). And finally, the couple of cases dealing with age preferences focused on preferential youth fares, rather than

The paucity of reported legal disputes regarding such

preferences for the elderly. Nonetheless, the language in *Transcontinental Bus Sys. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), was broad enough to condemn all age-based preferences, *id.* at 481-82, and it remains relevant in light of the "adequate" service requirement. *See also* *Trailways of New England v. CAB*, 412 F.2d 926, 933 (1st Cir. 1969). *See generally* 1 EGLT, *supra* note 23, § 14.15. (There were CAB orders which did address preferential fares for older people, and called them into question. *See, e.g.,* *Ozark Air Lines Senior Citizens Excursion Tariff*, CAB Order No. E-29173 (Mar. 31, 1965).) In 1980, however, the CAB promulgated a regulation which undercut the notion that age preferential fares could be deemed violative of the anti-discrimination language of the airline regulatory statute. 14 C.F.R. § 399.36 (1989). *See generally* 1 EGLT, *supra* note 23, §§ 14.16 - 14.18.

In the housing area there is some case law dealing with adults-only restrictions imposed by virtue of restrictive covenants, condominium declarations, and/or leases. These cases do not really pose a clash between the elderly and the non-elderly, whereby the former are being given, or are taking, a preference at the expense of the young. Rather, these cases involve a detriment imposed on children and adults who are the parents of young children, while all other adults, be they young or old, are unaffected. (As to federal legislation addressing adults-only housing practices, refer to note 77, *supra*.) There are a few cases, however, involving so-called retirement communities that exclude not only youngsters, but younger adults, childless or not, as well. One could argue that these latter rulings involve a clash between a preference secured by the old, i.e., access to certain housing and the advantage of zoning ordinances that legitimize this restricted housing, and the injured interests of those who are excluded. (Actually, most of these communities hardly limit access to just the elderly: a common demarcation line for admissions is age 52 or 50.)

There are a few retirement community cases in which plaintiffs—i.e., those who were excluded—have prevailed. *See* *Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 214 A.2d 131 (1965); *Adrian Mobile Home Park v. City of Adrian*, 94 Mich. App. 194, 288 N.W.2d 402 (1979). *See also* *Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So.2d 962 (Fla. 1987) (involving a county ordinance banning discrimination in housing on the basis of age; the Florida Supreme Court upheld the ordinance in the face of a challenge under the Florida constitution, and ruled that the prohibition of discrimination was an appropriate exercise of the police power even though it had the effect of outlawing retirement communities. *Id.* at 968). In *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App.3d 87, 94, 226 Cal. Rptr. 199, 202 (1986), the court rejected the argument that the subdivision in question constituted a retirement community.

More often, plaintiffs have failed. *See* *Taxpayers Ass'n. v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977), *rev'g* 125 N.J. Super. 376, 311 A.2d 187 (1973); *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976), *rev'g* 135 N.J. Super. 97, 342 A.2d 853 (1975); *Maldini v. Ambro*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1973), *cert. denied*, 423 U.S. 993 (1975); *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977); *Allen v. Town of North Hempstead*, 121 Misc.2d 705, 469 N.Y.S.2d 528 (Sup. Ct. 1983), *aff'd*, 103 A.D.2d 144, 478 N.Y.S.2d 919 (1984). As to the legal literature concerning retirement communities, refer to note 77 *supra*.

Housing-related preferences for older people also have been upheld in a few other contexts. *See* *Troy, Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984); *Parrino v. Lindsay*, 29 N.Y.2d 30, 272 N.E.2d 67, 323 N.Y.S.2d 689 (1971); *903 Park Ave. Corp. v. City Rent Agency*, 39 A.D.2d 694, 332 N.Y.S.2d 522, *rev'd on other grounds*, 31 N.Y.2d 330, 291 N.E.2d 141, 338 N.Y.S.2d 901 (1972). *Contra* *Property Owners Assn. of North Bergen v. Township of North*

favorable treatment likely reflects the fact that the elderly have—over the last several decades in particular—been viewed benignly.¹⁵⁵ Indeed, most Americans, the surveys tell us, continue generally to view the old as deserving of governmental assistance.¹⁵⁶ However, the earlier discussed, recent stirrings of public and political disquiet suggest a less serene future, with more challenges likely to be leveled regarding any actual or imagined preferred position of the elderly. Thus, it is worthwhile to examine this matter of preferences for the old.

Bergen, 74 N.J. 327, 378 A.2d 25 (1977); *McMinn v. Town of Oyster Bay*, 111 Misc. 2d 1046, 445 N.Y.S.2d 859 (Sup. Ct. 1981). *See also* *Apfelbaum v. Town of Clarkstown*, 104 Misc. 2d 371, 428 N.Y.S.2d 387 (1980).

Finally, there has been some legal activity regarding age-based preferential rates provided to older people by public utilities and other regulated industries. In a few decisions courts have ruled that the state public utility commissions did not have the authority under their state statutory and/or constitutional schemes to set lower rates for the preferred group, or groups. *See, e.g.*, *Colorado Mun. League v. Public Util. Comm'n*, 197 Colo. 106, 591 P.2d 577 (1979) (lower pay phone rates for areas where there were high concentrations of poor and elderly persons); *Mountain States Legal Found. v. Public Util. Comm'n*, 197 Colo. 56, 590 P.2d 495 (1979) (reduced gas rate to low-income elderly and low-income disabled persons); *Mountain States Legal Found. v. New Mexico State Corp. Comm'n*, 101 N.M. 657, 687 P.2d 92 (1984) (exemption of public assistance recipients who were 62 or older from telephone rate increases). Similarly, some public utility commissions have ruled that they did not have the authority to grant preferential rates. *See, e.g.*, *Re Lifeline Rates*, 46 Pub. Util. Rep. (PUR) 4th 149, 155-57 (Ind. Pub. Serv. Comm'n 1982); *Re Consideration of Lifeline Rates*, 43 Pub. Util. Rep. (PUR) 4th 355, 358-59 (Fla. Pub. Serv. Comm'n 1981); *Re Kansas Power & Light Co.*, 20 Pub. Util. Rep. (PUR) 4th 55, 63 (Kan. State Corp. Comm'n 1977); *Rate Concessions to Poor Persons and Senior Citizens*, 14 Pub. Util. Rep. (PUR) 4th 87, 91-92 (Or. Pub. Utility Comm'n 1976).

In *Mountain States Legal Found. v. Utah Pub. Serv. Comm'n*, 636 P.2d 1047, 1057 (Utah 1981), the court struck down a preference accorded heads of households over 65 years of age, whereby they were exempted from an electricity rate increase. (The court did so on the basis of the Commission not having made adequate findings to support the preference.) *Contra* *American Hoechst Corp. v. Department of Pub. Util.*, 379 Mass. 408, 399 N.E.2d 1, 3 (1980); *Re Consumers Power Co.*, 25 Pub. Util. Rep. (PUR) 4th 167 (Mich. Pub. Serv. Comm'n 1978). *See also* *Town Taxi Inc. v. Police Comm'r*, 377 Mass. 576, 582, 387 N.E.2d 129, 133 (1979) (plaintiffs who challenged discount fare for elderly held not to have standing; court in dictum stated: "we have serious doubt that giving a deserving class of passengers the right to use the services of a regulated monopoly . . . at a discount must be held to be against public policy").

155. Perhaps, also, the absence of such reported disputes flows from the fact that those who might consider complaining have been discouraged from seeking redress by the precedents establishing that age-based classifications evoke only minimal judicial concern.

156. *See e.g.*, *Intergenerational Tension in 1987: Real or Imagined?* 32-37 (1987) (a survey prepared by The Daniel Yankelovich Group Inc. for the American Ass'n of Retired Persons); Cook, *Social Security and the "Crisis" of Support*, 5 Center on Aging, Summer 1989, at 1.

1. *The Constitutional Context*

Within the United States Constitution itself there are what might be termed age-based preferences. In order to be eligible for election to the House of Representatives one must be, according to the Constitution, at least twenty-five years of age.¹⁵⁷ Thirty is the minimum age for Senators,¹⁵⁸ and the President and Vice-President must be thirty-five or older.¹⁵⁹ These uses of age lines are really only of incidental note, however.¹⁶⁰ Much more relevant to the constitutional status of an age-based system for preferential distribution of rights or entitlements are *Murgia* and *Vance*.

Murgia established—and *Vance* confirmed—that age-based classifications evoke only the most minor judicial scrutiny when challenged on constitutional grounds. Thus, assuming for the moment the very unlikely proposition that a hypothetical ten-year-old could demonstrate a nexus between the denial to her of a needed surgical procedure and the availability of that procedure—by virtue of a statute, policy, or practice according preference to the elderly—to some specifically identifiable seventy-five-year-old, it still would follow, given *Murgia*, that the grievant's complaint would elicit judicial rejection. Whether benign or malign,¹⁶¹ age classifications in and of themselves are not going to produce meaningful judicial response under the Constitution.¹⁶²

Granted, a statute or policy utilizing an age criterion may generate heightened constitutional concern if it is used to affect access

157. U. S. CONST. art. I, § 2, cl. 2.

158. U. S. CONST. art. I, § 3, cl. 3.

159. U. S. CONST. art. II, § 1, cl. 5 addresses the qualifications for the presidency; the twelfth amendment specifies that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President"

160. For an explanation of these, and of the other uses of age lines in the Constitution, see Eglit, *Of Age and the Constitution*, 57 CHL[-]KENT L. REV. 859, 864-66 (1981).

161. The hypothetical in the text of course illustrates that what is benign from one person's perspective—here, that of the preferred 75-year-old—may be malign from the perspective of the person who lacks the qualifying characteristic: in this instance, the characteristic of being old.

162. This contrasts with the treatment of benign racial and gender classifications. While there was no majority opinion in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), five justices were in agreement that the same rigorous scrutiny which is triggered by malign racial classifications, refer to note 90 *supra* and accompanying text, applies to benign uses of race, as well. In the gender context an intermediate level of scrutiny applies: the defendant must prove the existence of an important government interest and further prove that its challenged classification bears a substantial relationship to that interest. See, e.g., *Orr v. Orr*, 440 U.S. 268, 279 (1979).

to, or the enjoyment of, a fundamental right, but that is because of the right involved, and not because of the age element. For example, the first amendment guarantees freedom of association, and this came into play when the Supreme Court recently had before it the question of whether youngsters ages fourteen through eighteen suffered an injury of constitutional dimensions by virtue of an ordinance restricting their admission to certain dance halls.¹⁶³ While the age factor clearly was of central factual relevance, as a constitutional matter the only basis for the possible triggering of stringent scrutiny was the associational freedom aspect of the case. Since health care, like the access to public employment that was at issue in *Murgia* and *Vance*, has yet to be defined as being of a fundamental nature for constitutional purposes,¹⁶⁴ age-based preferences at this juncture are no more going to trigger special judicial scrutiny when measured against the Constitution's terms than are malign uses of age classifications.

2. *The Statutory Landscape*

There are three primary federal statutes addressing age discrimination: the ADEA, the Age Discrimination Act of 1975 (ADA),¹⁶⁵ and the Equal Credit Opportunity Act (ECOA).¹⁶⁶ None sets forth an unalloyed rejection of age discrimination. Rather, each poses a general prohibition, which then is mitigated (some would say compromised) by one or more caveats allowing the use of age, after all. Included among these caveats are provisions approving preferences for older individuals. Understandably, it is difficult to extract generalizations of large dimensions from statutes that are themselves quite disparate in focus, and which do not focus directly on health care delivery.¹⁶⁷ Even so, some review is use-

163. *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989).

164. Refer to notes 102-24 *supra* and accompanying text.

165. 42 U.S.C. §§ 6101-6107 (1982 & Supp. V 1987).

166. 15 U.S.C.A. §§ 1691-1691f (1982 & West Supp. 1989).

167. While the ADA does not explicitly address health issues, it does impose a proscription of age discrimination on the part of any recipient of federal financial assistance. Refer to notes 205-21 *infra* and accompanying text. It thus follows that many health institutions fall under its sway. The statute has generated a minimal amount of case law but, coincidentally, two of the three reported cases touch on health care matters, although they offer nothing instructive on any substantive issue of concern here. See *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981) (en banc) (involving an unsuccessful challenge to a medical center's planned relocation from a central city location to the suburbs, which would have resulted in the alleged underserving of older people who lived in the central city, plus

ful. Each enactment embodies a tension between its purported rejection of ageism on the one hand, and its simultaneous approval of benign discrimination on the other, and this tension also can be manifested in the context of health care distribution issues.

a. The Age Discrimination in Employment Act

At the structural, administrative, and litigation levels the ADEA addresses—or at least implicates—the question of preference. By its very structure the ADEA extends protection from employment discrimination only to persons ages forty and over.¹⁶⁸ Thus, the ADEA represents a choice by Congress to allow (or at least not to outlaw) discrimination against younger adults, while barring it vis-a-vis older adults. More than that, the ADEA constitutes a legislative commitment to put the moral, legal, and political weight of the federal government behind protecting older workers and job applicants, while leaving their younger counterparts without such support. Of course, the reality in the labor market is that employers are not typically seeking to disadvantage younger workers. (Indeed, the ADEA was prompted by data supporting the notion that younger workers fared better than their older counterparts.)¹⁶⁹ Still, individuals under forty sometimes do confront discriminatory employment practices, and on those occasions they find themselves, unlike their older colleagues, without recourse under the ADEA.¹⁷⁰

At the administrative level the Equal Employment Opportunity Commission (EEOC), which is responsible for administering

the imposition of alleged undue travel burdens); *Petock v. Thomas Jefferson Univ.*, 630 F. Supp. 187 (E.D. Pa. 1986) (medical student plaintiff unsuccessfully claimed that he was the victim of age discrimination because he was treated differently than the younger students).

The ADEA directly addresses health insurance benefits, within the context of dealing with employment discrimination. 29 U.S.C. § 623(g) (1982 & Supp. I 1989). *See generally* 2 ERLT, *supra* note 23, § 16.40. The ECOA, in addressing credit discrimination, could have relevance to the health needs of an individual seeking financial assistance to pay for health care. For a discussion of the ECOA and credit discrimination, refer to notes 186-203 *infra* and accompanying text.

168. 29 U.S.C. § 631(a) (1982 & Supp. I 1989).

169. *See* U.S. DEP'T OF LABOR, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (1965).

170. *See, e.g., Hahn v. City of Buffalo*, 770 F.2d 12 (2d Cir. 1985); *Settino v. City of Chicago*, 642 F. Supp. 755, 759 (N.D. Ill. 1986); *Arnold v. Postmaster General*, 46 Fair Empl. Prac. Cas. (BNA) 481 (D.D.C. 1988). *Contra Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1557-58 (N.D. Ind. 1986). *See generally* 2 ERLT, *supra* note 23, § 16.03.

and enforcing the Act,¹⁷¹ has issued an interpretive guideline approving to some degree preferential treatment of older workers:¹⁷² "The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination"¹⁷³ Although this provision has been in existence for a number of years, it was not until very recently that the EEOC issued a policy statement fleshing it out. The agency set forth general criteria indicating whether a particular extension of additional benefits violates the Act. According to the statement, legitimate additional benefits include those that:

- 1) Promote the employment of older persons, e.g., encourage older employees to continue employment; and/or
- 2) Reasonably counteract problems related to age discrimination, e.g., increased severance pay because the employer reasonably concluded that, due to myths about aging, persons 60 and older would encounter greater difficulty finding employment; and/or
- 3) Are offered in good faith to meet problems arising from the impact of age on employment.¹⁷⁴

While the EEOC approves of older individuals receiving special benefits, the agency does not condone preferential treatment for older workers in terms of hiring, immunity from demotion or

171. Until 1979 the Department of Labor was charged with these responsibilities. By virtue of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19,807 (May 9, 1978), reprinted in 5 U.S.C. app. at 1366 (1988), the EEOC supplanted the Labor Department. The transfer generated a number of constitutional challenges, with most of the courts upholding the constitutionality of the transfer. See, e.g., *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984); *EEOC v. Hernando Bank*, 724 F.2d 1188 (5th Cir. 1984). *Contra* *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984). Ultimately, the issue was laid to rest by enactment of a specific law authorizing EEOC enforcement of the ADEA. Ratification of Reorganization Plans as a Matter of Law, Pub. L. No. 98-532, 98 Stat. 2705 (1984) (codified at 5 U.S.C. §§ 901 and 906 (1988)).

172. Such guidelines do not have the force of law, but they are accorded considerable deference by the courts, nonetheless. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

173. 29 C.F.R. § 1625.2(b) (1988). The EEOC also has issued an opinion letter approving an amendment to a benefit plan which erected a provision giving preference to older workers. EEOC Opinion Letter 6 (July 2, 1985), reprinted in 3 EQLR, *supra* note 23, at App. K-14.

174. EEOC Policy Statement No. 9-915.029: Cases Involving the Extension of Additional Benefits to Older Workers (June 30, 1988), reprinted in 3 EQLR, *supra* note 23, at App. S-1.

discharge, or any other such action. This position is established in another interpretive guideline, in which the EEOC makes clear that as between two individuals who both are within the protected class—i.e., persons forty and over—it would be a violation of the Act to prefer the older of the two over the younger if age is the basis for that preference.¹⁷⁵

Both in theory and in actuality, of course, some of the same justifications for giving added benefits to an older worker could justify giving preference in hiring to an older job applicant. Just as an employer could reasonably conclude that a person "60 and older would encounter greater difficulty finding employment," to quote the EEOC policy statement, and accordingly deem it appropriate to extend to that employee an added severance benefit, presumably an employer also could conclude that like difficulty justifies extending a job offer to a sixty-year-old applicant, rather than a forty-five-year-old. The EEOC guidelines, however, condone only the former course of action by the employer, and they condemn the latter. The case law, albeit very limited, jibes with this distinction drawn by these guidelines. Several courts have indicated that a *prima facie* violation of the ADEA can be established where an older employee or job applicant is given preference over a younger plaintiff in direct hiring or firing situations, so long as the younger person also is within the ADEA's protected class.¹⁷⁶ In contrast,

175. 29 C.F.R. § 1625.2(a) (1988) provides:

It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

Id. One commentator has urged that the ADEA be amended so as to allow hiring practices giving preference to older workers. Note, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825, 859 (1983).

176. See, e.g., *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984); *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979); *Obitko v. Ohio Barge Line, Inc.*, 628 F. Supp. 62, 64-66 (W.D. Pa. 1986); *Smith v. World Book-Childcraft Int'l, Inc.*, 502 F. Supp. 96, 102 (N.D. Ill. 1980). As a practical matter, where a plaintiff has been replaced by someone older than him or her, the chances of the plaintiff succeeding with an age discrimination claim are very slim. The task of an ADEA plaintiff, after all, is to establish that age-based animus—typically animus against older workers—motivated the employer. The plaintiff must prove that age was a determining factor in the employer's decision, such that the employer would not have made the adverse decision but for the employee's or job applicant's age. *EEOC v. University of Okla.*, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 856-58 (D.C. Cir. 1982); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238 (4th Cir. 1982). The replace-

case law supports the legitimacy of employers extending benefits to older workers while denying them to younger ones.¹⁷⁷

There is an understandable, albeit not explicitly stated, basis for the distinction effectively enunciated in the EEOC guidelines and reflected in the ADEA case law. When an older employee receives an added benefit from an employer, the younger employee, it can be argued, is not harmed; he or she is no worse off than he or she otherwise would have been, since the resource—the funds for the benefit—does not come out of his or her pocket, but rather is provided by the employer.¹⁷⁸ In contrast, if an employer gives preference in hiring to an older worker over a younger one (albeit one who still falls within the class protected by the ADEA), the younger applicant does suffer a direct harm—denial of the job for which she applied. Likewise, a younger employee experiences direct and immediate injury when he or she is discharged so that an older employee may be retained.¹⁷⁹ There is, then, a difference between a preference whose burden is borne by a third party, i.e., the employer, which is outside the universe of those protected by the ADEA from discrimination, and a preference that imposes the burden on someone who does fit within the Act's ambit, i.e., an em-

ment of a 45-year-old plaintiff by a 50-year-old certainly cuts against the conclusion that discriminatory motivation existed. Still, a court could conceivably arrive at this conclusion. The employer, for example, may have hired an older replacement purposely to ward off a threatened suit. Thus, his or her hiring would not negate the age-based discrimination suffered by the aggrieved employee who earlier had been discharged.

177. See, e.g., *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (the ADEA "does not forbid treating older persons *more* generously than others"); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988) ("an early retirement plan that treats you better the older you are is not suspect under the [ADEA]"); *Mason v. Lister*, 562 F.2d 343, 346-47 (5th Cir. 1977); *Wehrly v. American Motors Sales Corp.*, 678 F. Supp. 1366, 1381-82 (N.D. Ind. 1988).

178. This does not purport to be finely tuned economic analysis. Admittedly, it is simplistic to view employees as being entirely uninfluenced by the economic circumstances of their employers. An employer that is spending resources on employee benefits will have less funds available for other purposes, including salaries. Moreover, to take the situation to an extreme, an employer that is swamped by benefit costs may have to reduce its work force, or even close up shop. Such scenarios obviously entail very negative consequences for employees. Thus, enhanced benefits paid to older employees can, after all, harm younger employees. Still, this rough and ready economic analysis captures a tenable premise for the otherwise unexplained distinction, refer to note 180 *infra*, the EEOC makes in its guidelines.

179. While I am ranking all exclusions from jobs on an equal plane insofar as harm to the rejected individual is concerned, three justices of the Supreme Court have deemed the layoff of existing jobholders to be more harmful than the rejection of job applicants, in the course of condemning a race-based affirmative action scheme. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-283 (1986) (Powell, J., writing for himself, Justice Rehnquist and Chief Justice Burger).

ployee or job applicant age forty or older.¹⁸⁰

In the context of addressing health care preferences for older people, the same type of distinction has some relevance. A preference that imposes no direct burden upon those not preferred can be seen as being of a different order than a preference that, by virtue of being accorded to the old, directly harms others. The problem, of course, is that the former type of preference—i.e., one with no downside, so to speak—is of uncertain likelihood. The health care universe arguably constitutes a zero-sum game, or at least something close to it: one person or one group's gain can only come at the expense of someone else's or some other group's loss.¹⁸¹ There is, so this argument would go, a relatively fixed pot of health care resources available, and a skewed distribution whereby a particular advantage is received by some necessarily means that others must lose.

Admittedly, there is room for debate concerning whether such a 'my gain, your pain' linkage properly should be drawn. Some see a more than incidental correlation between gains made by older people and losses suffered by the young, particularly children.¹⁸²

180. The history of the EEOC interpretations neither supports, nor refutes, this analysis. The provision barring adverse treatment in personnel actions as between two individuals who both fit within the ADEA's protected class directly descends from the original interpretation published in 1968 by the Department of Labor, the initial enforcer of the ADEA. This was codified at 29 C.F.R. § 860.91 (1986), which was effectively rescinded in 1981. EEOC, Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724 (1981). The Department of Labor issuance did not contain any language regarding the legitimacy of additional benefits for older workers. The provision approving the extension of such benefits first appeared in final form (in conjunction with the provision dealing with hiring and other personnel actions) when the EEOC published its final interpretations in 1981. The EEOC explained that these provisions constituted a continuation of what the Department of Labor had already done in two earlier opinion letters issued by the Wage-Hour Administrator. In explaining these letters, the then-acting chair of the EEOC stated:

The basis for both opinion letters was that an employer can take measures to counteract discrimination which is more prevalent against older members of the protected group. The former letter . . . [issued in 1976], recognized that an older employee (55 and over) may be a more frequent target of age discrimination, and the latter opinion . . . [issued in 1978], recognized that same principle in the context of job relocation. In both instances, the opinions were based on tacit recognition of the fact that age discrimination is frequently more prevalent and more severe against older workers in the protected age group . . .

EEOC Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724 (1981).

181. See J. VON NEUMANN & O. MORGENSTERN, *THE THEORY OF GAMES AND ECONOMIC BEHAVIOR* 47 (1944).

182. See, e.g., Preston, *Children and the Elderly in the U.S.*, *SCI. AM.*, Dec. 1984, at 44. See also Lamm, *Foreword to SHOULD MEDICAL CARE BE RATIONED BY AGE?* at xii (T.

Others argue against such a nexus,¹⁸³ contending that funds made available for health care can be expanded to serve the needs both of the elderly and the non-old.¹⁸⁴ But, on balance, it would seem that even if one accepts the view that the potentials for generating more money for health care have not yet been exhausted, so that more funds can be found through cost containment efforts and income transfer mechanisms such as taxes, there remains the problem of shortages of other, more inelastic resources. Most particularly, transplantable organs are in short supply,¹⁸⁵ and here a preference for one age-defined group would seem inescapably to lead to disadvantage for those who do not fit, by reason of their ages, into that preferred group (assuming that the particular organ is not physiologically only of use to patients of a limited age range). Moreover, while health care funds can be expanded, there are still going to be occasions when even the best-funded health facility will have to make choices. A commuter train crash, or an earthquake, can produce large numbers of injured victims whose needs will strain the capacities of even the best-equipped hospital emergency room and intensive care unit. A policy of preference used to allocate scarce beds, equipment, and personnel in this scenario may well result in harm for the nonpreferred.

Given the fact, then, that no preference, whether involving health care or some other desired commodity, is likely to be entirely innocuous, it follows that a commitment to a system free of age bias can have negative consequences for the elderly. In the ADEA setting we see that commitment (which admittedly is not resolutely resistant to all age-based decisionmaking, as discussed earlier regarding tenured college faculty and high level executives) being expressed in interpretive guidelines that tolerate preferences for older individuals only if no workers forty and under suffer injury as a result of that preferential treatment. While neither those guidelines nor the case law suggest that either can be read as the product of long and intensive ethical and philosophical debates, they do, I think, reflect expectable and respectable responses to commonly felt notions of justice and fairness, and so they are useful analogues to note.

Smeeding ed. 1987).

183. See, e.g., Gould & Palmer, *Outcome, Interpretations, and Policy Implications*, in *THE VULNERABLE* 413, 421-22 (J. Palmer, T. Smeeding & B. Torrey eds. 1988).

184. See Binstock, *supra* note 28, at 141-43.

185. Refer to note 225 *infra*.

This, of course, is not to say that the ADEA mix of statutory language, agency interpretations, and case law is of binding legal consequence here. It is to say, however, that preferences for the old have not been accorded unlimited approbation in that setting where the thus far most comprehensive system of legislative and administrative treatment focused on the issue of ageism has been devised and the largest body of case law focused on age has been developed. Thus, those who attack what they see as an undue allocation of health care resources to the elderly can find in the ADEA analogy some, although certainly not unalloyed, support for their position that ageist preferences—even those that benefit those we have typically thought of as deserving and needy, i.e., the elderly—may be unacceptable because they do violence to an antidiscrimination ethic. (At the same time, however, there is also some succor for those who resist attacks on the old. For, since the ADEA analogy reveals a repudiation—in the context of applying an anti-age discrimination principle—of preferences which harm the non-preferred, it would follow that a preference for the young over the old likewise could be seen as doing violence to an antidiscrimination ethic were the consequence of this preference to be injury to the elderly.)

b. The Equal Credit Opportunity Act

When he testified before the House subcommittee considering the 1976 amendments to the Equal Credit Opportunity Act¹⁸⁶ (ECOA), Arthur Flemming, who at the time chaired the United States Commission on Civil Rights, recounted the importance of credit in the American economy:

It would be difficult . . . to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Indeed, the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution.¹⁸⁷

186. Equal Credit Opportunity Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251.

187. *To amend the Equal Opportunity Act of 1974: Hearings on H.R. 3336 Before the Subcomm. on Consumer Affairs, House Comm. on Banking, Currency and Housing*, 94th

The ECOA attempts to confine lenders' decisionmaking to the question of creditworthiness, rather than allowing consideration of inappropriate, i.e., discriminatory, factors.¹⁸⁸ More specifically, the Act makes it unlawful for a creditor to discriminate with respect to any aspect of a credit transaction against any credit applicant "on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)"¹⁸⁹ However, as is generally true of almost every other statute dealing with age discrimination, the ECOA's proscription is not an unblinking one: not all uses of age are outlawed.¹⁹⁰ In fact, the ECOA clearly allows for affirmative uses of age to advance the interests of the elderly.

One such instance comes about in the context of the Act's approval of an increasingly common mechanism for credit evaluations, i.e., credit scoring systems. The ECOA provides that it shall not constitute discrimination for a creditor "to use any empirically derived credit system which considers age if such system is demon-

Cong., 1st Sess. 38-39 (1975) (statement of Arthur Flemming, Chairman, United States Comm'n on Civil Rights).

188. See generally 1 EGLRT, *supra* note 23, ch. 12. Several state statutes also proscribe age discrimination in credit transactions. See *id.* at § 12.51.

189. 15 U.S.C. § 1691(a)(1) (1982).

190. The underlying rationale was expressed in the Senate Committee's report on the 1976 amendments:

Creditors are obviously free to require that their applicants have reached the age of majority so that they are competent to enter binding contracts. Creditors are precluded from rejecting or "blackballing" any applicant solely because of his or her age, but creditors may inquire about the applicant's age in order to assess other factors directly related to creditworthiness. Thus a creditor justifiably may inquire how close to retirement an applicant is so that he may judge whether the applicant's income will continue at a sufficient level to support the credit extension. Similarly, the creditor is entitled to ask the applicant's age to gauge [sic] the pattern or intensity of his or her credit history. The Federal Reserve Board is given authority to identify other pertinent elements of creditworthiness for which age is a necessary preliminary inquiry. One such element might be the adequacy of any security offered by the applicant. An elderly applicant might not qualify for a 5%-down condominium loan because the duration of the loan exceeds his life expectancy and the condominium itself has a speculative future value. But that same applicant ought to be deemed creditworthy when he seeks a \$10,000 home improvement loan secured by a \$50,000 homesite.

SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976, S. REP. NO. 589, 94th Cong., 2d Sess. 5 (1976). The less than complete prohibition of age discrimination contrasts with the absolute prohibitions contained in the Act regarding other forbidden criteria: "The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor." *Id.* at 4.

strably and statistically sound"¹⁹¹ This provision's authorization for credit scoring systems to take account of age certainly undercuts the Act's purported ban on the use of age.¹⁹² (By way of contrast, statutory approval is not expressed for such systems to consider credit applicants' race or gender.) Insofar as older individuals are concerned, however, this provision takes back its sting, so to speak, by virtue of its limiting the extent to which an elderly credit applicant can suffer due to his or her age being considered: a scoring system cannot assign to the age of an elderly applicant "a negative factor or value."¹⁹³ This preference requires some explanation.

First, while the statute itself provides no definition of "elderly," the important regulations issued by the Federal Reserve Board¹⁹⁴ to implement the Act do define the word. "Elderly" refers to those who are sixty-two years of age or older.¹⁹⁵ The regulations also clarify what the statute means by its barring the age of an elderly applicant from being assigned a negative value. "Negative factor or value" means:

[A] factor, value, or weight that is less favorable regarding elderly applicants than the creditor's experience warrants or is less favorable than the factor, value, or weight assigned to the class of applicants that are not classified as elderly applicants and are most favored by a creditor on the basis of age.¹⁹⁶

By virtue of these provisions a creditor may not assign to persons ages sixty-two and over—or any subdivision thereof, such as persons ages seventy to seventy-three—a score that is less favorable than experience warrants. Thus, for example, in an empirically derived, demonstrably and statistically sound scoring system creditors ages sixty-two to sixty-five must be assigned the highest score, let us say a twenty, if the statistics reveal that this

191. 15 U.S.C. § 1691(b)(3) (1982). An empirically derived credit system "usually consists of an allocation of points to characteristics of the applicant, the total number of points depending on how the applicant compares to a statistical sampling of previous applicants with similar credentials." SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, *supra* note 190, at 6.

192. This provision's conflict with the ECOA's ostensible proscription of age discrimination has been criticized. See 1 EGLR, *supra* note 23, § 12.11.

193. 15 U.S.C. § 1691(b)(3) (1982).

194. 12 C.F.R. pt. 202 (1988). (This set of provisions is designated by the Board as "Regulation B.")

195. 12 C.F.R. § 202.2(o) (1988).

196. *Id.* at § 202.2(v) (1988).

age group indeed is the most creditworthy, i.e., they have the best record of paying their debts. There is nothing exceptionable about this. Suppose, however, that the statistics instead reveal that creditors ages sixty-two to sixty-five really are not very good credit risks, after all. This age group, then, should not be assigned a score of twenty, but should receive a lower score—let us say, fifteen. It would be the most creditworthy group—for the purposes of our hypothetical construct let us say those between ages forty-five and fifty—who would receive a twenty, and the next most creditworthy group—those, let us say, between ages thirty-five to forty—who would receive an eighteen, and so on. The statutory and regulatory language, however, bars the assigning of a score of fifteen to those sixty-two and over, even though it reflects actual, statistically validated experience. Rather, persons ages sixty-two and over must be assigned a score no lower than that accorded to the highest group. And so the group of those sixty-two and over, like those ages forty-five to fifty, must be assigned a score of twenty.¹⁹⁷

Here, then, is a preference accorded on the basis of age, and extended only to older individuals. Presumably, however, this benefit should raise no hackles so far as the nonpreferred are concerned, since the scoring scheme does not take anything away from younger adults; rather, it simply gives to older credit applicants an age-exclusive advantage.¹⁹⁸ Thus, this preference embodies an innocuousness consistent with the kind of preference approved for older workers under the ADEA.¹⁹⁹

While the ECOA's treatment of credit scoring and the elderly is somewhat complicated, the statute's authorization of affirmative efforts is quite straightforward. The Act explicitly approves special

197.

As a pragmatic matter, it can be argued that this preferential treatment is not inappropriate, inasmuch as numerous creditor witnesses who testified before the committees which drafted the 1976 amendments to the act were of the view that older debtors indeed have the best record of repayment.

1 EGLIT, *supra* note 23, § 12.11, at 12-29 (footnote omitted).

198. Admittedly, the economic conclusion set forth in the text is a simplistic one. One could certainly reason that a creditor that winds up making too many bad loans will eventually have to pass on its losses on those loans to either its customers or its shareholders, or both. Thus, the preference for the elderly indeed may redound at some point, in some perhaps attenuated way, to the detriment of younger people. The partial counterpoint to this observation is that younger people would not be singled out for financial loss in such a scenario; all customers and all shareholders would suffer, with their ages being irrelevant to their injury.

199. Refer to notes 173-80 *supra* and accompanying text.

purpose credit programs, which can be directed to benefiting economically disadvantaged classes and to enhancing special social needs.²⁰⁰ The Senate committee report on the 1976 amendments to the Act asserted that inasmuch as "[t]he essential prohibition in this legislation is directed at discrimination 'against' applicants," the Act should not "be read to bar occasional extensions of credit to individuals who would not normally qualify, or to bar experimental or ongoing special programs which prefer applicants in certain categories so long as there is no accompanying restriction of credit available to applicants not in those categories."²⁰¹ As examples, the report cited "positive credit programs aimed at 'young adults' or 'golden age' accounts."²⁰² This approval of preferences for the elderly, then, also is comparable to that seen in the ADEA: a preference will constitute acceptable discrimination so long as it does not take something away from younger people.²⁰³

c. The Age Discrimination Act

The Age Discrimination Act²⁰⁴ (ADA) bans discrimination on the basis of age by recipients of federal financial assistance.²⁰⁵ The

200. 15 U.S.C. § 1691(c)(3) (1982).

201. SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976, S. REP. NO. 589, 94th Cong., 2d Sess. 5-6 (1976).

202. *Id.*

203. Of course, the committee also endorsed special efforts for younger people, so its approval of benign discrimination was considerably more catholic than that in the EEOC's interpretations of the ADEA. The EEOC guidelines tolerate only preferences for the old. 29 C.F.R. § 1625.2(b) (1988).

204. 42 U.S.C. §§ 6101-6107 (1982 & Supp. V 1987).

205. The Department of Health, Education and Welfare (HEW) initially issued in 1979 model regulations defining "federal financial assistance." (The Department of Health and Human Services succeeded to many of HEW's functions, including responsibility for the regulations. *See* 20 U.S.C. § 3508 (1982).) These regulations serve as a model, pursuant to statutory directive, for the regulations issued by each federal entity responsible for distributing financial assistance. 42 U.S.C. § 6103(a)(4) (1982). *See generally* 1 ECLR, *supra* note 23, § 5.07. The regulations identify federal financial assistance as including grants, entitlements, loans, cooperative agreements, and contracts (other than procurement contracts and contracts of insurance or guaranty). 45 C.F.R. § 90.4 (1988). Notwithstanding this definition, an agency still may have considerable difficulty in determining whether a particular program is a program receiving federal financial assistance, as revealed by a report of the Comptroller General of the United States detailing flaws in federal agency enforcement of the ADA's analogue, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d-6 (1982). COMPTROLLER GENERAL, REPORT TO THE CONGRESS, AGENCIES WHEN PROVIDING FEDERAL FINANCIAL ASSISTANCE SHOULD ENSURE COMPLIANCE WITH TITLE VI 5-7 (1980).

Whether a given recipient of assistance is covered by the statute also can be ambiguous. Again, the regulatory provisions set forth a definition: government bodies, public and pri-

statute authorizes agency administrative enforcement, private suits, and suits by the United States Attorney General, with loss or denial of federal funds being the ultimate penalty flowing from a recipient's violation of the Act. In non-ADA settings courts have concluded that Medicaid and Medicare are federal financial assistance programs,²⁰⁶ and there is no reason to believe that a different interpretation would apply regarding the age statute. Certainly, a hospital that receives federal grants or other forms of assistance would come within the ambit of the Act.²⁰⁷ Moreover, by virtue of the Civil Rights Restoration Act of 1987,²⁰⁸ which amended the ADA along with several other statutes imposing comparable antidiscrimination prohibitions on recipients of federal financial assistance, an entire program or entity will come within the ADA's reach so long as some part of that program or entity receives federal assistance. The ADA model regulations²⁰⁹ do, however, exclude from the definition of "recipient" the "ultimate beneficiary of the assistance."²¹⁰ Thus, a Medicare- or Medicaid-covered individual, for example, would not be governed by the Act in terms of his or her own biased actions.

Knowing no more than that the ADA imposes a prohibition on age discrimination and defines "recipient" and "federal financial assistance" in broad terms,²¹¹ one might conclude that the debates of ethicists, philosophers, and others about the legitimacy, morality, and ethics of age-based health care allocation in America are

vate organizations, and individuals "to which federal financial assistance is extended, directly or through another recipient," are deemed to be recipients. 45 C.F.R. § 90.4 (1988).

206. See *United States v. Baylor Univ. Medical Center*, 736 F.2d 1039, 1042 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985), and cases cited therein; *United States v. University Hosp.*, 575 F. Supp. 607, 612 (E.D.N.Y. 1983), *aff'd on other grounds*, 729 F.2d 144 (2d Cir. 1984).

207. There is conflicting case law in non-ADA settings as to whether a federal tax exemption constitutes federal financial assistance. Compare *Bachman v. American Soc'y of Clinical Pathologists*, 577 F. Supp. 1257, 1264 (D.N.J. 1983) (negative view) with *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972) (affirmative view). A program directly conducted by the federal government does not constitute a program of federal financial assistance, even though individuals benefit from it. *United States Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986). See also *Soberal-Perez v. Schweicker*, 549 F. Supp. 1164, 1172 (E.D.N.Y. 1982), *aff'd sub nom. Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 468 U.S. 992 (1984); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975).

208. Pub. L. No. 100-259, 102 Stat. 28 (1987).

209. Refer to note 205, *supra*.

210. 45 C.F.R. § 90.4 (1988).

211. Refer to note 205 *supra*.

somewhat academic, at best. For, on superficial glance it might seem that as a practical matter the most significant allocations of health care resources on the basis of age already have been outlawed, at least when the allocative decisionmaker is a recipient of federal dollars (which certainly includes most institutional components of the American health care delivery system). The statute and its implementing regulations quickly yield a far different conclusion, however, for the statute is so unfocused in conception and so compromised by a series of broad caveats that it is questionable whether it could be of anything more than minimal practical utility to those who might seek to invoke its protection.²¹² Some abbreviated review of this statute and its flaws is relevant to addressing our concern here, i.e., age-based preferences.

i. *Defining "discrimination."* The statement of purpose set forth at the beginning of the ADA articulates an unadorned goal: "It is the purpose of this . . . [Act] to prohibit discrimination on the basis of age"²¹³ The operative prohibitory language of the ADA seems similarly rigorous: "Pursuant to regulations prescribed under . . . [the Act], no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."²¹⁴

As an expression of rights-protective aspiration, the ADA's universal reach, ranging from the premature infant to the eighty-five-year-old nursing home resident, is admirable. In application, however, the Act's undifferentiated coverage of persons of all ages causes considerable difficulty. After all, the use of age distinctions in our society is common; age lines regularly are used for the allo-

212. An extensive effort has been made to argue that the ADA indeed can be read as effectively outlawing age-based allocations of health care. See Silver, *From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care*, 37 CATH. U.L. REV. 993, 1064-72 (1988). See also Uddo, *The Withdrawal or Refusal of Food and Hydration as Age Discrimination: Some Possibilities*, 2 ISSUES L. & MED. 39, 53-5 (1986). While Ms. Silver focuses with particularity on age-based rationing of heart transplants, she also seeks to speak to age-based rationing broadly. Ultimately, her argument as to the ADA being applicable, so that in "each case where a hospital establishes a treatment protocol or engages in a consistent practice of considering a patient's age, that practice is subject to scrutiny under the ADA," Silver, *supra*, at 1070, seems to this author to be an overly optimistic one. In any event, that scrutiny almost invariably would be readily satisfied, given the broad exceptions built into the Act, as discussed below.

213. 42 U.S.C. § 6101 (1982 & Supp. V 1987).

214. 42 U.S.C. § 6102 (1982).

cation of social and economic resources, and for the imposition of rights and responsibilities. Even if one concedes—as one surely must—that some uses of age discrimination are abusive, others obviously are acceptable. The ADA's wholesale condemnation of age-based differentiations offers no criteria, however, for distinguishing good from bad distinctions. And so a great array of age lines embodied in statutes, policies, and regulations ostensibly are at risk, so long as they are tied into entities receiving federal funds, for the effect of each such line is to treat people on one side of it more advantageously than those on the other side—a consequence seemingly outlawed by the ADA.

One perhaps might conclude that an unstinting commitment to a non-ageist society led Congress to opt for this Draconian result, no matter the difficulties the transition to an age-blind culture might entail. In fact, however, the statute's history reveals that the Congress really had very little notion of what it was condemning, or whether there was even something really needful of condemnation.²¹⁵ In any event, to protect against any significant

215. For reviews of the strikingly flawed legislative activities which culminated in enactment of the ADA, see Eglit, *The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problems Areas*, 57 CHL[-]KENT L. REV. 915 (1981); Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979). Prof. Schuck aptly wrote:

Congress performed few of the conventional policymaking functions for which it is thought to be admirably designed: it failed to specify the problem; it gathered little information; it failed to articulate and weigh competing values or reduce them to operational terms; it considered no alternatives; and it declined to make hard choices. Having neglected to define the problem, Congress designed a legislative solution that, by reason of its singular indeterminacy, seemed consistent with any number of possible problem definitions. It adopted a sweeping nondiscrimination provision, then riddled it with exceptions and exclusions. These exceptions and exclusions appeared to be designed to afford a broad scope for precisely the kinds of allocative criteria—age classifications—that the nondiscrimination provision flatly condemned.

Id. at 82.

The impetus for the Act was what seemed to be almost an off-the-cuff comment by the then-Commissioner on Aging during his testimony before a House of Representatives committee considering some pending amendments to the Older Americans Act. He expressed the opinion that "in this country we have to contend with racism, with sexism and with ageism." CONFERENCE COMM., OLDER AMERICANS AMENDMENTS OF 1975, H.R. REP. NO. 670, 94th Cong., 1st Sess. 15 (1975) (statement of Arthur Flemming, Commissioner on Aging). The committee's response was to draft the ADA. But throughout the committee process, as well as in the course of full House consideration of the proposed statute, nothing was ever adduced to suggest that the Commissioner's fleeting observation had any empirical merit to it. Indeed, the paucity of data prompted hesitation in the Senate, which accordingly merely called for a study by the United States Commission on Civil Rights.

consequences actually flowing from its legislative endeavor, Congress built into the ADA a series of statutory caveats. These effectively establish what the ADA actually prohibits: to wit, the Act bars that which is not allowed by one or more of the exceptions. And examination reveals that these caveats are so broad that the Act turns out to prohibit very little, indeed.²¹⁶

Ultimately, an awkward compromise was struck: the prohibition of age discrimination was adopted, but the Act was not to go into effect until the Department of Health, Education and Welfare (HEW) had issued implementing regulations. However, these were not to be adopted until the Commission completed its study. "Thus, Congress was, at the same time, called upon by the conference committee [of the House and Senate committees that devised this compromise] both to legislate against a purported wrong and to mandate a study the very purpose of which would be to determine if the wrong even existed." Eglit, *supra*, at 922.

The Commission concluded in its study that discrimination indeed was a problem in a number of areas. Two of the 10 specific programs it studied involved health care services. In examining the practices of federally funded community mental health centers, the Commission found "one of the most glaring examples of discrimination on the basis of age." U.S. COMM'N ON CIVIL RIGHTS, THE AGE DISCRIMINATION STUDY 6 (1977). This discrimination manifested itself both at the high and low ends of the age spectrum: for the 328 centers surveyed, children under age 15 made up 28.8% of the service area population, but constituted only 16.3% of the patient population. *Id.* at 11. Persons 65 and over, who constituted 9.9% of the service area population, made up only 4.1% of the patient load. *Id.* While the Commission did not obtain similar concrete data with regard to federally funded community health centers, it reported and relied upon testimony of senior program people who expressed the views that older persons were underserved, while children were provided care in excess of their percentage in the population. *Id.* at 22. (The Commission's study has been criticized. See Schuck, *supra*, at 49-54; Teitelbaum, *The Age Discrimination Act and Youth*, 57 CHL[-]KENT L. REV. 969, 976-78 (1981).)

The Commission, recognizing that it had to operate within some sort of definitional parameters, developed what it described as "a tentative definition of age discrimination," i.e., "any act or failure to act, or any law or policy that adversely affects an individual on the basis of age." U.S. COMM'N ON CIVIL RIGHTS, THE AGE DISCRIMINATION STUDY 3 (1977). In applying this definition, the Commission primarily looked for statistical disparities, while acknowledging that not all such disparities necessarily supported conclusions that they were prompted by discrimination. As the Commission recognized:

The use of statistical evidence to establish the existence of age discrimination is important but limited. The transition from a finding of age disparities that can be statistically demonstrated to a finding of unreasonable age discrimination requires a normative judgment that cannot be statistically demonstrated. Disparities are matters of fact. Age discrimination and whether it is unreasonable are judgments concerning the explanations or reasons for the existence of disparities.

U.S. COMM'N ON CIVIL RIGHTS, THE AGE DISCRIMINATION STUDY, Vol. II, at 6 (1979). In any event, the Commission's work at least provided some after-the-fact data to support the ADA's thrust. Still, these data had meaning only within an evaluative system that assigned to them normative significance. It is the Act which must be looked to for that normative framework.

216. There are four primary exceptions to the Act. Three of them legitimize otherwise unlawful age-based discrimination if:

1. "such action reasonably takes into account age as a factor necessary to the normal

ii. *The "special benefits" caveat.* Notwithstanding the breadth of the ADA's statutory caveats, whereby most uses of age are legitimized, the statute does not express explicit approbation for special benefits based on age. Rather, the Act ostensibly leaves any federally assisted program utilizing an age criterion to rise or fall depending on whether the program comes within one or more of the exceptions. While the breadth of these exceptions would seem to ensure that most instances of preference would satisfy one or more of them, the drafters of the model regulations still feared that some special benefit programs somehow might fall. And the regulations' drafters were confident that Congress could not really have intended, by its omission of language explicitly saving age-related special benefit programs, to put such programs in jeopardy.²¹⁷ Accordingly, the agency bureaucrats took it upon them-

operation . . . of . . . [the] program or activity" 42 U.S.C. § 6103(b)(1)(A) (1982);

2. "such action reasonably takes into account age as a factor necessary to . . . the achievement of any statutory objective of . . . [the] program or activity" 42 U.S.C. § 6103(b)(1)(A) (1982); and/or

3. "the differentiation made by such action is based upon reasonable factors other than age" 42 U.S.C. § 6103(b)(1)(B) (1982).

The fourth exception provides that the ADA will not apply "to any program or activity established under authority of any law which (A) provides any benefits or assistance to persons based upon the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms." 42 U.S.C. § 6103(b)(2) (1982). It should be immediately obvious that each of these exceptions is freighted with vague language, subject to both expansive and narrow readings. What does "reasonably necessary" mean? When is a factor "necessary" to a program, and what is the "normal operation" of a program? Does "any law" encompass just federal laws, or does it also include state and local laws?

Each of the exceptions has evoked complex agency interpretation. The parsing of these interpretations has been undertaken elsewhere, and I do not intend to repeat it here. See 1 EGLR, *supra* note 23, §§ 5.17-28. As a general matter, it is worth noting that the Department of Health, Education and Welfare, which was charged by the Act with the task of promulgating model regulations for the entire federal establishment, refer to note 205 *supra*, was no more successful than Congress had been in devising a more than hortatory general definition of discrimination. In the regulations the prohibitory language of the statute is simply repeated. 45 C.F.R. § 90.12 (1988). This repetition is thence made subject to the caveat that the general prohibition of age discrimination is limited by the exceptions set forth in the regulations. *Id.* The regulatory exceptions simply flesh out the statutory exceptions. 45 C.F.R. §§ 90.14, 90.15 (1988).

217. The Department of Health, Education and Welfare drafters stated:

[T]he Congress has consistently made clear its support for the concerns of older persons. It is therefore unlikely that Congress intended the Act to call into question the generally accepted special benefits which are provided to older persons in programs that are otherwise available to a wider age range of the population. Public comment on the [proposed] regulations was almost unanimously supportive of these benefits, which often take the form of special discounts. Similarly, no one has suggested that similar benefits for children should be questioned under the

selves to rectify Congress' perceived error.

This was done by way of a two-step regulatory provision. First, the regulation authorizes recipients of federal financial assistance funds to take "affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age."²¹⁸ Second, special benefit programs are included under the rubric of such affirmative action:

If a recipient operating a program which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.²¹⁹

This provision generates several problems,²²⁰ the most signifi-

Act.

44 Fed. Reg. 33,771 (1979).

218. 45 C.F.R. § 90.49(b) (1988).

219. 45 C.F.R. § 90.49(c) (1988).

220. 45 C.F.R. § 90.49(b) (1988), which is the predicate for subsection (c), quoted in the text, provides authority for a fund recipient to engage in affirmative action "[e]ven in the absence of a finding of discrimination" in order to overcome the effects of conditions resulting in limited participation in the recipient's program or activity. It is questionable whether any analogies should be drawn to the affirmative action case law dealing with race and gender which has developed under the equal protection clause, refer to note 150 *supra*, since *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), establishes that there is minimal judicial scrutiny to be accorded age-based statutes attacked on constitutional grounds. Refer to notes 94-95 *supra* and accompanying text. In contrast, racial classifications—both malign and benign—elicit the most rigorous of judicial analysis when challenged on equal protection grounds. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (malign discrimination); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (benign discrimination). Similarly, affirmative action based on gender evokes heightened judicial scrutiny in the constitutional context, albeit of a lesser dimension than that applied to racial classifications. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). (As for analogies to the affirmative action case law developed under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. V 1987), refer to notes 150, 151 *supra*, that statute is very different from the ADA both in structure and focus.) Still, if one looked to equal protection case law by way of analogy in the ADA context, that likely would lead to reading 45 C.F.R. § 90.49(b) as a weak straw for a government agency which has received federal funds and which has adopted an age-geared affirmative action program to rely upon. This result ensues because of the Court's insistence that there be a defined nexus between an affirmative action program (in the racial context) and some prior discrimination by the entity now adopting the program. See *City of Richmond*, 109 S. Ct. at 724. (On the other hand, the Court has required much less under Title VII by way of the establishment of prior discrimination on the part of the agency adopting a program. See *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 628 (1986). Refer to note 151 *supra*.)

A second problem involved with both 45 C.F.R. § 90.49(b) and (c) is the issue of authority; it is questionable whether these affirmative action provisions are supported by the req-

cant of which follows from the extent to which the drafters of the provision strained to legitimize age-based preferences. The regulatory language allows for affirmative action efforts, i.e., preferences, so long as they do "not have the effect of excluding otherwise eligible persons from participation in the program." The key term here is "program." An example illustrates why this is so. Let us take the case of a common type of preference accorded persons on the basis of age: a city mass transit system's allowance of riders under age eighteen and over age fifty-nine to travel for half fare during nonpeak hours.²²¹ Since the reduced fare scheme does not bar riders of other ages from using mass transit, the preference is legitimate under the ADA regulation—if the "program" is deemed to be the entire transit system. If, however, "program" were defined to mean just the special fare plan, then it indeed would be seen as barring those ages eighteen through fifty-nine and so the regulation would not be satisfied.

Obviously, the drafters of the model regulation intended the broader reading, since the narrower construction of "program" would result in every special benefit program falling—a consequence completely at odds with what the drafters sought by their provision. Still, their regulatory product actually amounts to little more than a refutation of the ADA's supposed repudiation of age discrimination. After all, a thirty-five-year-old indigent woman who is unable to afford private transportation and is consequently dependent on mass transit to transport her to job interview sites certainly would be a victim of adverse, age-based treatment so long as she was ineligible for the reduced fare. That those under eighteen and over fifty-nine benefited would not diminish her injury. Nor would her freedom to use the mass transit system at full fare refute the fact that the "program" that counted—i.e., the reduced fare program—was foreclosed to her.

In sum, the ADA's ostensible rejection of age-based allocations of resources—a rejection already profoundly compromised by virtue of the statutory caveats—is further undermined by a regulatory exception allowing advantages to be bestowed upon the elderly (and children, as well). For our purposes, however, the

quisite statutory authority necessary to justify their issuance. See 1 EGLIT, *supra* note 23, § 5.34, at 5-70.

221. Actually, there is statutory authorization for such programs at 49 U.S.C. § 1604(m) (1982), and so this preference would pass muster under the ADA's "any law" exception. Refer to note 216 *supra*.

important lesson is that special benefits for the old do not offend the ADA so long as the extension of advantage to the elderly does not (in theory) take anything away from those not eligible for these benefits. This is a position which of course is comparable to that seen in the ADEA and ECOA contexts.²²²

d. Conclusion

In each instance where a federal statute has been used to combat age discrimination, there has been some allowance for age-based preferences—the statute's ostensible rejection of ageism notwithstanding. In each instance the predicate for approval of a preference has been the premise that those not eligible for the preference would not be harmed. In other words, the preferences for the elderly that have been approved are those which, at least in theory, do not take anything away from the non-elderly.

Presumably, no one would have a problem with innocuous preferences that indeed pose no disadvantages for the nonpreferred. The problem, of course, is that it is rare that a surplus of any commodity which is desirable exists, such that a preference in the allocation of that commodity will have no negative consequences. This, however, is a truth that, if even recognized, certainly has been left unsaid in each of the statutory contexts in which a congressional effort to outlaw ageism has been modified by an approval of preferential treatment based on age. Legislative silence (as well as the silence of the administering agencies) does not diminish the validity of this particular truth, but it does confirm that the conflict between an antidiscrimination principle on the one hand, and age-based preferences on the other, thus far largely has been finessed rather than resolved.

While these observations may be of little utility in devising answers in the health care setting, they do at least form the foundation for some mild conclusions, as well as a tempered conjecture. First, preferences whereby the elderly gain at the expense of the non-elderly are likely to increasingly evoke social and political discomfort. Second, such preferences are particularly problematic when they are put forth in the contexts of avowed commitments to combatting ageism. Third, in these contexts—i.e., the ADEA, the ECOA and the ADA—preferences for the elderly for the most part

222. Refer to notes 173-80, 191-202 *supra* and accompanying text.

have been condoned only when they are seen as imposing no loss on the non-elderly. Finally, and this is obviously the conjectural part of this synopsis, the financial and life-affecting stakes involved in health care allocation perhaps may come to be seen as so enormous as to force a direct and honest societal confrontation with the gnawing problem of preference, and not allow it once again to be submerged in legislative and regulatory obfuscation. On the other hand, perhaps because the problem is so profound and its resolution so unsettling, continuing obscuration will turn out to be the only tenable tack.²²³

C. *The Question of Cost*

1. *The Age Discrimination in Employment Act*

In very great measure the problems of health care distribution are a function of financial constraints. In a world of unlimited funds—never mind whether they are public or private—many of the difficulties identified as burdening both users and providers within the American health care system would not exist. Of course, one could not confidently predict that all problems would be resolved. Class and racial factors still likely would be operative.²²⁴ Shortages of scarce commodities—human hearts and livers for transplantation, for example—still would exist.²²⁵ Geographical

223. This is the approach reportedly used by doctors in Great Britain when dealing with older patients suffering end-stage renal disease for whom dialysis is foreclosed by virtue of age restrictions on the availability of this treatment. See H. AARON & W. SCHWARTZ, *THE PAINFUL PRESCRIPTION: RATIONING HOSPITAL CARE* 36-37 (1984).

224. A recently published study reports substantial racial differentials regarding the use of procedures for patients who are hospitalized with coronary heart disease, with whites receiving certain treatment far more commonly than blacks. See Wenneker & Epstein, *Racial Inequalities in the Use of Procedures for Patients With Ischemic Heart Disease in Massachusetts*, 261 J. A.M.A. 253 (1989). Blacks also receive a disproportionately low number of kidney transplants. See Eggers, *Effect of Transplantation on the Medicare End-Stage Renal Disease Program*, 318 NEW ENG. J. MED. 223, 225 (Jan. 28, 1988). See generally the studies cited in Wenneker & Epstein, *supra*, at 256. See also Rosenblatt, note 2 *supra*.

225. The shortage of hearts available for transplantation is reported in GAO REPORT, *supra* note 10, at 14-23. There have been reports of actual commercial trafficking of human organs, as well as proposed commerce in such commodities. See Kevorkian, *Marketing of Human Organs and Tissues is Justified and Necessary*, 7 MED. & L. 557, 557-58 (1989); Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1020-22 (1985). The National Organ Transplant Act, 42 U.S.C. §§ 273-274e (Supp. IV 1986), makes it a crime "for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation, if the transfer affects interstate commerce." *Id.* at § 274(e). As to the marketing of organs generally, see Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57 (1989).

maldistribution likely would still leave some rural areas and inner-city ghettos underserved.²²⁶ Still, money is the primary factor determining the availability and adequacy of any health care. Not surprisingly, given the lack of sufficient funds to provide good quality medical care for everyone, the extensive utilization of health care resources for the old is subject to attack as being too costly an enterprise. This argument may be expressed both in cost-benefit and cost-effectiveness terms.²²⁷

Financial concerns can translate into discrimination issues.²²⁸ Where there are limited economic resources, or where financial pressures create the need for allocation, decisionmakers may make cost-driven choices having adverse consequences for those who come out on the negative side of those choices. Thus, for example, if decisions are made on the basis of age to husband scarce dollars

226. Presumably, if money were no object, medical personnel could be attracted by special monetary incentives to locate in such areas.

227. Emery and Schneiderman have concisely explained the differences between these two approaches:

In CBA [cost-benefit analysis] all benefits, including health gained, are measured in terms of their monetary worth. This is accomplished by utilizing "human capital" calculations, which count the productivity (wages) gained as a measurement of the value of health. This value is then included with the other monetary benefits generated by the program, the most important of which is the cost of future medical care averted by implementing the project. CEA [cost-effectiveness analysis] can also incorporate human capital assessments by adding the dollar value of health into its "monetary benefits" category.

In CEA (but not CBA) health may be measured in a variety of ways: cases prevented, decreased length of hospital stay, reduction in mortality, etc. One popular measurement is the gain or loss of years of life because of an intervention. The years of life gained may be adjusted for the quality of life, though this is a controversial ethical point.

All measures are usually discounted at varying rates averaging about 5 percent yearly

Emery & Schneiderman, *Cost-Effectiveness Analysis in Health Care*, 19 HASTINGS CENTER REP. July-Aug. 1989, at 8-9. A cost-based analysis is put forth in Smeeding, *supra* note 4. See also Schwartz, *supra* note 3; Thurow, *supra* note 4.

228. Emery & Schneiderman, *supra* note 227, make this point well:

[A]ny cost-effectiveness formula that includes the expenditure of health care dollars due to extended lifespan arising from successful therapy will have higher costs for the elderly. This is due to the older person's overall requirement for more health care resources per year of life. A second bias results from the calculation of years of life gained by the therapy. Any life-saving intervention will appear more effective in the young, by virtue of their longer remaining lifespans.

Id. at 11-12 (footnote omitted). Cost-benefit analysis likewise bears the potential for discriminating against the elderly (as well as other individuals, such as low wage earners), since the dollar expended on health care for an older person will have a lesser return in terms of enhancing or preserving future years of productivity than will the dollar spent on a young person.

by denying certain procedures, limiting access to expensive treatments or facilities (such as intensive care units), or foreclosing life-extending care, these decisions can be read as being invidiously discriminatory against those whose accumulated years are either too few or too many, depending upon the particular age criterion used as the basis for allocation.

As yet, no clearly drawn statute,²²⁹ nor any constitutional provision or court decision, outlaws such discrimination in the health context. The intersection of cost considerations with an ostensible commitment to an antidiscrimination principle has, however, been addressed in other contexts.²³⁰ Indeed, the matter of age-related costs is a dominating one in the employment setting, which is governed by the Age Discrimination in Employment Act, as amended (ADEA).²³¹ As a review of the statute and its case law reveals, there can be a powerful conflict between cost-based decisions on the employer's part and the Act's guarantee of a work place largely free from ageism.²³² A recent ruling of the Court of Appeals for the Seventh Circuit, *Metz v. Transit Mix, Inc.*,²³³ poses this conflict in particularly pristine form.²³⁴

229. As discussed in note 212 *supra*, I do not regard the ADA as a significant barrier to health care allocative choices. Certainly, it is not a "clearly drawn" one.

230. In particular, a number of cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1982 & Supp. V 1987), bring to the fore the conflict between financial concerns of employers and the statute's proscription of discriminatory employment practices. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (discrimination on basis of religion); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1973) (discrimination on basis of pre-employment criteria); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981) (discrimination on basis of sex). See generally Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987) (arguing that recent Title VII case law reveals a growing judicial tilt in favor of employers that invoke cost concerns).

231. For a general discussion of the Act, refer to notes 128-136 *supra* and accompanying text.

232. There has been little trenchant scholarly attention directed to the cost/discrimination interface in the ADEA context. See Note, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 DUKE L.J. 580 (1982); Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979). Professor Brodin addresses the ADEA in a relatively few pages. Brodin, *supra* note 230, at 360-62.

233. 828 F.2d 1202 (7th Cir. 1987).

234. Actually, not only is *Metz* a perfect illustration of the problem, it is also one of the very rare direct judicial treatments of the clash between economic concerns and the nondiscrimination ideal. This is a clash which thus far has had a largely subterranean legal existence. Perhaps the case law is so limited because the agency directives, refer to notes 240-41 *infra* and accompanying text, have served as clear brakes on overt employer cost-based decisions. Or, perhaps there is little case law because of the prevalence of voluntary

After suffering three years of financial problems due to declining local construction activity causing reduced demand for its cement, Transit Mix's president, Lawrence, decided to temporarily close the branch plant that Wayne Metz managed in a small town in Indiana. Metz, who had worked for Transit Mix for twenty-seven years and who thereby was the company's second most senior employee, initially was just laid off. At that point he was earning \$26,000 annually, which made him one of Transit Mix's highest paid employees. Not surprisingly, "Metz's relatively high salary was a direct result of his many years of employment by Transit Mix"²³⁵ Indeed, the president of the company testified that "Metz [had been] given a raise each year, [even] including years when Transit Mix was losing money."²³⁶ A few months after the layoff Lawrence fired Metz, who was fifty-four at the time; replaced him with a forty-three-year-old—Burzloff—who had been with the company for seventeen years; and reopened the plant. Burzloff was paid just a little more than half of what Metz had been receiving.

The trial court found that it was cost savings, and not any problem with the quality of Metz's work, which had motivated the discharge. Thus, on review the two-judge Court of Appeals majority framed the legal issue as being "whether the salary savings that can be realized by replacing a single employee in the ADEA age-protected range with a younger, lower-salaried employee constitutes a permissible, nondiscriminatory justification for the replacement."²³⁷

This factual and legal scenario is an archetypal one. Older employees typically have more seniority than do their younger colleagues, and typically employees with more seniority receive greater compensation than do employees with less seniority.²³⁸

retirement plans, whereby older, highly paid employees, who otherwise might have been demoted or discharged and then might have sued the employer, have been induced by economically rewarding early retirement programs to voluntarily depart. As to the increasing prevalence of such plans, see generally E. MEIER, *EARLY RETIREMENT INCENTIVE PROGRAMS: TRENDS AND IMPLICATIONS* (AARP Pub. Pol'y Inst. 1986). As to the legal ramifications of such plans, see 2 EGLIT, *supra* note 23, §§ 16.18A-16.18B; McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C.L. REV. 347 (1988); Note, *Early Retirement Incentives: "Golden Handshakes" for Some, Age Discrimination for Others*, 54 BROOKLYN L. REV. 927 (1988).

235. 828 F.2d at 1203.

236. *Id.*

237. *Id.*

238. Empirical studies confirm the correlation between seniority and compensation.

Given that labor costs usually constitute an enterprise's major cost of doing business, it is predictable that employers seeking to reduce expenses—and most of them certainly pursue that goal to some degree—will be tempted to look, like Transit Mix, to their more highly paid employees as candidates for termination. This will be so, it would seem, at least when the work performed by the older employee is not so unique, and his or her experience and talents are not so special, that a man or woman with less seniority (and therefore likely younger) could not do the job as well.²³⁹

Metz won on appeal. The two-judge majority looked for guidance to an interpretive guideline issued by the EEOC and found that the agency took the position—with which the majority agreed—that “[a] differentiation based on the average cost of employing older employees as a group is unlawful except with respect

See Boaz, *The 1983 Amendment to the Social Security Act: Will They Delay Retirement? A Summary of the Evidence*, 27 THE GERONTOLOGIST 151, 154 (1987); NATIONAL COMMISSION FOR EMPLOYMENT POLICY, *OLDER WORKERS: PROSPECTS, PROBLEMS AND POLICIES* 17 (1985); Suzuki, *Age, Seniority and Wages*, 113 INT'L LAB. REV. 67, 70-75 (1976). There is also considerable empirical support for the existence of a strong correlation between seniority and age. See, e.g., Hamel, *Job Tenure of American Workers, January, 1963*, 86 MONTHLY LAB. REV. 1145, 1145-46 (1963). “The rate at which earnings increase with longevity of service varies among occupational categories, but the increase is fairly regular in virtually every major occupational group.” Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 581 n.76 (1979) (citing 3 U.S. MANPOWER ADMINISTRATION, DEPT. OF LABOR, *THE PRE-RETIREMENT YEARS: A LONGITUDINAL STUDY OF THE LABOR MARKET EXPERIENCE ON MEN* 67-68 (1973)). See also *Franci v. Avco Lycoming Div.*, 538 F. Supp. 250, 258 (D. Conn. 1982). But see *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982) (seniority and age are unrelated; the ADEA only prohibits discrimination on basis of latter); *Arnold v. United States Postal Serv.*, 649 F. Supp. 676, 683 (D.D.C. 1986) (noting that no ADEA court has held that age and seniority are inherently equal); *Long v. C. & O. Ry.*, 42 Fair Empl. Prac. Cas. (BNA) 990, 997 (E.D. Va. 1986), aff'd without opinion, 46 Fair Empl. Prac. Cas. (BNA) 1639 (4th Cir. 1987) (“legal nexus between seniority and age is not a foregone conclusion”); *Reilly v. Friedman's Express, Inc.*, 556 F. Supp. 618, 623 n.13 (M.D. Pa. 1983) (seniority and age are unrelated; the ADEA only prohibits discrimination on basis of latter).

The Metz court strenuously resisted the generalization that advancing years invariably correlated with increased compensation. 828 F.2d at 1208-09.

239. This was the situation in Metz:

He and Burzloff[, his successor,] were both plant managers—apparently of equivalent competence. Their work is of the sort where declining physical effectiveness through aging is not apparently of consequence and may be more than offset by growth in experience. The facts suggest, as is usual with this type of work, that seniority is a factor in compensation and age and seniority are, of course, strongly correlated. Metz is paid more—as are most middle managers—because he has been there longer. There may be other reasons for the pay disparity but certainly seniority is an important one.

828 F.2d at 1209.

to employee benefit plans which qualify . . . [under a specific exception contained in the ADEA allowing age-based differentiations based on the terms of such plans, so long as such plans are bona fide and so long as they are not subterfuges to avoid the purposes of the Act]."²⁴⁰ The majority found further confirmation for its support of Metz in an earlier, now-defunct guideline which had been issued by the federal Department of Labor when it administered and enforced the Act.²⁴¹

Transit Mix, while not taking issue with these agency condemnations of group-directed generalizations concerning the correlation between cost and age, argued that it was nonetheless permissible under the ADEA to single out for adverse treatment—i.e., discharge—an individual employee who was receiving a high salary due to his or her long tenure. In other words, the higher cost of employing a particular older worker would justify his or her termination, the defendant urged, even though an employer could not generally discharge all older workers because as a group they were paid more than younger workers would be. The appellate court majority rejected this argument, reasoning that "[t]he ADEA is aimed at protecting the individual employee."²⁴² As the judges saw the matter, "[g]iven the correlation between Metz's higher salary and his years of satisfactory service, allowing Transit Mix to replace Metz based on the higher cost of employing him would defeat the intent of the statute."²⁴³

Thus, as between the economic needs of the employer and the

240. 29 U.S.C. § 623(f)(2) (1982). This provision has since been subjected to a major interpretation in *Public Employers Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854 (1989). By virtue of this ruling cost-based differentials in employee benefit plans need no longer satisfy the terms of the EEOC guideline interpreting this provision. Refer to note 269, *infra*. The *Betts* decision does not affect the validity of the *Metz* court's analysis, however.

241. The guideline provided:

To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(h) (1986) (rescinded) (While this provision was effectively rescinded in 1981, 46 Fed. Reg. 47,724 (Sept. 29, 1981), it continued to appear in the Code of Federal Regulations (C.F.R.) through 1986. In 1987 the Department of Labor finally ordered the removal of the entire 29 C.F.R. pt. 860 from the C.F.R. 52 Fed. Reg. 23,812 (June 25, 1987).).

242. 828 F.2d at 1206.

243. *Id.* at 1207.

individual rights of the employee, the *Metz* court sided with the latter. The Court saw itself as justified in doing so because of the fundamental policy choice made by Congress, as reflected in the ADEA—a choice that the same court had described just weeks before in another age discrimination case:

“[A]lthough the ADEA does not hand federal courts a roving commission to review business judgments, the ADEA *does* create a cause of action against business decisions that merge with age discrimination. Congress enacted the ADEA precisely because many employers or younger business executives act as if they believe that there are good business reasons for discriminating against older employees. Retention of senior employees who can be replaced by younger, lower-paid persons frequently competes with other values, such as profits or conceptions of economic efficiency. The ADEA represents a choice among these values. It stands for the proposition that this is a better country for its willingness to pay the costs for treating older employees fairly.”²⁴⁴

Despite this rhetorical affirmation of principle over expediency, the *Metz* majority apparently did feel some discomfort with the bald notion that a societal commitment to nondiscrimination could implacably override Transit Mix's economic straits. Thus, the court, as it turned out, would have tolerated Transit Mix's reducing Metz's salary; this would have been, in the court's view, an acceptable, nondiscriminatory way for the company to have dealt with its financially troubled state. Indeed, it was the company's failure to pursue this tack, as opposed to the more Draconian one of termination, that apparently ultimately led the court to hold Transit Mix liable.²⁴⁵

The *Metz* court's analysis is not without its problems. Given that the ADEA outlaws age-based employment decisions, and

244. *Id.* at 1210 (quoting *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 n.8 (7th Cir. 1987)). See also *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715, 727-28 (E.D.N.Y. 1978), *aff'd in part, rev'd & remanded in part without opinion*, 608 F.2d 1369 (2d Cir. 1979).

245. The court wrote:

Metz's salary . . . reflected his twenty-seven years of service to Transit Mix. When Lawrence, the president of Transit Mix, decided that the company's poor performance no longer justified the salary that the company had given Metz, Lawrence replaced Metz because of that salary without first asking Metz to take a pay cut. Given these facts, Lawrence's desire to save costs was not a permissible, non-discriminatory reason for replacing Metz with the younger, less-costly Burzloff

. . . .
828 F.2d at 1208.

given further that age correlates with seniority and salary, it is not at all clear why a lowering of Metz's salary would have been tolerable under the statute. Such an action also would seem to be discriminatory unless at the same time everyone else's salary was lowered by a comparable percentage—a caveat the court itself did not (and likely could not)²⁴⁶ impose in the course of espousing the pay reduction alternative. The dissenting judge made this very point:

The premise of the court's opinion is that wage is the equivalent of age, and to treat an employee adversely because of his high wage is illegal because it has a disproportionately large effect on older employees. Reducing the salary of higher-paid employees also affects older employees adversely, and therefore should be equally illegal. Section 4(a)(1) [29 U.S.C. § 623(a)(1)(1985),] lists compensation as one forbidden ground. It would be a shocking violation of the ADEA to reduce by 50% the wages of all employees 50 and up; yet my colleagues suggest that Transit Mix should have done just that to Metz. Discharge and a reduction in salary are treated the same under § 4(a)(1). If one is off limits, so is the other²⁴⁷

The majority responded to this argument with an assessment perhaps more expressive of policy choices typically made by a legislature than of legal analysis:

[E]conomic imperatives must be continually balanced against the requirements of the age discrimination law. At least two things are clear: most older employees (who have difficulty getting new jobs) would prefer a wage reduction to being fired, and many employers, knowing of the morale problems created by wage cuts, would prefer to terminate older employees rather than have them remain at work with their morale in serious disarray because their pay was reduced. For this reason, we think general pay reductions are less a threat to senior employees than terminations would be (in part because employers are less likely to cut pay unless economic circumstances absolutely require it).²⁴⁸

Metz involved an employer's individualized decision, entailing

246. An across-the-board reduction could run afoul of 29 U.S.C. § 623(a)(3) (1982), which bars an employer from reducing "the wage rate of any employee in order to comply with" the Act. The significance of this provision was discounted in Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 592 n.125 (1979).

247. 828 F.2d at 1213-14 (Easterbrook, J., dissenting).

248. *Id.* at 1210.

one particularly highly paid older employee (within the context of the employer's personnel complement) being replaced by a younger, lower paid worker in the name of saving money. The conflict between an employer's desire to reduce costs by cutting highly paid workers and the strictures of the ADEA can be cast in a larger context, as well. *Leftwich v. Harris-Stowe State College*,²⁴⁹ a decision of the Court of Appeals for the Eighth Circuit, is illustrative. Here it was a general cost-cutting policy that had an adverse impact on an older employee.

Harris-Stowe was a local public institution of higher education located in St. Louis, the control of which was transferred by virtue of a newly enacted law to the state college system. The new state administration decided to reduce the number of full-time faculty in order to lower instructional costs. To that end, a plan was adopted that entailed selecting designated numbers of both tenured and nontenured faculty members from the school in its former incarnation. Professor Leftwich, who was forty-seven and was a tenured member of the local school's faculty, was not selected for one of the two positions—one of which was designated a tenure slot, and the other a nontenure slot—allotted to the biology department in the new college. Accordingly, he was discharged. A thirty-year-old was selected for the nontenure slot, for which Leftwich was not even considered, and a sixty-two-year-old was selected for the tenure position, even though Leftwich's qualifications concededly were superior to those of both selectees.

The *Leftwich* court utilized disparate impact analysis, which at least until the Supreme Court's recent defendant-protective restructuring of impact doctrine in *Wards Cove Packing Co. v. Atonio*²⁵⁰ had been commonly employed in cases arising under the

249. 702 F.2d 686 (8th Cir. 1983).

250. 109 S. Ct. 2115 (1989). *Wards Cove* involved the employment practices of two salmon canneries. Jobs at the canneries fell into two categories—unskilled and skilled. The unskilled "cannery" positions were filled primarily by nonwhites, Filipinos, and Alaskan Natives, while the skilled "noncannery" jobholders were predominantly white. The plaintiffs, who were unskilled workers, argued that a number of the defendants' hiring and promotion practices—nepotism, a rehiring preference, a practice of not promoting from within, separate hiring channels, and the lack of objective hiring criteria—caused the racial disparities in the companies' work forces.

The Court of Appeals for the Ninth Circuit held that the plaintiffs had made out a prima facie case of disparate impact in hiring; in so doing, the appellate court relied solely on statistics that showed a high percentage of nonwhite individuals in the unskilled jobs and a low percentage of nonwhites in the skilled positions. *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439 (9th Cir. 1987), *rev'd & remanded*, 109 S. Ct. 2115 (1989). The Supreme Court

ADEA's analogue, Title VII of the Civil Rights Act of 1964.²⁵¹

subsequently ruled that the lower court had erred in comparing the two groups of workers. The unskilled workers employed by the two defendant companies simply were not a relevant group to look to for determining the pool of people qualified to fill the skilled positions. "Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other 'skilled' noncannery positions . . .—by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling [unskilled] worker positions is nonsensical." 109 S. Ct. at 2122.

While this analysis by the Court was unremarkable, the Court went on to more significantly cut into prior case law when it addressed the fact that even in unskilled noncannery positions there was a predominance of whites, in contrast to the predominance of nonwhites in the other unskilled, cannery positions. The Court ruled that "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers)." *Id.* While leaving some room for the establishment of a prima facie case if the evidence warranted, the Court continued: "[I]f the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." *Id.* at 21-23. Accordingly, the Court stated: "Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact." *Id.* at 2123. As a result of this analysis, the task of a plaintiff to establish a prima facie case has been made more difficult.

The Court then proceeded to address further the mechanics of establishing a prima facie case. It imposed a specific causation requirement:

[E]ven if on remand [the plaintiffs] can show that nonwhites are under-represented in the at-issue jobs in a manner that is acceptable under the standards . . . [discussed above], this alone will *not* suffice to make out a prima facie case of disparate impact [The plaintiffs] will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.

Id. at 2125. This specific causation requirement had attracted the support of the plurality in *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988); now, it secured majority endorsement. While the *Wards Cove* Court acknowledged that the burden imposed on plaintiffs to establish specific causation would be viewed by some as being "unduly burdensome on Title VII plaintiffs," 109 S. Ct. at 2125, it discounted the weight of such a contention. It nonetheless is accurate to say that indeed the task for plaintiffs has been made harder.

In a third facet of its opinion the Court rejected the notion that an employer's justification for a practice having a disparate impact need be "'essential' or 'indispensable.'" *Id.* at 2126. The employer's justification need only survive "reasoned review." *Id.* And in the context of that review the employer bears only a "burden of producing evidence of a business justification for his employment practice." *Id.* The Court thus rejected the hitherto generally accepted legal proposition that the employer bore the burden of proof on this issue, and unequivocally asserted that "[t]he burden of persuasion . . . remains with the disparate-impact plaintiff." *Id.* This, in particular, has changed the posture of plaintiffs, making their ability to prevail much more difficult.

251. 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. V 1987). The prohibitory language

Under the case law, even after its severe modification by *Wards Cove*, discriminatory intent is irrelevant; what matters is whether an ostensibly neutral policy (neutral, that is, regarding the use of a forbidden classification criterion—i.e., race in the Title VII context, and age in the ADEA setting) has a disproportionately adverse impact on members of the protected group.²⁵² While the Supreme Court has not spoken to the applicability of such analysis under the ADEA,²⁵³ the majority of courts of appeals had, by the time *Wards Cove* was decided, approved its use vis-a-vis the age statute.²⁵⁴

In *Leftwich* the plaintiff's expert statistician testified at the trial that both the defendants' system of reserving certain positions for nontenured faculty and the defendants' use of salary as a factor in the selection process had adverse impacts on older faculty members. In turn, the defendants argued that the selection plan was aimed at achieving cost savings, and not at singling out older individuals for termination. The court found this argument unavailing, given the close correlation between age, tenure, and salary:

[T]he defendants' selection plan was based on tenure status rather than explicitly on age. Nonetheless, because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.²⁵⁵

of the ADEA tracks that of Title VII. Not surprisingly, ADEA courts—particularly in the 1970s, when ADEA case law was first beginning to appear—often have looked to Title VII decisions for guidance. See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1008-10 (1st Cir. 1979).

252. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-36 (1971).

253. In a dissent from a denial of certiorari, then-Justice Rehnquist seemed to argue that such analysis was inappropriate in ADEA cases. See *Markham v. Geller*, 451 U.S. 945, 947-48 (1981).

254. See, e.g., *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986); *Palmer v. United States*, 794 F.2d 534, 539 (9th Cir. 1986); *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 404 n.3 (7th Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321-23 (11th Cir. 1982); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975); *Heward v. Western Elec. Co.*, 35 Fair Empl. Prac. Cas. (BNA) 807, 811 (10th Cir. 1984). Nothing in *Wards Cove* suggests that impact analysis is not applicable to ADEA claims.

255. 702 F.2d at 691.

The defendants were unable to carry their heavy burden of proving that business necessity justified their selection plan,²⁵⁶ and so Leftwich prevailed.²⁵⁷

Metz and *Leftwich* are not anomalous. Almost all ADEA courts have rejected cost-based excuses when these have been proffered as justifications for treating older workers adversely, whether the disadvantage is accomplished by individualized discriminatory treatment, as in *Metz*, or by means of a broad policy, as in *Leftwich*. Several courts which have addressed the ADEA's bona fide occupational qualification exception²⁵⁸ have rejected economic

256. There had been some confusion as to whether a defendant in an impact case bore a burden of persuasion, or some burden less than that. In *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), a Title VII case, the Court spoke of the defendant's having to prove its business necessity defense. *Accord* *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 572 (4th Cir. 1985); *Harless v. Duck*, 619 F.2d 611, 616 n.6 (6th Cir.), *cert. denied*, 449 U.S. 872 (1980); *Equal Employment Opportunity Comm'n v. Navajo Ref. Co.*, 593 F.2d 988, 990 (10th Cir. 1979). *Contra* *Crocker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981) (en banc). Ultimately, the Court in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), also a Title VII case, held that the defendant only bears a burden of production. Almost certainly, this legal proposition will be transposed into the ADEA setting.

257. There has been some lack of clarity as to what a defendant must establish by way of justification in an impact case. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the seminal decision in which the Court first embraced disparate impact analysis in the Title VII context, the Court generated considerable confusion by putting forth a variety of phrases. The Court identified "[t]he touchstone [as being] business necessity," with the burden on the defendant to show that the job requirement in question had a "manifest relationship to the employment in question." *Id.* at 431-32. The Court also used the term "job related." *Id.* at 436. And it further asserted that the defendant's job requirements violated Title VII because they did not "bear a demonstrable relationship to successful performance of the jobs for which [they were] used." *Id.* at 431. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court asserted that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance" *Id.* at 332 n.14. The *Dothard* Court further used the phrases "essential to effective job performance" and "essential to good job performance." *Id.* at 331. In *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), the Court used language suggesting a more relaxed burden confronting the defendant. It upheld the challenged rule with the observation that the defendant's employment goals were "significantly served by—even if they . . . [did] not require," the rule. *Id.* at 587 n.31. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court enunciated a standard apparently even milder than that articulated in *Beazer*. Refer to note 250 *supra*.

In *Leftwich* the court required the defendant to prove that its policy bore a "manifest relationship to the employment in question, . . . [and] that there . . . [was] a 'compelling need . . . to maintain that practice.'" 702 F.2d at 692. In light of *Wards Cove* such a severe burden almost certainly no longer would be proper. This is so even though *Wards Cove* was decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. V 1987), while *Leftwich* was an ADEA case, inasmuch as Title VII case law typically is looked to as persuasive precedent in ADEA cases. Refer to note 251 *supra*.

258. 29 U.S.C. § 623(f)(1) (Supp. V 1987) provides:

It shall not be unlawful for an employer, employment agency, or labor organization—

factors as a valid basis for invocation of this defense.²⁵⁹ In the context of addressing the Act's reasonable factors other than age exception (RFOA)²⁶⁰ the courts consistently have rejected cost concerns as constituting legitimate factors other than age when these cost factors are in effect proxies for age.²⁶¹ Indeed, *Leftwich* is one example of such a case: the *Leftwich* court in part relied on the EEOC and Department of Labor interpretations also invoked in *Metz*, and these interpretations express the agencies' views regarding the RFOA exception. In *Geller v. Markham*²⁶² the Court of Appeals for the Second Circuit likewise relied on the Labor Depart-

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business

See generally 2 EGLR, *supra* note 23, §§ 16.25-16.30F.

259. See, e.g., *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 407 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1983); *Whitfield v. City of Knoxville*, 567 F. Supp. 1344, 1346 (E.D. Tenn. 1983), *aff'd on other grounds*, 756 F.2d 455 (6th Cir. 1985); *Gathercole v. Global Assocs.*, 560 F. Supp. 642, 644-45 (N.D. Cal. 1983), *rev'd on other grounds*, 727 F.2d 1485 (9th Cir.), *amended*, 34 Empl. Prac. Dec. (CCH) ¶ 34,563 (9th Cir.), *cert. denied*, 469 U.S. 1087 (1984); *EEOC v. County of Los Angeles*, 526 F. Supp. 1135, 1140-41 (C.D. Cal. 1981), *aff'd*, 706 F.2d 1039, 1042 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Adams v. James*, 526 F. Supp. 80, 85 (M.D. Ala. 1981).

260. 29 U.S.C. § 623(f)(1) (Supp. V 1987) provides:

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age

There is a split in the courts as to whether this provision establishes an affirmative defense. Compare *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1010-11 (1st Cir. 1979); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978) (negative view) with *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552-53 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) (affirmative view). See generally Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B. U.L. Rev. 155 (1986).

261. See *EEOC v. City of Altoona*, 723 F.2d 4, 6 (3d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *Kaczor v. City of Buffalo*, 657 F. Supp. 441, 443-44 (W.D.N.Y. 1987); *Popko v. City of Clairton*, 570 F. Supp. 446, 450-51 (W.D. Pa. 1983); *EEOC v. City of New Castle*, 32 Fair Empl. Prac. Cas. (BNA) 1409, 1413 (W.D. Pa. 1983), *aff'd without opinion*, 740 F.2d 956 (3d Cir. 1984). See also *Donnelly v. Exxon Research & Eng'g Co.*, 12 Fair Empl. Prac. Cas. (BNA) 417, 421-22 (D.N.J. 1971), *aff'd without opinion*, 521 F.2d 1398 (3d Cir. 1975). *Contra Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1307-08 (E.D. Mich. 1976). Actually, there is some legislative history (which the courts regularly have ignored) supporting an employer's taking cost into account as an RFOA. See *Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 49 (1967) (statement of Willard Wirtz, Secretary of Labor).

262. 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

ment RFOA interpretation as support for striking down another cost-cutting measure that had an adverse impact vis-a-vis the hiring of older schoolteachers.

Metz, *Leftwich*, and *Geller* all expressed rejection of the notion that an older worker can be subjected to disadvantage in the name of saving money. Each, however, left a narrow legal opening for an employer's financial straits to be recognized. In *Metz* the court would have tolerated an option—salary reduction—less drastic than discharge. *Leftwich* and *Geller* both allowed for the possibility of the employer prevailing if it had been able to establish business necessity as justifying cost control efforts, and if the plaintiff—upon such justification—was then unable to establish the existence of alternative policies that would have satisfied this business necessity while imposing less harm on older workers.²⁶³ *Equal Employment Opportunity Commission v. Chrysler Corp.*²⁶⁴ offered another, but still narrowly fashioned, approach. At issue was a retirement plan that Chrysler had instituted to force the departure of a number of employees. The car company attempted to justify the plan on the basis of its claimed need to reduce costs so as to avert possible insolvency. The Court of Appeals for the Sixth Circuit ruled against Chrysler, but it did set forth a two-part test which, if met, would allow an employer to use cost as a basis for acting adversely against older workers. "First, the necessity for drastic cost reductions obviously must be real Second, the forced early retirements must be the least-detrimental-alternative means available to reduce costs."²⁶⁵

The case law, then, reveals a deep antipathy toward allowing the higher costs associated with older employees to override the antidiscrimination thrust of the ADEA. The successive ADEA enforcement agencies also have resisted allowing the cost element to enter into the employment equation, if that factor is used as a

263. If a defendant successfully establishes business necessity, the plaintiff still can prevail by proving the existence of a less discriminatory alternative. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126-27 (1989); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 554 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985). In light of *Wards Cove's* easing of the burden confronting the defendant, refer to note 250 *supra*, it now should be easier for a defendant with a cost justification for its challenged action to survive an impact-based attack.

264. 733 F.2d 1183 (6th Cir. 1984).

265. *Id.* at 1186. The *Metz* court addressed, but did not endorse, the *Chrysler* formulation; it stated that Transit Mix in any event did not meet the two-part test. 828 F.2d at 1208.

proxy for age. Still, cost concerns are not totally excised from the ADEA computation. The ADEA's legislative history²⁶⁶ reveals congressional concern that the perceived higher benefit costs attributable to older workers would serve as a disincentive to the hiring of such workers.²⁶⁷ Accordingly, Congress included a provision in the ADEA allowing employers to observe the terms of bona fide employee benefit plans, so long as they are not subterfuges to avoid the purposes of the Act.²⁶⁸ The successive ADEA enforcement agencies interpreted this provision as embodying cost justification requirements, whereby age-based differentials in benefits could pass legal muster if justified in terms of the higher costs associated with older workers. A basic facet of this administrative position was enunciation of an equal cost/unequal benefit principle. Thus, the EEOC interpretation provided:

A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.²⁶⁹

266. See, e.g., HOUSE COMM. ON EDUCATION AND LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, H.R. REP. NO. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2217. See also the debates on the legislation, 113 CONG. REC. 31,254-55, 34,745-47 (1967).

267. The hiring problems of older workers was the only issue focused on in the seminal report that preceded enactment of the ADEA. See U. S. DEP'T OF LABOR, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (1965). Actually, it has turned out that the great majority of ADEA disputes do not concern hiring. About two-thirds of the administrative charges of unlawful discrimination which are filed with the Equal Employment Opportunity Commission as the statutorily required predicate to ultimately filing suit, 29 U.S.C. § 626(d) (1985), concern discharges and involuntary retirements. M. Schuster, J. Kapsin, & C. Miller, *The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Employer Compliance and Employee Characteristics*, A Final Report to the NRTA-AARP Andrus Foundation 44 (June 30, 1987) (unpublished manuscript). In contrast, refusals to hire have generated only about 13% of the complaints. *Id.*

268. 29 U.S.C. § 623(f)(2) (Supp. V 1987).

269. 29 C.F.R. § 1625.10(a)(1) (1988). (There is a caveat regarding group health plans: they must provide equal benefits. 29 U.S.C. § 623(g) (Supp. V 1987).) In *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989), the Court invalidated the EEOC interpretive guideline imposing a cost justification requirement vis-a-vis benefit plans. 29 C.F.R. § 1625.10 (1988), of which the equal cost/unequal benefit provision is a part. The Court deemed this interpretation to be contrary to the plain language of the bona fide benefit plan exception set forth in 29 U.S.C. § 623(f)(2) (Supp. V 1987). The consequence is that age-based differentials in benefits are legal, even if they are not justified in cost terms and

There are also other legal ways for employers to respond to cost pressures. Reductions in force, both of small and large dimensions, are common, and when age is not a factor in the employer's choice of who to terminate and who not, a force reduction—as applied to any particular worker—will pass muster under the ADEA.²⁷⁰ Employers also legally may seek to reduce their complements of highly paid workers by offering them financial incentives to voluntarily retire,²⁷¹ provided these incentives indeed allow for voluntary choices on the employees' parts. Ineptitude on the part of an employee—which presumably is going to have negative economic consequences for the employer—is a clear basis for discharge.²⁷² Furthermore, some highly paid policymaking officers can

even if the employer does not spend the same amount of money in purchasing or providing benefits for each employee. Thus, the *Betts* decision accords to employers even greater latitude to take into account the costs associated with providing benefits to older employees than they had when the EEOC interpretation held sway. This enhancement of employer freedom should not be read, however, as signifying a broadscale judicial shift towards allowing cost concerns to override the antidiscrimination thrust of the ADEA. The *Betts* ruling is confined just to a reading of a statutory exception which already allowed cost concerns to be taken into account in one particularized context.

270. See, e.g., *Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir. 1988); *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 609-10 (11th Cir. 1987); *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986); *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). See generally 2 EGLR, *supra* note 23, § 17.61. Likewise, a proxy for age—i.e., pension eligibility—cannot be used as a basis for selecting those to be discharged in the course of a reduction in force. See, e.g., *EEOC v. City of Altoona*, 723 F.2d 4, 6 (3d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

271. Refer to note 234 *supra*. *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), *cert. denied*, 108 S. Ct. 2038 (1988), illustrates the potential financial advantage to an employer of such a course of action. The plan in question provided for lump sum payments representing unused sick leave being offered to employees who chose early retirement. The size of the payment declined, however, as the age of the individual who accepted the offer of retirement increased, with the benefit not being available at all to those who retired after age 65. Thus, a 55-year-old would receive a more generous benefit than a 58-year-old, who in turn would receive a more generous benefit than a 62-year-old. The trial court saw an "obvious reason" for younger retirees receiving larger payments: "[T]he cost savings . . . in not paying salary for 15 years for ages 55-70 (\$818,074) is far greater than the savings in avoiding payment of salary for the five years between ages 65 and 70 (\$193,256)." Slip op. at 9-10. Since younger employees were giving up more by way of salary, they had to be offered more to leave. While computation of the total savings to the defendant would have to include the salaries of the replacements, here declining student enrollments meant that replacement hires were unlikely. In any event, even if replacements were hired, they likely would be lower-salaried younger teachers.

272. The ADEA specifically authorizes employers to act on the basis of factors other than age, 29 U.S.C. § 623(f)(1) (Supp. V 1987), and to discharge employees for good cause. 29 U.S.C. § 623(f)(3) (Supp. V 1987). Inadequate performance is the most common excuse offered by employers who are sued under the ADEA by terminated employees. See, e.g., *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984);

be mandatorily retired at age sixty-five, and senior tenured university employees—who are likely to have higher salaries than younger, lower ranking employees—can be ousted at age seventy, as discussed earlier.²⁷³

Employers, then, certainly are not held economic hostage to an inflexible social policy condemning ageism. Even so, after one recognizes that the statute relieves employers of the burden of expensive benefit costs attributable to older workers; that case law allows employers to reduce their work forces in response to financial exigency, provided age (or a proxy for age) is not a basis for selecting those to be terminated; and that case law further does not require employers to hire or retain incompetents; one is left with the fact that age, seniority, and salary mesh. Thus an employer may find itself with costs attributable to highly paid, adequately performing senior workers who, but for the ADEA, could be replaced at a monetary savings to the employer with no loss in productivity. The sole ploy left to the employer in such a situation would seem to be the argument that a senior, highly paid worker is, in economic terms, not performing adequately in the sense that he or she is less productive than a lesser paid—typically younger—employee, given that the latter employee could produce the same output for less money.

In *Metz* the dissenting judge made just this argument. The ADEA, he contended, does not bar discharge based on deficient productivity, and therefore Metz's termination indeed was legal since he was only half as productive as his younger successor, given that the successor could produce the same quality and quantity of work at half the salary. The *Metz* majority quashed this argument, however:

[I]f a company has twenty foremen, all of exactly equal ability, and the oldest ten make more money than the others because their average seniority is much higher, according to the dissent the employer would have a complete defense to an age discrimination charge when it fires the ten graybeards. In middle management jobs we would expect pay to reflect seniority and hence to be something of a proxy for age To accept the approach of the dissent is to make totally vulnerable the employees who are

Douglas v. Anderson, 656 F.2d 528, 533-34 (9th Cir. 1981); Anderson v. Viking Pump Div., Houdaille Indus., Inc., 545 F.2d 1127, 1131 (8th Cir. 1976). See generally 2 EQLIT, *supra* note 23, § 17.66.

273. Refer to notes 135-36 *supra* and accompanying text.

paid a little more because they have been with the company a little longer.²⁷⁴

2. *The Age Discrimination Act: Disproportionate Allocations of Resources*

As discussed earlier, the Age Discrimination Act's prohibitory language bars programs receiving federal financial assistance from excluding or denying benefits to individuals on the basis of age.²⁷⁵ In fact, several statutory exceptions allow recipients to use age in a variety of contexts.²⁷⁶ Assuming, however, that a fund recipient was unable to fit within the terms of one of these exceptions or within the terms of the regulation allowing age-based preferences for the young and the old,²⁷⁷ the possibility would then exist that liability could be established. This might particularly be so, presumably, if statistics revealed that one age-defined group was receiving more by way of funded services from the agency in question than was another age-defined group.

Such skewed allocations certainly are not unlikely. Indeed, in the preliminary stages of the ADA's implementation a study was done by the United States Commission on Civil Rights, and one of the findings was that age-identifiable disproportionate allocations were common in the federally assisted programs that the Commission studied.²⁷⁸

The ADA does not itself facially specify the proper treatment of disproportionate allocations. The now-defunct Department of Health, Education and Welfare addressed the issue, however, in the explanatory material that accompanied the issuance of the ADA's model regulations.²⁷⁹ The regulations' drafters disavowed the notion that the disproportionate allocation of resources alone would establish the existence of prohibited discrimination. At most, "program participation may be one of the elements which triggers an examination of whether age discrimination exists in the federally funded program or activity."²⁸⁰ If such an examination

274. 828 F.2d at 1209. *Accord* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 582-83 (1979).

275. Refer to notes 204-21 *supra* and accompanying text.

276. Refer to note 216 *supra*.

277. Refer to notes 218-21 *supra* and accompanying text.

278. Refer to note 215 *supra*.

279. Refer to note 205 *supra* and accompanying text.

280. 44 Fed. Reg. 33,771 (1979).

should be occasioned, "the recipient may show that the disparity in rates of participation, fund allocation, or services has non-discriminatory causes."²⁸¹

This emendation has little, if any, legal significance, since it is not embodied in statutory or regulatory form, nor does it even amount to legislative history. Still, it does reflect a perception that is particularly relevant in the health care context. Only the most unsophisticated student of distributive concerns could conclude that because a large amount of health care dollars and resources is consumed by the elderly, it automatically follows that there is an invidiously age discriminatory system in operation whereby the non-old are victimized.²⁸² That would be as inappropriate as maintaining that the American educational system is invidiously discriminatory against the aged because there is a skewing of expenditures towards the young. People, after all, have different needs at different stages of their lives, and so a system whereby each individual does not receive an equal amount of a given resource simply does not readily lend itself to depiction as discriminatory—at least in the negative sense of that term.²⁸³

281. *Id.*

282. The need to resist unwarranted generalizations based on statistical data is particularly persuasively set forth by Meyer and Moon who, after reporting that "[i]n 1986 about three-fourths of the \$100 billion spent on health care by the federal government aided persons ages 65 and older . . ." Meyer & Moon, *supra* note 15, at 175-76, caution:

The elderly rely disproportionately on the government, while children's expenditures are paid from several private and public sources . . . Thus, comparisons of public spending on health care necessarily lead to an exaggerated imbalance in the amounts of health expenditures directed at the two groups.

Id. at 176. The authors further observe that private employers receive tax subsidies to provide health insurance coverage for their employees, and that the lost revenues attributed to these subsidies ought to be factored into the computation of the federal government's total health expenditures. *Id.* They further note that while "[i]n 1978 total health care spending in the United States for elderly persons was 7.1 times higher than for children . . . [i]f outlays for nursing home care are omitted from these figures, the ratio of spending by the elderly to spending by younger families drops . . . from 7.1 to 1 to 5.3 to 1." *Id.* And they observe: "Because the elderly are the major users of nursing home care and children are seldom institutionalized in the United States, these acute care comparisons may be more valid in assessing relevant differences between the two groups." *Id.*

283. Indeed, it could be argued that an exact equality in the distribution of health care resources could itself have negative age-correlated consequences. Suppose, for example, that there was an expensive drug, available only in very limited amounts, which was particularly effective in dealing with a particular blood disorder akin, let us say, to leukemia. In older adults this disorder was manifested as a chronic illness, one with which an individual could live for 10 or 20 years. In children, however, the disorder quickly brought death. It would be folly, would it not, to distribute the drug on an age-proportionate basis so as to avoid any implication of age discrimination, given the fact that the drug is so much more

3. Conclusion

Money, not surprisingly, is the fundamental source of health care distributive problems. Obviously, no certain solutions are going to flow from examination of the ADEA or ADA experiences. Indeed, there is probably no solution to the problem of health care costs, for there never will be enough money or too little need. What we find in looking to the ADEA and the ADA—two concrete examples of efforts to combat ageism—is a nexus between resource expenditures on the one hand and the possibility of discriminatory treatment on the other.

As *Metz v. Transit Mix, Inc.*²⁸⁴ illustrates, the cost savings needs of employers indeed can conflict with the antidiscrimination imperative of the ADEA. This conflict exists despite the various accommodations to employer needs provided by the ADEA's exceptions and the courts' reduction-in-force decisions and other rulings. There is, it seems to me, an uneasy peace in the ADEA context, with employers having garnered some statutory and judicial allowance for their cost concerns, and employees having secured some protection from the age-seniority-cost triad's potential for wreaking harm on older workers. As for the ADA, this statutory exercise in dealing with ageism confirms what in any event should be (but may not be) obvious: a mechanical toting up of the amount of health care consumed by each age group (of course, there is a fundamental problem in even figuring out what the proper parameters of each group should be) to assure exact proportionality between each group's size and its share of the total consumption of health care cannot be dispositive in determining the existence or nonexistence of condemnable discrimination.

If the ADEA and the ADA are at all useful indicators of how, in the health care context, one meshes cost concerns with an acknowledged antidiscrimination ethic, one can predict that the resolution, such as it will be, of the problems created by these two issues will be diffuse, rather than precise. Unfortunately, given that the stakes are so much higher—in both economic and personal terms—than they are both in the ADEA and ADA contexts, the painful problems of health resource allocation demand more

critical to the needs of youthful patients? (This example was prompted by the analysis in Teitelbaum, *The Age Discrimination Act and Youth*, 57 CHL[-]KENT L. REV. 969, 977-78 (1981).)

284. 828 F.2d 1202 (7th Cir. 1987).

clearly defined, resolute answers than have thus far been fashioned in these analogous situations.

IV. CONCLUSION

At the outset, I cautioned against any expectation that incisive new insights were to be gained by looking outside the health care setting for answers to the problem of sensitivity to age discrimination intersecting with resource allocation concerns. Thus, having set myself a modest agenda, I need not in closing try to extract grand significance from the foregoing review of equal protection doctrine, the Age Discrimination in Employment Act of 1967, as amended, the Age Discrimination Act, and the Equal Credit Opportunity Act. Even so, I think some useful data have been addressed. Unfortunately, but expectably, there still remains the fundamental problem of meshing immeasurable, but clearly enormous, needs and desires for health care with competing needs for other goods and services and with the reality of limited resources. In the effort to try to cope with this problem we must devise responses that do not do violence to those values which capture the best aspirations of our society. In the past twenty or so years, I believe, a consensus has developed, albeit not an ardently endorsed one, that one of these values entails a condemnation of discrimination (not merely "differentiation") on the basis of age (typically, but not always, discrimination based on being too old, rather than too young). Thus, in assessing and addressing health care needs and the responses to those needs, this societal disavowal of discrimination—admittedly a not entirely unambivalent one, and one that may well be coming back 'round to supporting questioning whether the elderly have fared too well in recent decades—must be considered, respected, and heeded.