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Reforming Age Cutoffs

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REFORMING AGE CUTOFFS

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INTRODUCTION

During his campaign for office, America's oldest president ever proposed a policy that would help adults almost twenty years younger than him: lowering the eligibility age for Medicare, the country's largest health insurance program, from 65 years old to 60 years old.[1] This proposal went overlooked amidst higher-profile national challenges, in particular the COVID-19 pandemic, and appears unlikely to be adopted. Yet the pandemic itself has also illustrated the relevance of where age cutoffs are set: prioritizing early vaccine eligibility only for those over age 65 or 75 disproportionately excluded minority communities, even though minority residents are likely to die earlier in life from COVID-19.[2]

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1. *See* Julie Rovner, *Biden's Health Play in a COVID-19 Economy: Lower Medicare's Eligibility Age to 60*, NPR (Apr. 11, 2020, 5:00 AM), https://www.npr.org/sections/health-shots/2020/04/11/832025550/bidens-health-play-in-a-covid-19-economy-lower-medicares-eligibility-age-to-60 [https://perma.cc/N85B-L8ZU] ("Biden wants to lower the age of eligibility for Medicare from 65 to 60.").

2. Wendi C. Thomas & Hannah Grabenstein, *People Over 75 Are First in Line to Be Vaccinated Against COVID-19. The Average Black Person Here Doesn't Live That Long*, PROPUBLICA (Feb. 12, 2021, 11:30 AM), https://www.propublica.org/article/people-over-75-are-first-in-line-to-be-vaccinated-against-covid-19-the-average-black-person-doesnt-live-that-long [https://perma.cc/8G4Q-3UP6] (explaining that "[a]s of Feb. 6, Shelby County's vaccination rates have been highest along the Poplar Avenue corridor, a predominantly white swath of town . . . . Rates are far lower in the largely Black and less-affluent ZIP codes," and identifying how age-based cutoffs contribute to lack of access); Ted Doolittle, *Making COVID Vaccination More Fair*, CT MIRROR (Feb. 2, 2021), https://ctmirror.org/category/ct-viewpoints/making-covid-vaccination-more-fair/ [https://perma.cc/XM29-A7YW] ("[M]ortality evidence shows that seniors need to be immunized first, and the CDC-recommended 75-year cut-off is as good as any. But at the same time – 60 in Hartford equals 75 in West Hartford.").

This Article examines the use of minimum age cutoffs to define eligibility for social insurance, public benefits, and other governmental programs. These cutoffs are frequently used but rarely examined in detail. In Part I, I examine and catalogue policies that employ minimum age cutoffs. These include not only Medicare and Social Security but also other policies such as access to pensions and retirement benefits, eligibility for favorable tax treatment, and eligibility for discounts on governmentally provided goods and services. In Part II, I examine different rationales underlying eligibility and discuss the imperfect fit between these rationales and the use of age cutoffs, as well as the likelihood that cutoffs will exacerbate disparities and disadvantage those with atypical life plans. In Part III, I consider different ways that age cutoffs might be reformed. One, the most realistic, is the option proposed for Medicare: extending eligibility downward to people earlier in life. But other options exist as well. One option, often advanced by those further to the political left, would completely eliminate age-based eligibility cutoffs in favor of universal programs such as Medicare for All. Another option would adjust age cutoffs upward or downward based on factors like geography or occupation, rather than basing eligibility on a one-size-fits-all cutoff. Yet another would replace age-based eligibility cutoffs with eligibility time periods, which are limited but can be started and ended flexibly: people could give up some eligibility time later in life in order to receive access during earlier periods.

Ultimately, I argue that reforming minimum age cutoffs, as Medicare at 60 proposed to do, can be more than a mere tweak. Done right, changing or removing minimum age cutoffs will better target benefits toward those facing life-shortening forms of disadvantage, including poverty, geographic disadvantage, health disparities, and structural racism. This would both advance fairness and do more good.

I have discussed this issue in other work. *See* Govind Persad, *Allocating Medicine Fairly in an Unfair Pandemic*, 2021 U. ILL. L. REV. 1085 (2021).

I. MINIMUM AGE CUTOFFS FOR GOVERNMENTAL BENEFITS

Minimum age cutoffs are used across a wide variety of governmental programs. Because my focus is justice in the distribution of public resources, I specifically consider governmentally operated *benefit* programs—programs in which the government distributes cash or in-kind benefits (such as housing or medical care). The largest such programs that employ minimum age cutoffs are Medicare and Social Security, but many smaller programs use such cutoffs as well.

Many private businesses and civil society organizations also use minimum age cutoffs for program eligibility or for "senior discounts."[3] Private organizations' policies generate some of the same questions about fair access that governmental benefit programs do: senior discounts, for instance, also disproportionately exclude people who face life-shortening forms of disadvantage. But I do not discuss them here, both for reasons of manageability and because private firms and civil society groups do not have the same obligations of justice as governmental actors. Similarly, while retirement eligibility for governmental employees—such as "senior status" for federal judges[4]—is also often based on age, it falls outside the scope of this Article because it involves the government acting as an employer of specific individuals rather than as a provider of benefits to the general public.

I also do not discuss another large category of minimum age cutoffs: "age-of-majority" cutoffs, where age is used to define a boundary between younger people who are excluded from a given right or obligation and older people who are permitted to participate. These cutoffs typically concern the exercise of civil or personal rights (such as voting, running for office, or consuming intoxicants) rather than the distribution of benefits, and they are often based on the ability to take factual or legal responsibility for one's choices. While these cutoffs also raise interesting legal and ethical issues, those issues are less tied to the fair distribution of resources. Likewise, although minimum age cutoffs are used throughout the criminal justice system—for instance, to determine

3. *See, e.g.*, Baza v. Hillstone Rest. Grp., Inc., No. A145503, 2016 Cal. App. LEXIS 9497, at *10–11 (Nov. 9, 2016) (summarizing case law upholding senior discounts against legal challenges); Anderson v. Unemployment Comp. Bd. Review, No. 1056 C.D. 2017, 2018 Pa. Commw. LEXIS 167, at *2 (Mar. 20, 2018) (describing a restaurant's senior discount policy).

4. 28 U.S.C. § 371.

eligibility for parole or medical release from incarceration[5]—and their use raises some of the same normative issues, the distinctive character of criminal justice and fairness in punishment, in contrast to distributive justice, puts it beyond the scope of this Article.

A. *Public Benefit Programs*

The largest programs organized around minimum age cutoffs are Medicare and Social Security. With some exceptions for people with specific serious illnesses such as end-stage renal disease, Medicare eligibility begins at age 65.[6] Social Security eligibility begins at age 62, with eligibility for full benefits coming at age 66 or 67 (historically age 65)[7] and additional benefits available for those who wait to claim until age 70.[8]

The use of a minimum age cutoff for these programs likely reflects their status as a support for non-working adults. Particularly at these programs' inceptions, adults younger than 65 were thought to typically have access to income and health insurance by virtue of employment or by being part of a household containing an employed member.[9] Medicare and Social Security, in contrast, were designed to provide income and health insurance after separation from the workforce.[10]

Why was age 65 used as the minimum cutoff? The Social Security Administration claims that the initial selection of age 65 as the specific cutoff for Social Security eligibility "was, in fact, primarily pragmatic," rather than reflecting any firm normative commitments.[11] The two factors driving the selection of age 65 were

5. 28 C.F.R. § 2.78 (2020) ("Upon receipt of a report from the institution in which the prisoner is confined that a prisoner who is at least 65 years of age has a chronic infirmity, illness, or disease related to aging, the Commission shall determine whether or not to release the prisoner on geriatric parole.").

6. *Who is Eligible for Medicare?*, U.S. DEPT. OF HEALTH & HUM. SERVS., https://www.hhs.gov/answers/medicare-and-medicaid/who-is-elibible-for-medicare/index.html [https://perma.cc/Q5HN-KBTP].

7. *Retirement Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/retirement/planner/agereduction.html [https://perma.cc/7C8J-6FKW].

8. *Id.*

9. INST. OF MED., EMPLOYMENT AND HEALTH BENEFITS: A CONNECTION AT RISK 77 (Marilyn J. Field & Harold T. Shapiro eds., 1993) ("The elderly were singled out as a special problem, having greater medical needs but less financial protection than younger individuals still in the work force.") (internal citations omitted).

10. *Id.* at 77–78.

11. *Age 65 Retirement*, SOC. SEC. ADMIN., https://www.ssa.gov/history/age65.html [https://perma.cc/F789-MQH8].

that many state pension systems also used age 65 as an eligibility cutoff and that "using age 65 produced a manageable system that could easily be made self-sustaining with only modest levels of payroll taxation."[12] The use of age 65 in Social Security likely formed the basis for its use in Medicare, which has endured even after Social Security's full retirement age increased over time to ages 66 and 67.[13]

Other governmentally operated benefit programs also use minimum age cutoffs, either alone or combined with other criteria. For instance, the Supplemental Nutrition Assistance Program ("SNAP") excuses people over age 50 from certain work and training requirements[14] and permits experimental programs that pay people over age 65 the cash value of their benefits, allowing them greater financial flexibility.[15] Some states use older age as an eligibility criterion for certain forms of assistance with housing, such as help paying for cooling costs.[16] Some states also extend automatic tenancy protections to people who are over a specified age, seemingly treating age as a proxy for medical frailty, economic disadvantage, or both.[17] Others use older age as a qualifying factor for housing assistance.[18] The Bureau of Indian Affairs' Housing Improvement Program also uses age as a factor in access to housing assistance but does so using a graduated rather than sharp cutoff: priority slowly increases from age 55 up to age 70.[19]

12. *Id.*

13. *See* Jae Song & Joyce Manchester, *Have People Delayed Claiming Retirement Benefits? Responses to Changes in Social Security Rules,* 67 SOC. SEC. BULL. 1, 1–3 (2007).

14. 7 U.S.C. § 2015.

15. *Id.* § 2026 ("A pilot or experimental project may include projects involving the payment of the value of allotments or the average value of allotments by household size in the form of cash to eligible households all of whose members are age sixty-five or over . . . .").

16. *E.g.*, 476 NEB. ADMIN. CODE § 2-003 (2020) (stating that persons age 70 and older and persons for whom the Department has purchased an air conditioner in the last four years are eligible for cooling assistance without a medical statement).

17. *E.g.*, N.J. ADMIN. CODE § 5:24-3.3 (2022) ("If the applicant furnishes proof of being either at least 75 years of age or disabled . . . proof of income shall not be required.").

18. *E.g.*, N.J. STAT. ANN. § 2A:18-61.42 (West 2020) (providing that, for purposes of housing subsidies, the "income limitation shall not apply to any tenant who is age 75 or more years or is disabled . . .").

19. 25 C.F.R. § 256.14 (2020) (stating that housing applicants receive "1 point per year over age 54, up to maximum of 15 points" as part of a point system in which higher point scores improve one's prospect of housing receipt).

B. *Governmental Grants*

Governmental entities often use age minimums to define access to certain volunteer and grant opportunities. At the federal level, the Senior Volunteer Corps program defines seniors as adults over age 50 and provides for the payment of expenses for volunteer recruitment and retention.[20] A national grant program for seniors allots, with some exceptions, grant funding to states from a pool of available funds in "an amount that bears the same ratio to such funds as the product of the number of individuals age 55 or older in the State and the allotment percentage of such State bears to the sum of the corresponding products for all States."[21] A senior scholarship program provides funds for a "Silver Scholarship Grant Program for individuals age 55 or older, in which such individuals complete not less than 350 hours of service in a year carrying out projects of national need and receive a Silver Scholarship in the form of a $1,000 national service educational award."[22] The federal guidelines for "encore service programs" likewise focus on people over age 55.[23] The Senior Community Service Employment Program's regulations define those most at need to include, *inter alia,* those "age 75 or older."[24]

Federal-state partnerships and state-level volunteer programs use similar age-based criteria. For instance, one statute provides that "a State shall work with appropriate State agencies and private entities to develop a comprehensive State service plan for service by adults age 55 or older."[25] Another encourages "appropriate steps to insure that special efforts are made to recruit, select, and assign qualified individuals age 55 years or older from minority populations to serve as volunteers."[26]

Some population-level measures of need for services or funding are also designed using age cutoffs. For instance, applications to construct subsidized housing for seniors in New Jersey are judged

20. 16 U.S.C. § 742f(c)(6).

21. *Id.* § 3056(d).

22. *Id.* § 12653c(a).

23. *Id.* § 12511 ("The term 'encore service program' means a program, carried out by an eligible entity . . . that . . . involves a significant number of participants age 55 or older in the program; and . . . takes advantage of the skills and experience that such participants offer in the design and implementation of the program.").

24. 20 C.F.R. § 641.140 (2021).

25. 42 U.S.C. § 12638(g).

26. *Id.* § 5023.

on the basis of the area population age 70 or older.[27] Washington State defines a ratio of nursing home beds per unit of population using "the estimated or forecast resident population age seventy and older" as the guiding comparator.[28] Federal funds for the Area Agencies on Aging program are distributed among different states "proportionately based on the population of individuals 70 years of age or older."[29]

C. *Tax Benefits*

Minimum age cutoffs are used to define eligibility for tax credits, deductions, and other benefits. For instance, people aged 65 and over receive a credit of up to $5,000 on their federal taxes.[30] They also receive an additional $600 deduction.[31] In addition, people over a specified age are permitted to contribute "catch-up contributions" to tax-advantaged retirement accounts,[32] to receive contributions from Roth IRA retirement accounts without paying income tax,[33] and to withdraw contributions penalty-free from health savings accounts for purposes other than health spending. People over age 75 are also protected from benefit suspensions otherwise permitted for struggling employer-funded retirement plans.[34]

Many states and localities, meanwhile, provide property tax exemptions to individuals over a specified age, ranging from age 65 to higher ages.[35]

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27. N.J. ADMIN. CODE § 5:80-33.12 (2022) ("Market studies submitted for projects applying to the Senior Cycle shall include an evaluation of the market for the eligible population over 70 years old.").

28. WASH. ADMIN. CODE § 246-310-010 (2019).

29. 42 U.S.C. § 3030s-1.

30. 26 U.S.C. § 22.

31. *Id.* § 63.

32. 26 C.F.R. § 1.414(v)-1 (2019); 26 U.S.C. § 219(b)(5).

33. 26 U.S.C. § 408A(d) ("The term 'qualified distribution' means any payment or distribution . . . made on or after the date on which the individual attains age 59½ . . . .").

34. *Id.* § 432.

35. *E.g.*, 44 R.I. GEN. LAWS § 44-3-13 (2021). *See generally* Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195, 197–98 (2005) ("A wide variety of property tax relief programs are aimed at senior citizens, and eligibility requirements and benefits vary from state to state and community to community.").

D. *Access to Governmental Services*

Various publicly provided services are often offered at discounts or at no charge to people over a certain age. For instance, the Federal Transit Administration ("FTA") specifies that transit systems receiving FTA funds must offer lower fares to senior passengers, defined as anyone age 65 or over.[36]

In addition to services, license fees are also often discounted or waived: in some states, driver's license fees decrease progressively with age.[37] In Minnesota, "[a] resident age 90 or older may take fish without a license[,]"[38] and other states permit free fishing or free hunting and fishing for older adults.[39] Professional license fees are also waived in certain states.[40]

II. EVALUATING AGE CUTOFFS

Many governmental benefit programs limit eligibility or differentiate benefits according to differences among participants.

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36. 49 C.F.R. §§ 609.23, Pt. 609, app. A (2020) ("[T]he definition of elderly persons may be determined by the FTA recipient but must, at a minimum, include all persons 65 years of age or over." (emphasis omitted)).

37. *E.g.*, 625 ILL. COMP. STAT. 5/6-118 (2019) (providing that licenses in Illinois are five dollars for people 69 through 70, two dollars for people 81 through 86, and free for those 87 or older); IND. CODE § 9-24-12-5 (2021) (similar).

38. MINN. STAT. § 97A.451 (2013).

39. *E.g.*, N.J. ADMIN. CODE § 7:25-6.10 (2022) ("Any person, who has a fishing license or is under the age of 16 or over 70 years of age, may take up to 35 baitfish, except Alewife and/or Blueback Herring, per person per day from the freshwaters of the State."); N.J. ADMIN. CODE § 7:25-6.22 (2022) ("Any person who has a fishing license or is under the age of 16 or over 70 years of age, may in the waters of the State, take snapping turtles, bull frogs, and green frogs by means of spears, angling with hook and line, dip nets not more than 24 inches in diameter, traps, or by hand."); N.M. CODE R. § 19.31.3.11 (LexisNexis 2021) ("[F]ree fishing license holders over age 70"); 321 MASS. CODE REGS. 2.06 (2020) ("Resident Citizen Fishing (Blind, Paraplegic, Intellectually Disabled, and Aged 70 or Over), to be issued without a license fee to any resident citizen of the United States, 18 years of age or older, whose legal residence in Massachusetts covers a period of at least six months immediately preceding the date of application."); ARIZ. ADMIN. CODE § R12-4-201 (2021) ("A pioneer license grants all of the hunting and fishing privileges of a combination hunting and fishing license. . . . A person who is age 70 or older and has been a resident of Arizona for at least 25 consecutive years immediately preceding application may apply for a pioneer license by submitting an application to the Department.").

40. *See, e.g.*, MISS. CODE ANN. § 73-25-14(1) (2022) ("The payment of the annual license renewal fee shall be optional with all physicians over the age of seventy (70) years."); MO. REV. STAT. § 327.261 (2021) ("[B]ut no renewal fee need be paid by any professional engineer over the age of seventy-five."); N.H. REV. STAT. ANN. § 310-A:21 (2022) ("If a professional engineer is 70 years or older at time of renewal . . . the board may waive the renewal fee in accordance with rules adopted by the board."); N.J. STAT. ANN. § 45:9-19.15 (West 2021) ("The board shall establish a reduced licensing fee for physicians and podiatrists who are 65 years of age or older.").

Minimum age cutoffs are just one among many such differences that might be used in this way. This Part considers the normative case for and against using minimum age cutoffs and how the relevant normative values map onto legal evaluation of these cutoffs.

As a threshold matter, the widespread use of minimum age cutoffs suggests that the use of age—despite age being an identity category in some sense—does not constitute facially-unacceptable discrimination in the way that using other characteristics like race, sex, or religion to distribute benefits might.[41] Race or sex, for instance, may typically only be used to distribute benefits when doing so remediates historical disadvantage or achieves some other compelling governmental interest, and even then the use of these categories is legally circumscribed. In contrast, the use of age is much more broadly permissible.

While using minimum age cutoffs are typically legally acceptable, they may not be the normatively optimal approaches to defining program eligibility. Understanding the appropriateness of age-based eligibility requires considering the ultimate purposes that benefit programs aim to realize. These purposes are often not fully specified in the programs' enabling statutes or in their regulatory specification.

Consider Medicare as an example. Medicare's enabling statute states only that Medicare "provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care"[42] for various individuals, in particular those age 65 and over, but does not explain *why* it provides this protection or why eligibility is limited to older adults.[43] Distinguished commentators have identified a variety of distinct purposes for the Medicare program. Some understand Medicare's goal in egalitarian terms: "to assure that the elderly and disabled receive health care not materially different from that provided to the rest of the population."[44] Others understand Medicare as a safety-net program that protects against poverty or against illness due to inability to pay: "to protect households against impoverishment from

41. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("[A]ge, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment.").

42. 42 U.S.C. § 1395c.

43. *See id.*

44. Henry J. Aaron, *Medicare Reform: Rhetoric Versus Substance*, BROOKINGS (Oct. 11, 2021), https://www.brookings.edu/research/medicare-reform-rhetoric-versus-substance/ [https://perma.cc/2QGG-C3U8].

sickness"[45] or "to help elderly people obtain medical care that they cannot otherwise afford."[46] Others understand Medicare as helping to spread financial risk or cushion households against financial shocks. The National Academy for Social Insurance, for instance, sees Medicare as a "social insurance program," rather than a social welfare program, and sees Medicaire's core goal as being to "spread the financial risk of medical care for beneficiaries across the population."[47] Still others see Medicare as incentivizing the provision of better-quality care to beneficiaries: the "primary purpose of Medicare was to improve the quantity and quality of health care services provided to seniors."[48] Similar debates exist over the purpose of Social Security as well.

Scholars of tax policy have historically been particularly comprehensive in assessing the purposes of tax provisions, such as the provisions discussed in section I.C that use minimum age cutoffs to define eligibility for favorable tax treatment. As an example, Eugene Steuerle's influential treatise identifies four basic principles: horizontal equity (equal treatment of equals); vertical equity (burdens proportional to ability to pay); efficiency (gains from program exceeding losses); and individual equity (entitlement to one's earnings).[49] It also identifies two other relevant values: simplicity and raising enough revenue to meet budgetary needs.[50] In contrast, many of the smaller programs discussed in section I.D are unlikely to have comprehensively discussed purposes.

I will organize the relevant values for this Part similarly to Steuerle's list, but with slight modifications in view of the distinctive purpose of benefit programs. I focus on four programmatic aims: benefiting people, addressing disadvantage, horizontal equity, and rewarding social contribution. I then also consider budgetary limitations, simplicity, and political feasibility as constraints on these aims.

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45. J. Michael McWilliams, *Out-of-Pocket Medical Spending and Charon's Obol*, 28 J. GEN. INTERNAL MED. 169, 169 (2012).

46. Mark V. Pauly, *Can Beneficiaries Save Medicare?*, *in* MEDICARE IN THE TWENTY-FIRST CENTURY: SEEKING FAIR AND EFFICIENT REFORM 67, 73 (Robert B. Helms ed., 1999).

47. *Medicare Payment Policy Challenges: Hearings Before the S. Comm. on the Budget*, 108th Cong. 74 (2003) (statement of Mary K. Wakefield, Director, Center for Rural Health).

48. James C. Capretta, *Medicare in USA: Present and Future*, 11 EUR. PAPERS ON NEW WELFARE 78, 80 (2009).

49. C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 10–13 (2d ed. 2008).

50. *See id.* at 14–15.

A. *Benefiting People*

Benefiting people is analogous to Steuerle's principle of efficiency—that the benefits of a program should outweigh its costs or harms.[51] The idea of benefit is core to "benefit programs," and is seen as a fundamental goal of policymaking: if policies do not make people better off, they are hard to defend. The use of minimum age cutoffs might align with benefiting people if it enables programs to be well-targeted—to direct limited resources toward those who can benefit most from those resources. There are several reasons, however, to question whether minimum age cutoffs are an effective way of targeting benefits.

Minimum age cutoffs might be justified for health programs like Medicare, because people who are older are often more medically frail, but the underlying justification for the need is medical frailty, not age. Age is an imperfect proxy for frailty because it excludes younger people with major medical needs. It also supports the misleading assumption that all older people are frail.

Alternatively, being older might also be associated with greater capacity to benefit from financial assistance. At one point, being older was a reasonable proxy for being poorer,[52] which often indicates a greater capacity to benefit from financial assistance due to the diminishing marginal value of income and wealth. But this is no longer true: older people are not generally poorer than younger people, particularly once wealth, not just income, is considered.[53] Child poverty has remained high while older people's poverty has

51. *See id.* at 12.

52. Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 420 (2003) ("The composition of the ranks of the poor has changed considerably over the past twenty-five to thirty years. While child poverty rates have remained high since the middle of the 1970s, the poverty rate of the elderly, once considered the poorest group, has dropped significantly.").

53. Jonathan Barry Forman, *Reconsidering the Income Tax Treatment of the Elderly: It's Time for the Elderly to Pay Their Fair Share*, 56 U. PITT. L. REV. 589, 594–96 (1995) ("[T]he elderly tend to be wealthier than the nonelderly."); Russell N. James III, *American Charitable Bequest Transfers Across the Centuries: Empirical Findings and Implications for Policy and Practice*, 12 EST. PLAN. & CMTY. PROP. L.J. 235, 269–70 (2020) ("Older adults are also particularly important for charitable dollars transferred because wealth among those filing estate tax returns increases with every year of age, even up to age 98. This is due in part to differential mortality; those with greater wealth die at older ages than those with less wealth.").

dropped.[54] To identify poverty or economic disadvantage, whether among older people or in general, it would be preferable to use some other easily accessible form of qualification such as Medicaid eligibility, eligibility for SNAP, or yearly income, rather than assuming that all older people are poorer and so can benefit more from financial assistance.

B. *Addressing Disadvantage*

Programs like Medicare and Social Security not only aim to benefit people, but in particular, to benefit those who are less advantaged. While this aim often aligns with the more general aim of benefiting people—since, as explained above, poorer or less advantaged people can often gain more from a given quantum of assistance—the two aims are distinguishable.

While the main critique of using minimum age cutoffs to reach those who stand to benefit most was merely that these cutoffs are imperfect proxies, the use of minimum age cutoffs stands in starker tension with the goal of addressing disadvantage, because people who are disadvantaged tend to die earlier in life.[55] Most factors that expose individuals to various forms of disadvantage, such as poverty, racism, and unemployment, are also life-shortening, and therefore make it more difficult for potential recipients to attain minimum age thresholds for eligibility.[56] While some hypothesize that they would prefer to "die before I get old,"[57] those who die young are generally more disadvantaged, while those who become old are generally better off. In order to reach a minimum age cutoff set at age 65 or 70, people need to survive through many years of life. This task is made easier by being wealthy enough to avoid

54. Anne L. Alstott, *The New Inequality of Old Age: Implications for Law*, 18 THEORETICAL INQUIRIES L. 111, 112 (2017) ("[O]nly ten percent of Americans over sixty-five were poor in 2014, while twenty-one percent of children were poor.").

55. *See* Raj Chetty, Michael Stepner, Sarah Abraham, Shelby Lin, Benjamin Scuderi, Nicholas Turner, Augustin Bergeron & David Cutler, *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 JAMA 1750, 1750–64 (2016).

56. *Id.*; S. Jay Olshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFFS. 1803, 1803–1809 (2012), https://doi.org/10.1377/hlthaff.2011.0746 [https://perma.cc/F7UG-AEPZ]; David J. Roelfs, Eran Shor, Aharon Blank & Joseph E. Schwartz, *Misery Loves Company? A Meta-Regression Examining Aggregate Unemployment Rates and the Unemployment-Mortality Association*, 25 ANNALS EPIDEMIOLOGY 312–20 (2015), https://doi.org/10.1016/j.annepidem.2015.02.005 [https://perma.cc/L6DA-M5S8].

57. *See* Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 246 (2004) (quoting THE WHO, MY GENERATION (Brunswick Records 1965)).

dangerous work, to receive needed health care, and to protect oneself against environmental hazards; being well-placed geographically and occupationally to avoid dangers such as accidents and violence; and being protected by identity from life-shortening oppression and structural racism. As a given eligibility age moves later and later in life, more people are cut down before they can reach that age—and those who are cut down earlier are disproportionately likely to be people who are disadvantaged in various ways.

To see the empirical evidence for this point, consider a minimum age cutoff at age 65. People over age 65 are substantially less likely to be members of racial minority groups than those under age 65.[58] People over age 65 are also more likely to own their homes, less likely to be in poverty now, and less likely to have been in poverty earlier in their lives.[59] Programs that restrict benefits to those over age 65 further disadvantage those who are unable to live to age 65, while benefiting those who have been able to survive to age 65. And while the demographics of people over age 65 have changed, they have not done so equally:

> [G]ains in longevity have not been equally distributed. For instance, the National Academies of Science, Engineering, and Medicine studied life expectancy at age fifty for two cohorts of men: those born in 1930 and those born in 1960. The analysis found a thirteen-year gap between the lowest-earning and highest-earning quintiles for the 1960 group. By contrast, the rich-poor longevity gap for the 1930 cohort was just five years. The inequality trend for women is, if anything, worse. The National Academies found a fourteen-year life expectancy gap for rich and poor women in the 1960 cohort (compared to a four-year gap for the 1930 cohort). Strikingly, the study found that the life expectancy of women in the bottom fifth of the earnings distribution had *declined*: poorer women, age fifty and born in 1960, could expect to live only twenty-eight more years (compared to thirty-two more years in the 1930 group).[60]

58. *See* ANDREW W. ROBERTS, STELLA U. OGUNWOLE, LAURA BLAKESLEE & MEGAN A. RABE, U.S. CENSUS BUREAU, ACS-38, THE POPULATION 65 YEARS AND OLDER IN THE UNITED STATES: 2016 4 (Oct. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf [https://perma.cc/5973-GK58].

59. *Id.* at 14, 20.

60. Alstott, *supra* note 53, at 114.

Similarly, only 80% of men, for instance, live to age 65,[61] and those who die before age 65 are much more likely to be from disadvantaged groups.[62]

Despite the strong connection between disadvantage and death earlier in life, discussions of minimum thresholds have typically not recognized their disparity-increasing effect and have sometimes even misframed them as disparity-alleviating. One reason for the lack of objection to minimum thresholds might reflect the misapplication of an idea familiar from antidiscrimination law: the difference between antisubordination and anticlassification.[63] Age is generally not subject to an anticlassification approach: it is not regarded as fundamentally objectionable to classify people according to their age.[64]

Is age subject to an antisubordination approach? Using an antisubordination approach, a classification is objectionable only when it works to exacerbate preexisting hierarchies of disadvantage.[65] So an antisubordination approach, for instance, might permit using race as a factor in university admissions in order to pursue integration but not in order to exclude previously disadvantaged groups from access to advantage.[66] Some laws, most notably the Age Discrimination in Employment Act ("ADEA"), do seem to adopt an antisubordination approach that regards only people at older ages as disadvantaged. Under the ADEA, employment laws are unacceptable if they exclude older people (as mandatory

61. World Bank Group, *Survival to Age 65, Male (% of Cohort) - United States*, WORLD DEV. INDICATORS (2019), https://data.worldbank.org/indicator/SP.DYN.TO65.MA.ZS?locations=US [https://perma.cc/WQ4F-2BKU].

62. Alstott, *supra* note 53, at 112 ("For instance, the longevity gap between high- and low-earning men at age fifty is now thirteen years—meaning that, of all men who reach age fifty, the richest fifth can expect to live thirty-nine more years, while the poorest fifth can expect to live only twenty-six more years.").

63. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 960–67 (2012); *see also* Govind Persad, *Evaluating the Legality of Age-Based Criteria in Health Care: From Nondiscrimination and Discretion to Distributive Justice,* 60 B.C. L. REV. 889, 913–16, 921 (2019) (differentiating antidiscrimination from anticlassification concerns about age-based criteria).

64. *See* Persad, *supra* note 62, at 913–15; *see also* Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 902–03 (2019) (discussing application of a "symmetry principle" to age discrimination).

65. *See* Persad, *supra* note 62, at 921.

66. *Compare* Grutter v. Bollinger, 539 U.S. 306, 330, 335 (2003) (approving the "goal of attaining a critical mass of underrepresented minority students" as part of a policy that improves "'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"), *with* Sweatt v. Painter, 339 U.S. 629, 631, 634 (1950) (rejecting the exclusion of a black student from law school admission).

retirement ages, for instance, do), but acceptable if they disadvantage younger people.[67] But the ample data about the correlation between earlier death and disadvantage—data which has come to the forefront during the COVID-19 pandemic[68]—indicates that framing those who fall *above* minimum age thresholds as the only object of subordination—particularly outside employment contexts—is a mistake.[69]

Minimum age cutoffs are likely to also exacerbate documented disparities of other kinds, such as the wealth gap between Black and white Americans.[70] This is especially true to the extent that white Americans are more likely than others to have substantial savings remaining when they pass away and to be able to transfer those savings to their children.[71] Those currently below minimum age thresholds, and especially those who will never live long enough to surpass them, are far more likely to be poor, Black, and brown.[72] Concerns about racial disparity represent another basis

67. Boni-Saenz, *supra* note 63, at 903 ("The Age Discrimination in Employment Act is asymmetrical in two ways. It only protects those over the age of forty, and the Supreme Court has ruled that the Act does not prohibit discrimination against younger members of that protected class in favor of older ones.").

68. Thomas & Grabenstein, *supra* note 2; Mary T. Bassett, Jarvis T. Chen & Nancy Krieger, *Variation in Racial/Ethnic Disparities in COVID-19 Mortality by Age in the United States: A Cross-Sectional Study*, PLOS MED., Oct. 20, 2020, at 5, 10, https://doi.org/10.1371/journal.pmed.1003541 [https://perma.cc/RU36-TSHZ] (explaining that Black, Latino, and Native American patients are much more likely to die of COVID-19 at earlier ages).

69. *Cf.* Boni-Saenz, *supra* note 63, at 903 ("[A]s an empirical matter, the young also suffer from age discrimination in employment. This counsels in favor of removing the age floor and requiring equal treatment for all members of the protected class.").

70. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (providing a holistic analysis of American racial wealth inequity).

71. *E.g.,* Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 467 (2010) (quoting Robert V. Avery & Michael S. Rendall, *Lifetime Inheritances of Three Generations of Whites and Blacks*, 107 AM. J. SOC. 1300, 1315, 1318 (2002)) ("[T]he distribution of inheritances already received is even more unequal between whites and blacks than is the distribution of current wealth."); Richard R.W. Brooks, *The Banality of Racial Inequality*, 124 YALE L.J. 2626, 2645 (2015) ("[R]esearchers have turned their attention to the effect of family transfers, including gifts and inheritances, as the likely source of wealth differences between blacks and whites.").

72. *See* Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1514–15 (2004) ("[A] Black worker would receive less in lifetime benefits than his or her White counterpart because of the differences in life expectancy."); Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?*, 89 OR. L. REV. 1179, 1218–19 (2011) ("Currently, the benefits calculation for Social Security does not explicitly adjust for race, gender, or income level; however, the differences in life expectancy across these groups can result in an unintended redistribution of benefits to higher income workers given their higher longevity rate.").

for questioning the use of minimum age thresholds to exclude people from access to public benefits and social insurance.[73]

C. *Horizontal Equity*

By drawing sharp distinctions at the cutoff age, minimum age cutoffs also arguably violate the principle of horizontal equity by treating near-equals very unequally. In tax policy, sharp discontinuities in benefits are typically disfavored. While they are disfavored in part because they create perverse incentives (for instance, to reduce one's earnings due to high marginal tax rates), they also are disfavored because they are perceived as unfair: the difference in access to benefits is not proportional to the small difference in age.[74] This is particularly true for programs that are very financially or personally valuable, such as Medicare.

One might challenge the idea that the cutoff age represents a sharp distinction by arguing that even if benefit eligibility begins at a specific time, the *net quantity* of benefits received slopes upward more gently over time. However, a guarantee of present and future program eligibility may have value immediately, even before many benefits have been received, by allowing people to move geographically or change their employment status without fear of becoming uninsured or destitute. Additionally, if we conceive of Medicare as directly paying medical bills—as it does in its traditional form—then the quantity of benefits received initially may be very large. Notably, Social Security's phase-in of benefits from age 62 to 70 could be seen as better aligning with horizontal equity by allowing the generosity of the yearly benefit amount to increase with age.

D. *Individual Choice*

Many believe that one's financial rewards should reflect one's choices. While people do not control or choose what age they are, people who have lived longer have typically worked longer as well. But it seems preferable to focus on the choices themselves, rather than on age as a proxy. In particular, it seems preferable to use

73. *Cf.* Jonathan Barry Forman, *Supporting the Oldest Old: The Role of Social Insurance, Pensions, and Financial Products*, 21 ELDER L.J. 375, 384 (2014) ("[T]he oldest old are overwhelmingly white (88.1% in 2006-2008) . . . [and] those who survive to 90 are more educated and had higher incomes than their deceased peers.").

74. *Cf.* Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. 655, 669–70 (2014).

employment history rather than age as a proxy for choice. Both Medicare and Social Security incorporate employment history, though each only requires 10 years of work for eligibility while still requiring those who have worked longer to wait until the minimum eligibility age before receiving benefits.

Furthermore, even if we accept age as a proxy for past choice, basing governmental benefits on past choices can conflict with targeting benefits to those who can benefit most. Normative theorists have argued that even if past choices may be appropriate bases for financial reward, they should not be used to exclude individuals from public benefits that are fundamental essentials, such as access to health care or a basic level of financial sufficiency.[75]

Minimum age cutoffs, additionally, present a trade-off with the promotion of individual choice as well as the recognition of past individual choice—one that calls into question their compatibility with the National Academy of Social Insurance's criterion of "[m]aximizing individual liberty."[76] These cutoffs favor those following a "normal" life plan in which a period of work is followed by an indefinite period of absence from the workforce in retirement and disadvantage people who pursue atypical life plans, such as spending more time earlier outside the workforce or entering and exiting the workforce multiple times due to caregiving or other responsibilities. Medicare eligibility at age 65 was originally imagined as a transition from consistent employment-based health insurance earlier in life to government-subsidized eligibility for health insurance at retirement. But this model does not fit the lives of workers who change jobs many times during life, who often work in jobs that do not offer health insurance, and who face increased dangers of unemployment as they become older, even before they reach age 65.[77]

75. Elizabeth S. Anderson, *What is the Point of Equality?* 109 ETHICS 287, 298 (1999) ("[J]ustice does not permit the exploitation or abandonment of anyone, even the imprudent.").

76. Reginald D. Williams II, *Restructuring Medicare: A Synthesis of the NASI Medicare Projects*, 9 NAT'L ACAD. OF SOC. INS.: MEDICARE BRIEF 1, 4 (2003), https://www.nasi.org/wp-content/uploads/2009/11/medicare_brief_9.pdf [http://perma.cc/BJY6-UF3U].

77. *Cf.* Lainie Rutkow, *Optional or Optimal?: The Medicaid Hospice Benefit at Twenty*, 22 J. CONTEMP. HEALTH L. & POL'Y 107, 140–41 (2005) ("[M]any Medicaid beneficiaries never had the opportunity to qualify for Medicare: 'The career self [(describing a person who can create and execute a life plan to be economically and socially productive)] was never an option for those who are poor, chronically ill, severely disabled, or the object of others' domination or control.'" (quoting Hilde Lindemann Nelson, *Pictures of Persons and the Good of Hospice Care*, HASTINGS CENTER REP., Special Supplement Mar.-Apr. 2003, at S18)).

If everyone worked for the same amount of time, was retired for the same amount of time, and died at the same age, minimum age cutoffs would respond to facts about universal human needs. But lifespans and life plans do not work that way. People live for different amounts of time, and their differing lifespans reflect their access to advantage and their subjection to oppression. And people also work for different amounts of time within the same lifespan, are retired, are caregivers, or are unable to work for different amounts of time as well.

Beyond the connection between advantage and life plans, people also pursue different careers and plans across their lifespan. Life plans and needs tend to vary among cultures.[78] For instance, in some cultures people take on caregiving obligations at older ages as part of multi-generational households rather than forming smaller households that pursue leisure in retirement. The diversity of life plans has been an important theme in normative discussions: John Rawls, for instance, discusses the idea that people try to plan for various events in their life and to organize their lives with a view to achieving these plans.[79] Importantly, Rawls also believed that public policy should not favor certain plans of life over others but, instead, should ideally try to create the conditions for people to pursue a variety of plans of their choosing.[80] The use of minimum age cutoffs to define benefit eligibility may thus not only exacerbate disadvantage, but also stand in tension with the goal of allowing people broad choice among life plans.

E. *Practical Constraints: Simplicity, Budgetary Constraints, and Feasibility*

One possible justification for using minimum age cutoffs, which has been particularly prominent during the COVID-19 pandemic, is simply that minimum age thresholds appear very easy to use and enforce.[81] Verifying that someone is 65 years old is easier than

78. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 335 (1999) (discussing the argument that "all human choices are made within a cultural context; cultural structure is recognized as a 'context of choice,'" and noting that "[t]his context naturally provides us with sets of alternative life plans as well as the framework for assessing the legitimacy and value of those plans" (emphasis omitted)).

79. *See* James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 CHI.-KENT L. REV. 763, 782 (1994).

80. *Id.* at 765.

81. *E.g.*, Drew Altman, *We Need a Better Way of Distributing the Covid-19 Vaccine. Here's How to Do It,* WASH. POST (Jan. 12, 2021, 12:20 PM), https://www.washingtonpost.com/opinions/2021/01/12/covid-19-vaccine-distribution-needs-be-radically-simplified-

verifying their income, need, or overall disadvantages—evaluations frequently derided as inefficient or intrusive "means-testing."[82] Avoiding the administrative costs of such means-testing can better optimize the benefit of programs and could also help them better address disadvantage. However, analyses of pandemic response have also suggested that combining age with other easy-to-assess factors, such as geography, can produce policies that both better address disadvantage and generate more benefit than one-size-fits-all age cutoffs alone.[83]

Additionally, as the Social Security Administration's discussion of age-65 eligibility for Social Security reveals, some age cutoffs may result from simple actuarial calculations: using an age cutoff makes it more predictable how many people will qualify for a program. In contrast, economic cutoffs could lead to a flood of eligibility during economic downturns. While expanding eligibility to a growing pool of needy recipients at such times is likely to address disadvantage and provide more benefit, it may also present serious budgetary challenges.

Further, the higher an age cutoff is, the fewer people fall within the eligible group, decreasing the fiscal burden of providing benefits to them. This budgetary argument has often been used to justify raising eligibility ages for various benefit programs such as Social Security. Some commentators have argued that these eligibility ages should be raised further as life expectancy increases. However, as explained in section II.B, raising the eligibility age is likely to address disadvantage poorly, since living to an older age is highly correlated with being more advantaged.

Last, minimum age cutoffs that use older age as a basis for receiving benefits may also be justified by political feasibility. Because propensity to vote tends to increase with age,[84] conferring

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heres-how-do-it/ [https://perma.cc/NK8F-EUDE] ("Start with one easily understood criterion mandated by the federal government: age. The administration's reported plan to replace the patchwork of state priorities is a step in the right direction. Begin with Americans 65 and older, then those 45 to 65 years old and so forth. Everyone will know when they qualify. They'll also have ID to prove it. This system can't be gamed.").

82. *See generally* Li Zhou, *The Case Against Means Testing*, VOX (Oct. 15, 2021, 11:50 AM), https://www.vox.com/2021/10/15/22722418/means-testing-social-spending-reconciliation-bill [https://perma.cc/5QF3-ARM6].

83. Elizabeth Wrigley-Field et al., *Geographically Targeted COVID-19 Vaccination Is More Equitable and Averts More Deaths Than Age-Based Thresholds Alone*, SCI. ADVANCES, Sept. 29, 2021, at 1, https://doi.org/10.1101/2021.03.25.21254272 [https://perma.cc/CMU2-6BXW].

84. *See* Norval D. Glenn & Michael Grimes, *Aging, Voting, and Political Interest*, 33 AM. SOCIO. REV. 563, 563 (1968).

benefits on older people fits well with the political goal of conferring benefits on those who are likely to vote. This outcome likely explains part of the political endurance of programs like Medicare and Social Security. However, it fits uneasily with the goal of addressing disadvantage, since disadvantaged people tend to be both younger and less likely to vote.[85] Other countries have been able to extend programs like health insurance to wider populations, suggesting that current age cutoffs do not mark the limit of political feasibility.[86]

More concerningly, minimum age cutoffs may be used as a proxy for discriminating against politically less powerful racial minority populations. For instance, the modal age of whites in the United States in 2018 was 58 and the median age 44, while the modal age of minority Americans was only age 27, and the median age 31.[87]

III. REVISING AGE CUTOFFS

As section II.B explains, minimum age cutoffs—particularly those set at older ages—all serve to disproportionately exclude groups who die earlier. These include Black Americans, Native Americans, and poorer Americans of all races. While some Latino American populations have longer life expectancies,[88] the current age structure of Latino Americans means they are disproportionately excluded as well.[89]

85. Isabel V. Sawhill & Christopher Pulliam, *Six Facts About Wealth in the United States,* BROOKINGS (June 25, 2019), https://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-states/ [https://perma.cc/DHY4-JWZ3]; Jeremy Adam Smith & Teja Pattabhiraman, *How Inequality Keeps People from Voting*, GREATER GOOD MAG. (Oct. 29, 2020), https://greatergood.berkeley.edu/article/item/how_inequality_keeps_people_from _voting [https://perma.cc/LZ5Z-34J6].

86. INST. OF MED.*, supra* note 9, at 57 ("[T]he United States is almost alone among developed countries in lacking some governmentally mandated form of comprehensive health coverage for all or nearly all its population.").

87. Katherine Schaeffer*, The Most Common Age Among Whites in U.S. Is 58–More Than Double That of Racial and Ethnic Minorities*, PEW RSCH. CTR. (July 30, 2019), https://www.pewresearch.org/fact-tank/2019/07/30/most-common-age-among-us-racial-ethnic-groups/ [https://perma.cc/4RSX-9N4J].

88. *See* Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 854 n.237 (2009) (discussing the fact that "Hispanics, who traditionally have longer life expectancies, are the most likely to opt out of pensions").

89. José Raúl Alcántar & David W. McCombie III, *Hispanic Private Equity: A Cultural Approach to Achieving Superior Investment Returns*, 10 HARV. LATINO L. REV. 233, 240–41 (2007).

Some of these policies, such as Medicare and Social Security eligibility and tax policy, clearly have large effects on almost everyone. But even apparently inconsequential policies can still be meaningful sites for reform. For instance, while the practical disparity-increasing effect of New Jersey's granting people over age 70 the opportunity to "take up to 35 baitfish, except Alewife and/or Blueback Herring, per person per day from the freshwaters of the State"[90] is certainly smaller than the effect of requiring people to wait until age 70 to receive maximal Social Security benefits, reforming this eligibility cutoff could still be a meaningful way to better include shorter-lived groups at low cost. This is particularly true given disparities in the use of state and federal parks.[91] Further, reforming these statutes could serve an important expressive function by communicating that lawmakers realize that one-size-fits-all age cutoffs are likely to increase disparities and that lawmakers are committed to including people at greater risk of early death in public programs.[92]

In this Part, I consider four options for reforming the use of age as an eligibility criterion. The first and easiest, discussed in section III.A, is simply to lower minimum age cutoffs, thereby broadening eligibility and improving access for shorter-lived groups: Medicare at 60, discussed in the Introduction, is a prime example of this reform approach. Another option, discussed in section III.B, would be to remove minimum age cutoffs entirely in favor of either universal eligibility or some form of eligibility based on economic need. This more radical option has substantial normative appeal for many programs. But the entrenched nature of age-based eligibility makes this sort of sweeping change difficult to achieve, as well as costly.

Another idea, discussed in section III.C, would be to replace one-size-fits-all age cutoffs with cutoffs that better account for

90. N.J. ADMIN. CODE § 7:25-6.10 (2022).

91. Sarah J. Morath, *A Park for Everyone: The National Park Service in Urban America*, 56 NAT. RES. J. 1, 9 (2016), https://dx.doi.org/10.2139/ssrn.2730678 [https://perma.cc/YF25-Z3V8] ("A 2011 study commissioned by the [National Park Service] revealed that one in five visitors to a national park is non-white and only one in ten is Hispanic, despite being America's fastest-growing demographic group."); Emily Mott, *Mind the Gap: How to Promote Racial Diversity Among National Park Visitors*, 17 VT. J. ENV'T. L. 443, 447 (2016) ("The diversity problem facing national parks runs deeper than race; it is arguably based on a long-standing trend of marginalization, lack of access to the parks by minorities, and possibly, racial discrimination.").

92. *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing expressive function of legal enactments).

differences in group or individual life expectancy. At an individual level, however, using some of the most obvious group differences, such as differences by race and sex, would present legal problems. A more compelling way of varying age cutoffs would be to either consider racial differences at a group rather than individual level or to use legally unproblematic factors such as state, county, zip code, census tract-level geographic differences in life expectancy, or risk between different occupations.

Yet another proposal, which section III.D examines, is to replace eligibility based on age—which restricts eligibility only to people who have lived beyond a defined point, disadvantaging both people with shorter lives and those with atypical life plans—with a fixed time period of eligibility. This idea also has normative appeal and could be implemented, unlike lowering or eliminating minimum age cutoffs, without increasing costs. But it presents the unpalatable prospect of long-lived individuals outliving their eligibility period, which is likely to present a major implementation barrier in practice.

A. *Adjusting Age Cutoffs*

Lowering eligibility cutoffs for benefit programs—such as opening Medicare eligibility at age 60—would decrease racial and economic disparities in access. It would improve individuals' ability to pursue a variety of life plans by allowing people to pursue greater flexibility earlier in life and reducing forms of job lock that hamper people's willingness to pursue alternative careers in which they might be more productive or find more enjoyment.

Yet, while the Biden Administration and others have floated lowering the age for Medicare eligibility, many others have argued that the eligibility age for Medicare and Social Security should move upward rather than downward.[93] These arguments draw on ideas of budgetary constraint: the changing age structure of the United States will lead to a much greater number of people who will draw on Medicare and Social Security, increasing burdens on the public treasury.[94] In the United States, the number of people over age 65, for instance, is expected to double between 2012 and

93. For a review of these debates, *see generally* Templin, *supra* note 72; Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 543 (2001).

94. *See generally* Templin, *supra* note 72; Moore, *supra* note 93.

2050.[95] This number is not merely expected to increase in absolute terms, as one might expect for any group in a growing population, but also to increase as a proportion of the population.[96] In addition, life expectancy on average has increased over time, and life expectancy at age 65, which is the more important benchmark for these social programs, has also increased over time.

Adjusting age cutoffs upward, while it may save money, will exacerbate disparities because increases in life expectancy have not been equally enjoyed.[97] Rather, divergences in life expectancy between more and less advantaged groups have continued or increased. These divergences have tracked lines of identity, such as race, but have also tracked other divisions such as economic class and geography. Because life expectancy has not uniformly risen, uniformly raising program eligibility ages would exclude more people from disadvantaged communities than from advantaged communities. This will be true for any minimum age cutoff but will be truer for cutoffs set at older ages.

One important difference between the allocation of scarce resources—for instance, during the COVID-19 pandemic—and the design of social insurance systems is that social insurance does not involve absolute scarcity. During the initial period of scarcity, permitting more people *under* a given age to receive vaccines worsens the odds that people *over* that age will be able to receive them, because the number of vaccines is absolutely limited.[98] In contrast, lowering the eligibility age for social insurance programs like Medicare or Social Security does not necessarily reduce the resources

95. Press Release, U.S. Census Bureau, Fueled by Aging Baby Boomers, Nation's Older Population to Nearly Double in the Next 20 Years, Census Bureau Reps. (May 6, 2014), https://www.census.gov/newsroom/archives/2014-pr/cb14-84.html [https://perma.cc/E8uQ-ZTRC].

96. *Id.* ("In 2012, there were 22 people 65 and older for every 100 working-age people in the U.S. By comparison, in 2030, there will be 35 people 65 and older for every 100 working-age people. This means there will be approximately three working-age people for every person 65 and older.").

97. *See* Moore, *supra* note 93, at 546 (explaining that raising the eligibility age for benefit programs would "have a more substantial adverse impact on some subpopulations, such as blue-collar workers, lower-income workers, blacks, and Hispanics"); Steven P. Wallace, Vilma Enriquez-Haass & Kyriakos Markides, *The Consequences of Color-Blind Health Policy for Older Racial and Ethnic Minorities*, 9 STAN. L. & POL'Y REV. 329, 334 (1998) ("One reason why eliminating Medicare for those sixty-five to sixty-six years old is undesirable is that a disproportionate number of those who would lose insurance coverage are minorities.").

98. Debra DeBruin, *Editorial Counterpoint: Speed Should Not Overrun Ethics in Vaccine Rollout*, STARTRIBUNE (Jan. 29, 2021, 6:00 PM), https://www.startribune.com/editorial-counterpoint-speed-should-not-overrun-ethics-in-vaccine-rollout/600016774/ [https://perma.cc/T2KX-KPJ5].

available to those who would have been eligible under the prior thresholds. Additionally, minimum age thresholds for these programs, because of the connection between early death and disadvantage, disproportionately benefit people whose lifetime income and wealth are higher. Shifting the thresholds downward will reduce this disproportionality and improve fairness.

Simply moving the eligibility age downward includes more people who are likely to die earlier in life or to live shorter lives. It is therefore an improvement for fairness. However, it also raises program costs by lengthening the amount of time that participants receive benefits. This may well be unproblematic from a societal perspective if any increases in program costs are offset by economic gains—for instance, due to better health outcomes for participants. However, shifting household expenditures from insurance premiums to taxes required to pay for expanded insurance eligibility could present political challenges.

Beyond cost and benefits, a compelling normative argument for shifting the minimum age cutoff downward might appeal to the idea of sufficiency.[99] Adopting a lower age threshold allows more people at least a minimally decent period of retirement, even though those who live longer are able to enjoy a longer and more generous retirement. The commitment to delivering at least a minimally decent yearly income in retirement undergirds many normative defenses of programs like Social Security.[100] Such a commitment to minimal decency should support not only a minimally decent *yearly income* guarantee but efforts to ensure that this guarantee is available for a sufficient *amount of time* even to those with shorter life expectancies.

Ultimately, while Medicare eligibility at age 60 seems preferable to eligibility at age 65, there are important questions about where minimum age cutoffs should best be set. Determining what eligibility age best balances programmatic goals against fiscal, and potentially political, constraints requires assessing both the financial

99. *E.g.*, Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1026 n.15 (2014) (explaining that "[b]y 'sufficientarian,' I refer to those positions in the literature on distributive justice that hold that justice demands that everyone in society have enough to satisfy some specified standard"); *see also* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 481 (2014) ("Sufficientarians subscribe to the notion that 'what is important from the point of view of morality is not that everyone should have the same but that each should have enough.'" (emphasis omitted)).

100. Jonathan Barry Forman, *Making Social Security Work*, 65 OHIO ST. L.J. 145, 179 (2004) (arguing that the Social Security retirement "system should ensure that every elderly American has an adequate income throughout her retirement years").

costs of including more people by moving eligibility ages downward and the benefits of including more people by doing so. As an example, people just below age 65 struggle to access adequate, affordable insurance in the individual health insurance marketplace.[101] This seems to hold true well into earlier middle age, but not necessarily for people in their 30s and 40s.

Moving eligibility earlier is also likely to have important spillover benefits within communities. For instance, extending Medicare eligibility to people in their early 60s may free up household resources, thereby also benefitting spouses who fall below the eligibility age by freeing up household resources. It may also benefit children, because people in their early 60s are more likely either to be the direct caregivers of their own children or to be caregivers for the children of others. This may be especially true in communities where grandparents are more likely to be primary caregivers. Enabling better health care access for caregivers has strong indirect community benefits.

Additionally, while moving eligibility ages downward across the board will advance important racial justice goals, it has the practical advantage of simultaneously realizing other forms of justice such as economic justice, justice for "sandwiched" caregivers in late middle age, and justice toward people in rural communities with shorter life expectancies.[102] This enables building a broader and more robust coalition than a program focused solely on racial justice. Recent bipartisan enthusiasm for greater assistance to children and programs to relieve child poverty suggests that such a coalition across different societal groups may be effective at changing policy in a way that better benefits people facing a variety of distinct, although often overlapping, disadvantages.[103]

Recent polling also shows that Medicare at 60 is popular.[104] What political challenges has it nevertheless faced? Generally,

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101. Govind Persad, *Choosing Affordable Health Insurance,* 88 GEO. WASH. L. REV. 819, 826 (2020).

102. *See, e.g.,* Erika Ziller & Andrew Coburn, *Health Equity Challenges in Rural America*, 43 HUM. RTS. no. 3, 2018, at 10 ("Growing evidence indicates that a significant rural-urban disparity in life expectancy exists in the United States, driven largely by urban longevity gains that have not been shared among those living in rural places.").

103. Jeff Stein, *Mitt Romney Unveils Plan to Provide $3,000 Per Child, Giving Bipartisan Support to Biden's Effort*, BOS. GLOBE (Feb. 4, 2021), https://www.boston.com/news/politics/2021/02/04/mitt-romney-unveils-plan-to-provide-3000-per-child-giving-bipartisan-support-to-bidens-effort [https://perma.cc/3ZAN-DYEA].

104. Phil Galewitz, *Biden Plan to Lower Medicare Eligibility Age to 60 Faces Hostility From Hospitals*, KAISER HEALTH NEWS (Nov. 11, 2020), https://khn.org/news/

policies encounter difficulties if a well-organized group mobilizes against them, especially a group that is popular with the public.[105] However, employers and insurers are likely to view Medicare at 60 favorably because it will offload insurance costs and risk for this higher-cost population, allowing insurers to offer insurance at a more appealing price to employees or customers below age 60.[106] People below age 60, who might be disappointed to be excluded, are nevertheless no more likely to push back at an age 60 than at an age 65 cutoff and may even view the change more favorably if removing people above age 60 from the risk pool lowers their health insurance costs.[107] Overall, Medicare at 60—despite not being included in recent legislation—has the political promise that it imposes a fairly diffused burden on taxpayers more generally and assists a well-defined group, people between ages 60 and 65, who will recognize the benefits of this policy and may organize politically to try to ensure its enactment.

Challenges could arise if incumbent Medicare beneficiaries become upset about the lowering of the eligibility age, under the belief that bringing more people into the program will reduce program benefits. Some commentators and politicians posited such an outcome.[108] However, it seems unlikely that merely changing the

biden-plan-to-lower-medicare-eligibility-age-to-60-faces-hostility-from-hospitals/ [https://perma.cc/H8QQ-KRPD] ("Lowering the Medicare eligibility age is popular. About 85% of Democrats and 69% of Republicans favor allowing those as young as 50 to buy into Medicare.").

105. *See, e.g.*, Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 837 (1997) ("Economic and political theorists agree that organized interests are most influential when they are small and the issue they promote is narrowly focused. When the interest group is small and narrowly focused, it is better able to overcome its collective action problems. When the issue provides narrow benefits to the group, but diffuse costs to society, not only is the group better able to organize, but opposition is less likely to exist."); Lisa L. Tharpe, *Analysis of the Political Dynamics Surrounding the Enactment of the 1993 Family and Medical Leave Act*, 47 EMORY L.J. 379, 379–80 (1998) (explaining that positive political theory "predicts that smaller, well-organized interest groups will prevail over larger, more diffuse ones"); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 728 (1985) ("In this standard scenario of pluralistic politics, it is precisely the diffuse character of the majority forced to pay the bill for tariffs, agricultural subsidies, and the like, that allows strategically located Congressmen to deliver the goods to their well-organized local constituents.").

106. *See* Galewitz, *supra* note 104 (reporting statement of public policy professor Jonathan Oberlander that "'[i]t is hard to find a reform idea that is more popular than opening up Medicare' to people as young as 60," and that "early retirees would like the concept, as would employers, who could save on their health costs as workers gravitate to Medicare").

107. *Cf.* Govind Persad, *Expensive Patients, Reinsurance, and the Future of Health Care Reform*, 69 EMORY L.J. 1153, 1191 (2020) (arguing that "a well-designed high-risk pool will reduce resentment of high-risk patients").

108. Rick Newman, *How 'Medicare For All' Might Harm Seniors*, YAHOO! FIN. (Apr. 30, 2019), https://finance.yahoo.com/news/how-medicare-for-all-might-harm-seniors-15181549

eligibility age would prompt such strong pushback, particularly because people just below age 65 are often closely connected to those just above age 65 by family and marital ties. In this respect, Medicare at 60 may be better positioned politically than a broader program such as Medicare for All, which—even though it also would not remove eligibility from existing beneficiaries—extends its benefits so widely that the set of potential beneficiaries may no longer be so well-organized. And Medicare for All also requires higher costs that could lead taxpayers to become frustrated or resistant.[109]

Another source of pushback against Medicare at 60 might be health care providers and hospitals who may fear receiving lower reimbursement from Medicare than they would from private insurers.[110] Such pushback, however, will depend on the Medicare reimbursement rate and whether it is easier to handle Medicare reimbursement than reimbursement from certain private insurers or from Medicaid.

Would Medicare at 60 lead to age 60 thresholds in other programs as well? There is reason to think it might, given the public salience of Medicare and the numerous programs described in Part II that have open eligibility at age 60 or even earlier. But there is also reason for doubt, especially with respect to programs that have high price tags, such as Social Security or certain tax benefits. Lowering the Social Security eligibility age or full retirement age would also advance equity, just as Medicare at 60 does, but might more obviously seem to threaten the long-term solvency of Social Security for current or future participants.[111] These solvency

4.html [https://perma.cc/79PG-RS9S] (reporting statement by Center for Medicare and Medicaid Services Administrator Seema Verma that "[w]e think the focus should be on strengthening and protecting our Medicare program, not trying to weaken it by adding more people to the program").

109. *See* Seth J. Chandler, *Medicare for All: The Need for a Long Approach*, 20 HOUS. J. HEALTH L. & POL'Y 1, 1–3, 8–9 (2020).

110. Galewitz, *supra* note 104 ("Hospitals fear adding millions of people to Medicare will cost them billions of dollars in revenue. . . . Medicare reimbursement rates for patients admitted to hospitals average half what commercial or employer-sponsored insurance plans pay.").

111. *See, e.g.*, Judith A. McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C. L. REV. 347, 368 (1988) ("In its effort to shore up the Social Security system, Congress has taken steps to discourage early retirement, such as raising the eligibility age for Social Security and the eligibility age for early retirement, both of which will be gradually phased in over the next decades."); Sara E. Rix, *The Aging of the American Workforce*, 81 CHI.-KENT L. REV. 593, 610–11 (2006) ("Further increases in Social Security's full retirement age could go a substantial way toward restoring the long-range solvency of the Social Security trust funds. Some economists argue that workers should retire later in light of the increasing life expectancy that has lengthened the years workers spend in retirement."); *see also* Samuel Kan, *Divorce and the Collapse of the*

problems could potentially be addressed by, for instance, raising the cap on earnings that are taxable for Social Security purposes,[112] but such a change would require concerted political effort.

With respect to less consequential programs, such as discounts and tax benefits, the harmonization of age cutoffs across programs appears more likely, especially if Medicare cards or enrollment are used as a verification criterion, as is required for some transportation discount fare programs.[113] A challenge for lowering age thresholds across the board, however, is that if life expectancy continues to lengthen—at least for better off populations—this will fuel the push toward *raising*, rather than lowering, minimum age eligibility thresholds in order to limit program costs.[114]

B. *Eliminating Age Cutoffs*

To what extent would arguments for adjusting age cutoffs downward also support the complete removal of age cutoffs, as a Medicare for All program would involve? As age cutoffs move downward, more people are included, and a greater proportion of disadvantaged people are included as well. This would serve the aims of benefiting people and addressing disadvantage. It would also

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Three-Legged Stool: Setting Servicemembers Up for Success in the Age of BRS and Covid-19, 66 WAYNE L. REV. 409, 471–72 (2021) ("Second, Congress should decrease benefits by gradually increasing the full retirement age past age sixty-seven and the early retirement age past age sixty-two.").

112. Nina Mojiri-Azad, *Social Security Benefits to Widows: The Ongoing Favoritism of Single-Earner Families and the Impact on Elderly Women*, 17 LAW & INEQ. 537, 559 (1999) ("In light of the recent prognosis concerning the viability of the Social Security system, the use of this cap should be re-examined. If the earnings cap is raised or eliminated, more contributions would be made to the Social Security Fund."); Regina T. Jefferson, *"Let Them Eat Cake": Examining United States Retirement Savings Policy Through the Lens of International Human Rights Principles*, 31 HARV. HUM. RTS. J. 63, 105 (2018) ("In order to strengthen the financial position of the Social Security program and infuse additional funding into the system to help pay for the proposed benefit increases discussed above, the payroll cap on wages subject to the Social Security payroll tax should be eliminated."). *But see* Linda Sugin, *Payroll Taxes, Mythology, and Fairness*, 51 HARV. J. ON LEGIS. 113, 162 (2014) (observing that "[t]he possibility of raising or eliminating the earnings cap has been the most widely discussed solution for the long-term imbalance," and removing the cap "would raise the most total revenue, compared to the other options for changing the taxation of earnings," but arguing against cap removal on the basis that it would unfairly disadvantage those receiving labor income compared to those receiving capital income).

113. 49 U.S.C. § 5307(c) (requiring organizations receiving federal financing to "ensure that, during non-peak hours for transportation using or involving a facility or equipment of a project financed under this section, a fare that is not more than 50 percent of the peak hour fare will be charged for any . . . individual presenting a Medicare card issued to that individual under Title II or XVIII of the Social Security Act").

114. Rovner, *supra* note 1 ("In recent years, Republicans have pushed to raise the eligibility age to 67, to match the new Social Security threshold being phased in.").

obviate the issue of horizontal equity and could serve the aim of recognizing and promoting individual choice. For instance, someone might be able to pursue entrepreneurship or caregiving more easily at an earlier age without having to worry about reduced access to affordable, broad-network health insurance.[115]

The relative merit of eliminating versus merely adjusting age cutoffs likely depends on the availability of alternative sources of benefits at different ages. For instance, if most people's life plans allow them to access employment-based insurance or affordable marketplace insurance earlier in life—say, before age 60—the gains from earlier eligibility may be less.[116] There may be a "sweet spot" beyond which the costs of eligibility expansion are not justified by the benefits. Although defining program eligibility using age risks homogenizing individual life plans, allowing complete flexibility in program eligibility presents the problem of runaway program costs.

Path dependence is obviously relevant here. For instance, a designer building a medical insurance system from its inception might not define eligibility using minimum age limits. But when working within the United States' current medical system, adjusting the existing minimum age limits downward is a more tractable approach that allows progressive adjustment to change rather than creating sweeping change all at once. The same is true for other policies that incorporate minimum age limits, such as Social Security. Instead of age-based eligibility, an initial design for these programs might instead have chosen universal eligibility combined with higher taxation of benefits for higher earners (akin to a basic income) or eligibility based on financial need rather than on age. But shifting to such a benefit design from the status quo might be very challenging.[117] Lowering the eligibility age is a simple and tractable way of trying to improve the equity of benefits arrangements.

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115. Brendan S. Maher, *Unlocking Exchanges*, 24 CONN. INS. L.J. 125, 143 (2017) (observing that "[n]o credible moral theory conditions the availability of health insurance and care upon having a job with health insurance benefits; that would exclude, just to name a few examples that come to mind, the young, the old, freelancers, entrepreneurs, the disabled, homemakers, and the unemployed").

116. Persad, *supra* note 101, at 826 (explaining that health insurance affordability is most challenging for individual marketplace purchasers who are middle-aged and older participants).

117. *See* Chandler, *supra* note 109, at 1 (discussing high cost of shifting to a Medicare-for-All policy and explaining that the cost would be seen in the form of increased taxes).

Eliminating minimum age cutoffs entirely could, however, have certain expressive or symbolic benefits. One advantage might be a reduced association between chronological age and frailty: current programs may contribute to ageist perceptions that older people, merely by virtue of their chronological age, are frailer and less able to do certain tasks. Removing age cutoffs would also define program eligibility in more tailored ways, rather than using age as an all-purpose profiling tool. While the use of age does not, and in my view should not, prompt the same sorts of legal strictures that exist with respect to the use of criteria such as race, there might be advantages to avoiding age-based profiling.

Removing minimum age cutoffs would also help counteract what one might call an "inverted antisubordination" framework for the use of age. This framework would see *maximum* age requirements as troubling because they exclude people who fall above a certain age but see *minimum* age requirements as untroubling because they only exclude people who fall below a given age. As discussed in Part II, the Age Discrimination in Employment Act ("ADEA"), which in work settings only proscribes age discrimination against people over age 40 in work settings, comes closest to embodying this view, at least under the Supreme Court's interpretation. In *General Dynamics Land Systems, Inc. v. Cline*, the Supreme Court concluded, in rejecting the legitimacy of age discrimination claims by younger workers under the ADEA, that—at least regarding employment—"as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype."[118] The Court went on to claim that "[o]ne commonplace conception of American society in recent decades is its character as a 'youth culture,' and in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older."[119] Two vigorous dissents, however, argued that age discrimination could plausibly be understood—as the regulatory agency charged with enforcing the ADEA previously had—to cover any discrimination based on age, whether against those earlier in life or those later.[120]

118. 540 U.S. 581, 589–91 (2004); *see also id.* at 593 ("[O]ur consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern.").

119. *Id.* at 591.

120. *Id.* at 613 (Thomas, J., dissenting) ("[T]he ADEA clearly prohibits discrimination because of an individual's age, whether the individual is too old or too young."); *id.* at 601

As the Supreme Court's language indicates, the inverted antisubordination approach regards people earlier in their lives as a socially dominant group, akin to people who are white, male, nondisabled, or have other advantaged social identities. But the problem with this analysis is that people earlier in their lives—while they may on average be less medically frail—are not properly viewed as socially dominant. The population of people early in their lives right now contains many people who will not live to old age because of health conditions, accidents, or violence. All these obstacles to longevity are exacerbated by other forms of disadvantage. In contrast, people above minimum age cutoffs have, by definition, been able to live to old age, an outcome that is highly correlated with various forms of social advantage.

Are people at *earlier* ages the proper objects of an antisubordination framework? This question illustrates the limits of classifying groups on a binary, as either subordinated or dominant. People at earlier ages are less likely to face some of the medical challenges faced by people at later ages. For instance, people at earlier ages on average have lower health insurance costs and face fewer health limitations that make it more difficult for them to work in certain types of jobs.[121] But, as noted above, people at earlier ages are much more likely to be members of groups who face other forms of disadvantage or oppression, such as members of minority groups and people with life-shortening health conditions.

Rather than viewing age through an antisubordination framework, it seems preferable to consider specific uses of age in light of the goals of specific programs. For instance, it may make sense to

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(Scalia, J., dissenting) ("[T]he [Equal Employment Opportunity Commission]'s interpretation is neither foreclosed by the statute nor unreasonable.").

121. *See* Fernando M. Torres-Gil, *The New Aging: Individual and Societal Responses*, 10 ELDER L.J. 91, 108 (2002) ("A major consequence of aging is the increased numbers of persons who will require some type of caregiving and assistance with activities of daily living, or ADLs (e.g., bathing, toileting, walking)."); Rebecca C. Morgan, *What the Future of Aging Means to All of Us: An Era of Possibilities*, 48 IND. L. REV. 125, 129 n.22 (2014) ("The CBO report notes that the chance of having a functional limitation grows with age. . . . Of those aged sixty-five to seventy-four who live in the community, fewer than twenty percent reported a functional limitation, but of those at least age eighty-five, it jumps to almost three-times that amount. Nearly one-third of those aged seventy-five to eighty-four have a functional limitation. Those who need help with activities of daily living (ADLs) (fourteen percent of the sixty-five to seventy-four age group), need assistance with at least one ADL while forty-one percent of those at least eighty-five do." (internal citations omitted)); Michael C. Chase, *"Transferable Skills" and the Older Claimant's Dilemma: A Call for Allowing Employer Hiring Practices and Other Economic Justifications to Be Relevant in the Decision to Award Disability Benefits*, 31 RUTGERS L.J. 553, 582 (2000) (explaining that "providing health insurance to newly-hired older workers is more expensive than for younger ones").

set minimum age thresholds for certain programs in order to use age as a proxy for frailty. But using minimum age thresholds in this way is, at the same time, fraught with problems because of the unequal levels of frailty or other challenges that people face at a given age. In particular, medical research documents the phenomenon of "weathering" in older people from minority communities.[122] This phenomenon indicates that frailty can come on more rapidly for people who face a variety of other social challenges, making their chronological age is a poor predictor of their capabilities.[123] In light of phenomena like weathering, it would seem preferable to try to use frailty itself as the criterion for policies that aim to address frailty, rather than using a proxy such as age.

Notably, with respect to frailty, Medicare permits access to benefits earlier for people with specific high-cost medical conditions, such as end-stage renal disease.[124] The rationale for this earlier provision of Medicare seems to be that people with severe medical frailty are both likely to require expensive care and unlikely to be able to work full-time. Illness-based eligibility for Medicare seems to regard Medicare as, at least in part, a need-based program rather than one based on merit or past payments into the program.

C. *Combining Age Cutoffs*

One alternative to lowering eligibility ages across the board (as Medicare at 60 would do) or eliminating them altogether is to combine age with other potential bases for eligibility in order to better track the differential needs of people at different ages. For

122. Arline T. Geronimus, Margaret Hicken, Danya Keene & John Bound, *"Weathering" and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States*, AM. J. PUB. HEALTH, May 2006, at 826, 826, https://dx.doi.org/10.2105%2FAJPH.2004.060749 [https://perma.cc/6NC4-CV7Y]; Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1261 (2020) ("The idea is that chronic stress—measured in terms of 'allostatic load'—increases the speed at which body systems deteriorate. The physiologic responses to persistent stress may result in the 'weathering' of body systems, making them age more rapidly. One study on 'chromosomal markers of aging indicate that black women ages 49-55 appear on average 7.5 "biological" years older than white women.' Other studies propose that chronic stress can impact the adrenal system, resulting in 'obesity, hypertension, and diabetes.' If racism is a source of chronic stress for black people, and if chronic stress has negative physiological impacts, then racism could explain the higher rates of morbidity and mortality among black women. Indeed, weathering would explain why black women who report encountering race-based stresses are more likely to give birth to preterm infants or infants with lower birth weights than black women who do not report encountering these stresses.").

123. Bridges, *supra* note 122, at 1260–61.

124. Persad, *supra* note 107, at 1189 (explaining that "patients with end-stage renal disease (ESRD) who require dialysis, regardless of age, are covered by Medicare").

instance, eligibility could be set at different ages in communities that have different life expectancies. This idea parallels proposals that have been made in the COVID-19 pandemic to vary vaccine eligibility according to local life expectancy, with people in shorter-life-expectancy counties receiving earlier access to vaccines.[125] Some state regulations implementing the Older Americans Act also use local demographics for their funding distribution, although they base funding on population-level group racial demographics rather than directly on community life expectancy.[126] Areas receive funding based on their overall population of residents above 75 and minority residents over 60.[127] In contrast, defining eligibility based on an individual beneficiary's race, even in combination with age, is likely to present legal problems.[128]

In addition to varying binary thresholds according to occupation, geography, or demography, policymakers could also replace binary thresholds for eligibility with eligibility gradients. The underlying factors thought to justify minimum age cutoffs for eligibility, such as higher predicted medical costs, higher need, or lower future life expectancy, typically phase in over a period of time rather than appearing all at once. This suggests the possibility of replacing binary cutoffs, whether at age 60, 65, or some other age, with a phase-in process under which people receive increasing benefits over time.[129] A phase-in, as opposed to binary, approach is already used for certain programs. For instance, in some states, driver's license fees decrease progressively with age rather than there being a single cutoff for access to a discount.[130] As discussed above, Social Security also has a phase-in process, where people who take Social Security earlier receive smaller benefit checks than those

125. Ted Doolittle, Opinion, *Making COVID Vaccination More Fair*, CT MIRROR (Feb. 2, 2021), https://ctmirror.org/category/ct-viewpoints/making-covid-vaccination-more-fair [https://perma.cc/TDH7-9VXW].

126. ILL. ADMIN. CODE tit. 89, § 230.45 (1992) (listing as "indicators of greatest social need, the number of the state's elderly" who are "60 years and over and a member of a minority group" and those "75 years of age and over"); UTAH ADMIN. CODE r. 510-100-1 (LexisNexis 2015) (specifying that the "[w]eighted elderly population shall consist of: (i) The number of persons age 60 and over who have annual incomes below 125% of the poverty level, plus (ii) The number of persons age 75 and over weighted two times, plus (iii) The number of minority persons, as defined by the Governor's Office of Planning and Budget, age 60 and over.").

127. ILL. ADMIN. CODE tit. 89, § 230.45 (1992); UTAH ADMIN. CODE r. 510-100-1 (LexisNexis 2015).

128. *See* Persad, *supra* note 2, at 1120.

129. *Cf.* Kolber, *supra* note 74, at 669–70.

130. *See* 625 ILL. COMP. STAT. 5/6-118 (2019).

who postpone benefit receipt.[131] For a program like Medicare, people might be permitted to start buying into Medicare at age 50 or 60, with the share of premiums borne by the government increasing over time until, at age 65, the premium drops to the current level charged to Part B purchasers.

Varying age cutoffs according to geographic or demographic indicators of life expectancy makes normative sense but also may face administrability challenges. Geographic areas are internally heterogeneous: a long-lived state, county, or zip code may have many disadvantaged residents with short life expectancies.[132] This might be partly alleviated by using the life expectancy of the most disadvantaged quartile or decile of decedents as a benchmark. Geographic criteria also present the challenge of properly classifying people who move between zip codes, in particular upon entering retirement. Someone's lifespan is likely to reflect their zip code earlier in life more than their zip code during retirement.[133] If eligibility were based only on present zip code, this might lead those hoping to receive earlier access to benefits to move to some of these zip codes. This could desirably lead to greater socioeconomic integration,[134] similar to "opportunity zone" programs or other incentives for businesses that locate in underserved areas,[135] but it is not

131. *See* Kan, *supra* note 111, at 432–33 ("For those working individuals born in 1943 or later, Social Security adds eight percent to one's benefit for each full year the individual delays receiving Social Security benefits beyond his or her full retirement age up to the age of seventy.").

132. *See* Charity Scott, *Incorporating Lawyers on the Interprofessional Team to Promote Health and Health Equity*, 14 IND. HEALTH L. REV. 54, 72 (2017), https://doi.org/10.18060/3911.0029 [https://perma.cc/U8BL-X695] ("In New Orleans, for example, life expectancy can vary by as much as twenty-five years across neighborhoods. In Atlanta, a thirteen-year difference in life expectancy exists between the neighborhoods of Buckhead and Bankhead, less than six-miles apart.").

133. *See* Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 774 (2020) (explaining that "today in Alameda County, California, 'a White child born in the affluent Oakland hills will live on average 15 years longer than an African-American child born just miles away in East or West Oakland'").

134. Zachary C. Freund, *Perpetuating Segregation or Turning Discrimination on Its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833, 853 (2018) (discussing argument that "middle-income residents' migration into lower-income neighborhoods yields increased integration and enhances community resources to the benefit of the preexisting residents who remain"); Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 843 (2019) (discussing arguments that the movement of wealthier individuals is "necessary to: stem population loss in cities; rebuild public and private neighborhood institutions in under-resourced neighborhoods; and promote interaction across race and class lines").

135. *Cf.* Dechert LLP v. Pennsylvania Dep't Cmty. & Econ. Dev., 234 A.3d 911, 912–13 (Pa. Commw. Ct. 2020) (discussing program "to encourage business development and

obvious that it would be an effective way of calibrating eligibility to individual lifespan or risk.

Another option, which could be used alongside geographic data, would be to calibrate eligibility ages to employment or economic status. For instance, eligibility age could depend on the number of work quarters in certain industries as opposed to others, with people who worked in high-risk, lower wage industries—such as agricultural and slaughterhouse work, mining, and domestic labor—becoming eligible sooner than others.[136] Or, people who worked more quarters earlier in life could be made eligible earlier. As one article notes, the comparative burden of occupational activities plays a role in the generosity of railroad retirement benefits.[137] More generally, earlier retirement was traditionally the practice in certain fields that are considered to be highly burdensome, and early retirement—often alongside a generous defined-benefit pension—is still offered for specific public-sector occupations, such as law enforcement, firefighting, and the military.[138] Such a policy will be an imperfect proxy for risk or disadvantage because people may be active in many different careers during their working lives, but it may be a tractable way of trying to better calibrate age cutoffs to risk.

A further possibility to help offset the costs produced by allowing some people to take Social Security earlier would be to remove or further pare back the additional benefits received by people who choose to take Social Security at a later age, such as age 70. Currently, delaying benefit receipt is highly financially adventurous. This, however, might present political challenges because people may perceive waiting to take Social Security as a "responsible" choice that should be rewarded[139] and because of difficulties of

employment in certain distressed areas"); Poplar Point RBBR, LLC v. United States, 147 Fed. Cl. 201, 208 (2020) (mentioning "a federal Opportunity Zone, a program providing tax incentives for commercial projects to locate in low-income communities").

136. Thomas R. Ireland, *Accounting for Work Time Differences in Personal Injury Litigation*, J. LEGAL ECON. 65, 73 (2003) ("Occupations differ in what constitutes normal retirement ages. Most professional athletes will have retired from their respective sports by the age of 40. Firefighters, police and military occupations offer pensions after 20 years of work." (emphasis omitted)).

137. *Id.* ("Many of the jobs in this industry involve hard outside labor and nights away from home. This is reflected in pension arrangements such that a worker with 360 months of railroad credits can retire with a retirement annuity that is not actuarially reduced at age 60 under current law. Early retirement provisions under the Railroad Retirement System reflect the nature of the type of work being done.").

138. *See id.*

139. *Cf.* Steve Lohr, *For a Good Retirement, Find Work. Good Luck*, N.Y. TIMES (June 22, 2008), https://www.nytimes.com/2008/06/22/weekinreview/22lohr.html [https://

obtaining an analogous guarantee of lifetime income outside of the Social Security program.[140]

D. *Replacing Age Cutoffs*

Yet another way of reforming age cutoffs would be to shift from an eligibility age to a period of eligibility time. Considered abstractly, this may appear fair because each person receives the same total benefit and is able to select the time during which they will receive it. Some commentators have discussed such proposals—for instance, "a model where, for every two years of work, there is one year of retirement."[141] On this approach, eligibility for benefits would be more analogous to eligibility for paid leave—workers would earn these benefits by working and then be able to recoup them at a time of their choosing.

A different normative underpinning for replacing minimum age cutoffs with time-period eligibility is the ethical value of *equality of resources*.[142] Under this framework, everyone would be eligible for public support for an equal number of years. This allows individuals flexibility to decide when during their lives they would like to receive public support or have access to certain benefit programs, rather than being restricted to receiving this support later

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perma.cc/E23A-MFA2] ("Waiting, and working longer, she says, is the wiser and more financially responsible choice for most people. A person who retires at 66 will pocket a monthly Social Security check that is one-third higher than if that person retired at 62."); Rhian Horgan, Opinion, *Five Coronavirus Lessons for Anyone With a Retirement Fund*, FOX BUS. (May 1, 2020), https://www.foxbusiness.com/personal-finance/coronavirus-lessons-retirement-fund [https://perma.cc/5C6J-GXBB] ("[A]t times, delaying retirement is the most financially responsible choice. This act has many benefits, and it can allow your finances to be sustainable for a longer period of time, so it is definitely worth considering not just when times are tough, but as a strategy for long-term financial success.").

140. Joseph Bankman & Barbara H. Fried, *Winners and Losers in the Shift to a Consumption Tax*, 86 GEO. L.J. 539, 553 n.36 (1998) (explaining that "private annuities offer an unfavorable rate of return, due primarily to adverse selection"); Jefferson, *supra* note 112, at 96–97 ("[B]ecause the normal form of payment in the Social Security program is a life annuity, Social Security effectively provides a guaranteed rate of return throughout retirement. This feature protects workers from the risk of outliving their assets, a form of protection increasingly difficult to find in the private retirement system, which now offers fewer defined benefit plans.").

141. Templin, *supra* note 72, at 1214.

142. *See, e.g.*, Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 476 (2007) ("While one's choices are always constrained by scarcity, the idea of equality of resources is that scarcity should be apportioned so that each person has a pro rata share of the resources available for her generation."); *see also id.* at 476 n.19 (reviewing the views of proponents of equality of resources).

in their lives. Such an approach would better foster a variety of life plans.

However, a time-limited, period-of-eligibility approach is difficult to implement because of the unpredictable length of individual life expectancy. To the extent that public benefit programs are intended to prevent destitution, time-limited benefits present the risk that someone will outlive the benefit period.[143] Of course, someone who lives so long that they outlive their eligibility is quite likely to be better off over their lifetime, possibly immensely so, than someone who dies younger.[144] Unlimited eligibility for social insurance has the unusual feature of being provision of insurance against a *good* outcome, longevity, rather than the more usual form of insurance against bad outcomes such as illness, destruction of valuable property like a home or car, or liability for an accident caused by or on one's property.[145] Most people would find dying at the age of 100 almost immeasurably preferable to dying at age 60. Yet it will strike many as untenable to end benefits for a person at age 100 no matter how well off, or how much better off than others, they are from a lifetime perspective.[146]

Others have suggested that people should be allowed to shift some of their Social Security benefits to support paid leave earlier in life.[147] This proposal would allow people to better calibrate their use of Social Security benefits to their life plan, making the

143. *Cf.* Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1748 (1998) (explaining that a "term-annuity option would be unappealing" because it presents the risk that one partner "might outlive the annuity period").

144. *See* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315, 330 ("Other studies analyze the data slightly differently by attempting to place a value on one year of life. They calculate figures in the range of an average of $300,000 to $500,000 per person per year of life (depending upon a number of variables)."); Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 980 (2004) ("FDA has calculated an assumed [monetary value] of $373,000 for a statistical [Quality Adjusted Life Year] [i.e., each year of life at a QALY value of 1].").

145. Persad, *supra* note 63, at 948 (explaining that "insurance is typically designed to indemnify people against the consequences of *bad* luck," but that "[i]n contrast, old-age insurance programs like Medicare compensate people when they experience the *good* luck of living long enough to need health care at eighty-five or ninety-five.").

146. *Id.* at 930 ("The nonabandonment principle implies that older people should not be entirely excluded from the benefits of the health care system, and that they retain claims to assistance insofar as they can benefit from medical interventions.").

147. Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 427–28 (2019) ("Senator Marco Rubio sponsored the Economic Security for New Parents Act . . . . This plan provided paid leave by allowing new parents to pull money from their own Social Security benefits—so the paid leave would, many years down the line, delay the retirement of any parent who used it.").

program more akin to a time-limited basic income. However, such proposals have been vigorously criticized on two grounds. First, people might mispredict their later needs and be left without adequate benefits if they live longer than they expected.[148] Some theorists have framed this in terms of unjust deprivation of a future self.[149] Second, some believe it is unfair to permit people to reduce or alienate what should be an inalienable entitlement to retirement benefits.[150] Notably, people are also not allowed to pledge or alienate their Social Security benefits, although they can pledge or alienate existing property or income streams in reliance on later receipt of Social Security.

During the COVID-19 pandemic, people have also been permitted to withdraw money from certain tax-advantaged retirement accounts, such as 401(k) accounts, without penalty, even though penalty-free withdrawals are normally only available to those over age 60.[151] Because these retirement accounts are more often used by wealthier savers to deliver benefits over and above those available from public benefit programs,[152] and because people are permitted to withdraw funds from these accounts regardless of their current age if they pay a penalty, such a proposal does not raise the same concerns about destitution or abandonment as would a proposal to allow early use of Social Security or Medicare.

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148. *See generally* RICHARD POSNER, AGING AND OLD AGE (1995).

149. *See generally id.*

150. Ryan Cooper, Opinion, *Coronavirus Is No Reason to Cut Social Security*, WEEK (May 11, 2020), https://theweek.com/articles/913783/coronavirus-no-reason-cut-social-security [https://perma.cc/76LQ-TUJ5]; Kelly McDonald Garrison, Avantica Shinde, Mary Stoney, Daniel Wood & Xiaodan Zhang, *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 359 (2020) (arguing that "the New Parents Act presents a three-way Hobson's choice: no paid leave, diminished future paychecks, or a requirement to work further into the employee's golden years").

151. IRS, CORONAVIRUS-RELATED RELIEF FOR RETIREMENT PLANS AND IRAS QUESTIONS AND ANSWERS (2021), https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers [https://perma.cc/W2K6-FYPC].

152. Khristopher J. Brooks, *New Stimulus Bill Allows Penalty-Free 401(k) Withdrawals. Should You Do It?*, CBS NEWS (Jan. 6, 2021, 3:19 PM), https://www.cbsnews.com/news/stimulus-bill-covid-relief-penalty-free-401k-withdrawal [https://perma.cc/8EHF-5JJL] (reporting that "Monique Morrissey, an economist with the Economic Policy Institute [said] [t]he nation has seen 'a ripple and not a wave' of 401(k) withdrawals because the most cash-strapped Americans who would need that money — namely service sector workers — had jobs that didn't offer retirement plans to begin with"); *see also* Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. ON LEGIS. 53, 68 (2012) ("401(k)s are traditionally offered to those with long-term employment with a company. But women, African Americans, Latinos, and those with lower incomes tend to work for shorter durations and are more likely to move from job to job. This makes it much more difficult for them to gain a foothold in a company's plan.").

Ultimately, many seem to view Medicare and Social Security as universal civic benefits like parks and roads, to which people do not lose their entitlement—no matter how long or intensively they have used them. Once a person has become eligible for these programs, many will believe that their benefit receipt may never be allowed to end or at least should never end merely through the passage of time. This may present problems for efforts to replace the use of minimum age cutoffs followed by an open-ended eligibility period (as programs like Medicare and Social Security are currently organized) with a fixed number of eligibility years that can be taken at any time during life. If lifespans continue to diverge—or begins to diverge more sharply—between those who are more or less advantaged, however, the use of open-ended eligibility may become normatively harder to defend, as disadvantaged people will increasingly be asked to underwrite the provision of benefits they are highly unlikely to ever themselves receive.

CONCLUSION

Despite the ubiquity of minimum age thresholds, there is little literature articulating the justification for these thresholds. Further, unlike certain types of maximum age thresholds, such as mandatory retirement laws or exclusions of people older than a certain age from access to scarce medical treatments, which have been challenged as ageist or unfair to people who crossed the maximum threshold,[153] there is generally little objection to these minimum thresholds. Proposals to lower the Medicare eligibility age to 60 offer an opportunity to revisit the rationales for our current thresholds, and concerns raised about minimum age cutoffs during the COVID-19 pandemic suggest that our current thresholds for other programs may unintentionally exacerbate existing patterns of disadvantage. Together, these changes suggest an opportunity to reform age cutoffs in public programs, including but not limited to Medicare, to better align them with societal goals.

153. Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 91 (2012) ("Proponents of abolishing mandatory retirement called for the eradication of 'negative stereotypes' based upon age, as well as the parallels between 'ageism' and racism and sexism.").