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CORE VALUES IN CONFLICT: THE UNITED STATES APPROACH TO ECONOMIC ASSISTANCE TO THE ELDERLY

Lawrence A. Frolik*

In devising programs to assist the elderly, the United States has, for the most part, rejected the social welfare model, which is premised on a belief that the government has an obligation to care for the elderly. The social welfare model often relies on social insurance where all members of society are required to contribute to a fund, which is then distributed through insurance to aid members of society who are in need. The current Medicare program, the federal subsidized health-care insurance program for the elderly, is an example of social insurance. The social welfare model, however, is not universally accepted. Many Americans believe that beyond a minimum safety net, the government should not, and likely cannot, save everyone from every bad outcome. Individuals must accept personal responsibility and care for themselves. To rely on the government is not only impractical but leads to a loss of liberty and autonomy.

As a result of this conflict in values, the United States does not usually operate programs modeled on social insurance, but rather provides care to those identified as “needy.” This does not mean that the United States refuses to provide subsidized care for the elderly; only that the government is not seen as required to provide such care and does so only out of a regard for the individual’s need, not because of any fundamental obligation to provide universal coverage. The result is that nearly every governmental program that assists the elderly is under constant scrutiny and must continually defend its existence.

The degree of economic assistance that the government ought to provide to the elderly is a political question open to challenge and debate. Even the premise that the government might want to assist the elderly is open to question in the minds of some. Consequently, the fundamental question is not, “How much should the government assist the elderly?” but rather, “Should the government assist the elderly?” The answer to the question of whether the government should assist the elderly is almost always “yes,” but merely asking the question colors the debate as to who the government should assist, in what way, and how much assistance should be provided.

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With subsidies for the elderly open to challenge, advocates for the elderly must be prepared to provide answers to the three basic questions:

- Who among the elderly should the government assist?

- What form should the assistance take?

- How much assistance should be provided?

For example, although the federal Social Security program has been operating for over seventy years, it still meets with opposition. A small minority still contends that the government has no responsibility, and perhaps even no right, to provide income to the elderly, except in the case of the direst need. Although such objections find little support, they are nevertheless afforded a hearing and, thus, require a response. A larger minority claims the present system is unsustainable and so must be radically changed.¹

Advocates for reform of the Social Security program do not feel a need for their proposals to guarantee a universal minimum income to the elderly sufficient to lift all of them above the poverty level. For example, advocates of so-called “personal responsibility” are free to propose reforms that will almost certainly result in some elderly being very poor, yet still claim that their proposed reforms would be true to national values such as autonomy and self-reliance, which to them are more important than alleviating elder poverty.

Currently, Social Security and Medicare are subjects of intense debate because they face an uncertain financial future. Unless both programs either reduce benefits or increase revenues, in a few years both programs will be paying benefits that exceed their revenues; as some claim, the programs will go “bankrupt.” The debate as to how to fix both programs, that is, how to realign revenues with expenditures, is currently awaiting the results of the 2008 Presidential election. The debate will be renewed, however, and will continue to reflect the national schism on the relative value of social insurance and personal responsibility. Because of these profound differences in philosophy, all suggested reforms of Social Security and Medicare are very politicized and will be extremely difficult to enact.

Additionally, a problem much less appreciated by the general public is how to pay for long-term care for the elderly, an issue which plagues the federal and state governments. Currently, Medicaid pays for about half of

¹ One suspects that these opponents have an unspoken dislike for the very concept of social insurance as antithetical to personal liberty.
the cost of long-term care for the impoverished elderly.\textsuperscript{2} Medicaid is a joint federal and state program of which the federal government subsidizes nearly one-half of the cost and establishes minimum-eligibility criteria.\textsuperscript{3} The state governments pay the other one-half of the cost and administer it with the result that Medicaid programs vary somewhat from state to state.\textsuperscript{4} What does not vary is the growing cost of the program, which is particularly vexing to state governments that see their Medicaid programs absorb an ever-increasing proportion of their budgets. While not a topic much discussed by politicians, those who understand the program realize that major changes are needed to reverse an unsustainable trend—to too many beneficiaries receiving care that is too costly.

Although not thoroughly discussed herein, the financial difficulties of Social Security, Medicare, and Medicaid are not going away, and when the debate is renewed, the question of how to make them financially stable promises to be very contentious.

Social Security is financed by a wage tax that currently produces more revenue than the annual expenditures for retirement benefits.\textsuperscript{5} The current excess of income over expenditures was an intentional result of the reforms of Social Security that occurred in the 1980s.\textsuperscript{6} At that time, Social Security was about to bring in less revenue than it was spending.\textsuperscript{7} To insure the financial well-being of Social Security, Congress changed it from a "pay-as-you-go" program to one that generated a surplus to be spent down in future years.\textsuperscript{8} Up until that time, Social Security had always been a program in which the taxes on workers paid for the benefits for the current retirees. Each generation paid the benefits for the preceding generation, and that generation in turn had its retirement benefits paid for by the next generation

\textsuperscript{2} Medicaid paid 57\% of the cost of nursing home care in 1997. \textsc{celia s. grabel}, \textsc{nat'l ctr. for health statistics, ctrs. for disease control \& prevention}, Characteristics of Elderly Nursing Home Current Residents and Discharges: Data from the 1997 National Nursing Home Survey, Advance Data No. 312 (April 25, 2000) (based on Congressional Budget Office data).

\textsuperscript{3} \textsc{richard l. kaplan}, \textit{The Inheritance Threat of Long-Term Care Expenses}, in \textsc{Proceedings of the 41st Annual Heckerling Institute on Estate Planning} 17-1, 17-17 (Mathew Bender 2007).

\textsuperscript{4} \textit{Id.} at 17-18.

\textsuperscript{5} Social Security also provides benefits to younger disabled individuals, but that aspect of the program is not part of this discussion.

\textsuperscript{6} \textsc{lawrence a. frolik \& alison mccrystal barnes}, \textsc{elder law: cases and materials} 163 (4th ed. 2007).

\textsuperscript{7} \textit{Id.}

\textsuperscript{8} \textsc{see john svahn \& mary ross, u.s. soc. sec. admin.}, \textit{Social Security Amendments of 1983: Legislative History and Summary of Provisions}, 46 Soc. Sec. Bull. 3 (July 1983).
of workers.\textsuperscript{9} However, in the 1980s, it became apparent that changing demographics were making that concept less feasible. The ratio of retirees collecting benefits to workers paying the wage tax was falling, resulting in an increased burden on workers. The trend continues today. In 2005, there were three workers paying the wage tax for every retiree receiving benefits or a 3:1 ratio. By the year 2030, that ratio will be 2:1.\textsuperscript{10} Similar to the 1980s, to keep the system solvent, workers may need to pay sharply increased wage taxes to keep Social Security solvent.\textsuperscript{11}

During the 1980s, the wage tax was raised enough to generate annual surpluses.\textsuperscript{12} For the first time, Social Security began to raise money to accumulate funds to pay future benefits.\textsuperscript{13} For the past twenty years, the surpluses have been invested in the United States Treasury notes that pay a fixed rate of interest, so that, today, Social Security has over $2 trillion of saved surplus.\textsuperscript{14}

The era of surplus revenues, however, is coming to a close. The exact year can only be estimated, but current estimates suggest that, by 2017, Social Security revenues will be less than the benefits paid.\textsuperscript{15} Although starting small, the revenue to expenditure gap will gradually widen.\textsuperscript{16} Initially, the deficit can be made up by the interest due on the treasury bonds held by the Social Security trust fund.\textsuperscript{17} By 2027, however, the program will have to begin to draw down principal by redeeming the treasury bonds that it holds.\textsuperscript{18} Though very large, the surplus held in the form of the treasury bonds will not last forever. It is estimated that, by the year 2041, the surpluses will be exhausted, and the revenue gap will remain.\textsuperscript{19} The annual shortfall is estimated at 25\%, or put another way, the current wage

\textsuperscript{9} FROLIK \& BARNES, supra note 6, at 162.
\textsuperscript{11} FROLIK \& BARNES, supra note 6, at 162.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
tax will only pay about 75% of the promised benefits once the surplus is exhausted. Many refer to this as the coming crisis of Social Security.

Others claim the crisis will arrive much sooner, estimating that the annual revenues become less than the annual expenditures near 2017. When that occurs, Social Security will begin to spend the interest on the treasury bonds to make up the shortfall. The question then becomes how will the federal government pay the interest on the bonds when it has an annual deficit that it has paid for in part by borrowing the surpluses from Social Security?

To pay back Social Security, the government will have to:

- increase the deficit of the federal budget;
- increase general-tax revenues by raising the income tax;
- raise the Social Security wage tax; or
- reduce Social Security benefit payments.

None of these alternatives is attractive. An increase in the deficit is not a solution and may lead to greater inflation. Raising any taxes, including the Social Security wage tax, is politically very unpopular and, according to President Bush and other leading Republicans, absolutely unacceptable. Reducing benefits could mean either raising the retirement age necessary to qualify for benefits or lowering the amount of benefits paid to some or all retirees, which in turn is likely to lead to greater poverty among the elderly.

Any cut in benefits would be fiercely resisted by the elderly and with good reason. Those who paid Social Security wage taxes between 1985 and 2017 will have paid, not only for the benefits of retirees, but also for part of their own retirement benefits. They were the first generation that was taxed to pay for part of their own benefits. Reducing the benefits of these workers would penalize them twice—first, by taxing them to help pay for their own benefits and, second, by reducing their benefits.

Therefore, Social Security is facing two crisis points: one near 2017, when expenditures exceed revenues, and again near 2041, when the surpluses run out. These events have caused many individuals and interest groups to offer possible solutions, so many that it is not feasible to cover them in detail. Instead, this Article presents the solutions grouped together into a few categories that reflect common underlying values.

20 Id.
One group of commentators who apparently subscribe to notions of social insurance favors a continuation of the current Social Security with no fundamental changes. They note that the crisis can be solved by:

- Using the interest paid to Social Security on the treasury bonds that it owns to meet the shortfall until about 2027. At that time, Social Security should start selling bonds to meet the revenue shortfall. To pay the interest and eventually repay the bonds, the government should increase the federal income tax as needed to raise the additional funds. The rise in the income tax should be borne primarily by the top five or ten percent of the income earners based upon the premise that their incomes have risen disproportionately over the past two decades.

- Avoiding the revenue shortfall of 2041 by raising the wage tax and by increasing the percentage of income subject to the wage tax (which suggests that, the sooner the tax is raised, the less it will have to be raised). The combined employee and employer wage tax is currently 12.4% (each pays 6.2%). If it were raised in 2008 to a combined 14.4%, Social Security would be solvent for another seventy-five years or until about 2080. Currently, about 85% of wage income is subject to the tax ($102,000 in 2008, adjusted annually for inflation). That percentage has declined in recent years to about 84% of wages, down from the historical 90% coverage, reflecting the rapid rise in earnings by upper-income employees (whose incomes have risen faster than inflation). A return to 90% coverage of wages is recommended by many and would cut the shortfall over the next seventy-five years by 45% although all earnings up to $180,000 would be subject to the Social Security wage tax. Some even advocate 100%

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22 Id. at 342 & n.3.
25 Moore, supra note 21, at 371.
26 Id.
coverage, taxing all earnings—just like the Medicare wage tax.27

- Eliminating the practice of indexing benefits to the Consumer Price Index, which some economists contend overstates the degree of inflation for the elderly by up to a 1% per year. In other words, if Consumer Price Index rises by 3%, benefits should not be raised that percentage, but rather by about 2%.28

Other suggestions are more drastic, but still maintain the essential nature of the Social Security program. These suggestions demonstrate a lack of commitment to the social-welfare model (evidenced by a reluctance to increase revenues, that is, raise taxes):

- Some commentators would have the Social Security program invest 40% of the $2 trillion surplus in stocks and so gain an estimated 3.5% higher annual return. This would reduce the shortfall over the next seventy-five years by 40%. Of course, the return on stocks could be better or worse with a corresponding effect on the shortfall. Not surprisingly, some of the strongest advocates for this proposal are investment firms and banks. Advocates do not agree as to who should make the investment choices. A popular idea would have the Social Security Administration buy indexed mutual funds rather than actively trading stocks.

- Other commentators believe that the current benefit schedule is not sacrosanct. They note that, if benefits were immediately cut by 13%, Social Security would be solvent for the next seventy-five years.29 There is very little support for this proposal, though many advocate some level of reduction in benefits, particularly for the retirees receiving the largest benefits. Some advocate a reduction

27 See id. at 369.
in benefits for retirees with other sources of retirement income. Others answer that, because higher income workers paid more Social Security wage taxes, they should receive more benefits. Moreover, if the benefits to higher-income retirees were cut, they would not support the program and might urge a radical transformation of Social Security.

Some suggest that raising the retirement age, the age at which full retirement benefits are paid, would be a logical step in light of rising life expectancy. At present, the age for full retirement benefits is sixty-six, and that will gradually rise to age sixty-seven by the year 2017. Some would immediately raise the age to sixty-seven and index it in the future to the growth in life expectancy.

Advocates for workers with physically demanding jobs reject any further rise in the age of retirement. They claim that age sixty-seven is too high as a retirement age in light of the nature of their jobs. African-Americans, who have a shorter life expectancy (age sixty-five) than white Americans, also object because an increase in the retirement age would result in a greater loss of benefits for them than for whites. Others point out that Social Security also provides disability benefits for individuals unable to work because of a mental or physical disability. Because the number of workers who apply for disability rises with age, some believe that workers claim disability as a means of retiring early. Given that the rate of disability increases with age, raising the retirement age may increase the number of workers filing for disability benefits. If this is true, a rise in the retirement age will raise the likelihood that more workers will become disabled before the increased retirement age, thus resulting in Social Security paying more disability benefits even as it pays fewer retirement benefits.

Not all commentators believe that Social Security should survive. Those with a strong aversion to social insurance prefer to replace it with

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31 Id.
33 Moore, supra note 21, at 382.
private-retirement accounts. Others want to greatly reduce its scope by partial privatization. President Bush, for example, advocates partial replacement of Social Security with private accounts, though many believe his ultimate goal is to completely dismantle the present system.

Under the proposal for private-retirement accounts, private accounts would be mandatory savings accounts funded by a tax on earnings—very much like the current Social Security wage tax. The tax proceeds, however, would not go to pay benefits to retirees, but would be maintained in an account for the benefit of the worker who would have control over how the account was invested. The amount of income that would be diverted to the plan and amount of investment latitude given to the worker varies from proposal to proposal.

The private-accounts proposals share a belief that an individual should save for his or her own retirement. Rather than the social-insurance model of Social Security that pools the risk of retirement by granting lifetime pensions, advocates for private accounts promote autonomy and self-reliance. They favor individual control over retirement savings at the cost of retirement-income security. They support the accumulation of personal wealth over income redistribution. Proponents of private accounts claim that it would help create an ownership society in which individuals would be free to spend their retirement accounts or save them and pass them on to their heirs.

Of course, even the most ideologically committed supporters of private accounts concede that some low-income workers will not be able to save enough to meet their basic needs in retirement, and a few even admit that some workers will invest their account so poorly that they will not accumulate sufficient funds for their retirement. Consequently, private-account supporters admit that some form of the current Social Security must remain. However, they would significantly lower the Social Security wage tax to free up funds for private accounts, while converting the Social Security benefit structure to a minimum payment with only modestly higher benefits for workers who paid higher wage taxes. In short, Social Security

35 See Moore, supra note 21, at 344.
37 Moore, supra note 21, at 347.
38 Id. at 345.
39 Id. at 345-46.
would become a welfare program—a safety net—that gathers wage-tax revenues and disburses a small, but universal, pension to all workers who paid into the program.

The transformation of Social Security into a program that exists to provide only a bare minimum level of benefits would change the perception of Social Security as primarily benefiting the poor elderly. As such, Social Security would no longer command the depth of support of the middle class that it presently enjoys. The benefit levels paid by such a program would become a subject of political debate, with proponents stressing the need for more basic income support of the elderly and opponents arguing that the benefits discourage individuals from working enough and saving enough to provide for old age.

The proposals for reform of Social Security take on greater significance because of the transformation of the American private-retirement system. Traditionally, retirement income was said to rest on a three-legged stool that consisted of Social Security, private-employer-provided pensions, and personal savings.\(^4\) Because of the expectation of employer-provided pensions and personal savings, Social Security was expected to provide only partial replacement of lost wages. The replacement rate for the average worker is about 40%, somewhat higher for lower-earning workers and less for higher-income workers.\(^{42}\) For workers with earnings above the maximum wage tax, the replacement percentage is even less.\(^{43}\)

When enacted, Social Security was seen as necessary social insurance protecting workers against the loss of income resulting from retirement, which was often involuntary. Either the employer forced the worker to retire at an arbitrary age, usually age sixty-five, or the worker was physically unable to perform his job as he aged. Today, mandatory retirement is outlawed by the federal Age Discrimination in Employment Act (ADEA)\(^{44}\) and far fewer jobs are so physically demanding that older workers find them impossible to perform.

The result is that retirement is seen as a voluntary, desirable event. For example, the average retirement age has settled between the ages of sixty-


two to sixty-three.\textsuperscript{45} The explanation is that age sixty-two is the earliest that a worker can claim Social Security retirement benefits, albeit actuarially reduced from what the worker would have received had he or she waited until reaching full retirement age (currently, age sixty-six).\textsuperscript{46} Some workers, thus, see Social Security less as a form of social insurance that saves them from poverty and more as an extra benefit that they have earned by paying wage taxes.

This attitude has two consequences. First, some workers consider whether a greater financial return would have been achieved by investing in a private-retirement account in lieu of paying the Social Security wage tax. Their perception is that they could have saved more by investing in a private-retirement account instead of being subject to the Social Security wage tax. Second, they could see Social Security as public benefits being paid to individuals who do not really need it, or do not need it to escape poverty. Both views reduce public support for Social Security.

The irony is that, as public support for Social Security is diminishing, the need for it is growing. As stated, retirement income is supposed to have three sources: Social Security, employer-provided-retirement pensions, and personal savings. Unfortunately, today, only the Social Security source of retirement income seems secure. Accordingly, they are an important aspect of retirement income. For those seniors age sixty-five and older, who are in the bottom-income quarter, Social Security provides over 85\% of their income.\textsuperscript{47} Even for those in the top-income quarter, Social Security is the source of 20\% of their income.\textsuperscript{48} As the transformation of the U.S. private-pension system continues, the importance of the Social Security program to the economic security of the elderly will only grow.

The private-pension system is voluntary on the part of employers, but is encouraged by a complex interaction of income-tax incentives and statutory and regulatory governance of pension plans. In the 1950s, many of the larger corporations adopted pension plans known as defined-benefit plans, which provide a lifetime annuity to the retired employee. These plans were most appropriate for employers who wanted to maintain a stable, lifelong workforce because the defined-benefit plan rewarded employees who remained with the employer for a long period of time.

\textsuperscript{46} \textit{FROLIK \& BARNES, supra} note 6, at 166.
\textsuperscript{48} Id.
To operate a defined-benefit plan, an employer funds a trust during the working career of the employee, relying on actuarial estimates of the amount that must be contributed to insure the ability to pay the promised annuity. The variables involved are length of employment, the wages paid to the employee, and the investment return on the money contributed to the plan by the employer. The latter, being subject to the fluctuations of the stock market and interest rates paid on fixed securities, was often the most volatile. The investment risk of a defined-benefit plan is on the employer, with the employee guaranteed an annuity of a set amount as calculated by the terms of the plan. If the plan has poor investment returns and fails to meet its projected rate of return, the employer must make up the difference.59

Changing work patterns in the 1980s and 1990s found fewer employees spending their lives working for the same employer. Although blue-collar workers might spend their lives with the same employer, white-collar management and professional employees were likely to work for several employers during their careers. For these employees, defined-benefit plans held little attraction. In response, employers began to offer 401(k) plans under which the employee, and sometimes the employer, contributes an amount to an account and the assets in the account grow each year (or decline) according to the investment return on the account.50

401(k) plans permit employees to manage the investments in their individual account.51 This feature is very popular because employers were relieved of the burden of investing the employees' retirement funds; in addition, many employees enjoy having the right to manage their own money.52 Of course, upon retirement, some employees can regret their investment choices when they see how small the account is relative to their income needs during retirement. Moreover, even if their investments are successful, only a minority of employees contribute enough to their 401(k) plans to fund a comfortable retirement.53

53 Stabile, supra note 50, at 311-12 ("Only about ten percent of participants contribute the maximum amount permitted under the Code, and those who do are likely to be the highest income employees.").
The movement away from defined-benefit plans has been dramatic. Although they still cover 21 million employees and pay benefits to 23 million retirees, the proportion of the workforce covered by these plans has dropped by more than half—from 40% of all employees in 1980 to less than 20% today.\(^{54}\) The newly enacted Pension Protection Act of 2006 promises to accelerate the trend as it imposes more administrative and funding requirements on the employers who offer these plans.\(^{55}\)

Overall, only about 50% of American workers participate in any retirement plan.\(^{56}\) Almost all public employees participate in a retirement plan although the plans vary considerably. Most, however, are a form of a defined-benefit plan although the federal government has moved to a defined-benefit plan. Lower-income workers participate in retirement plans at much lower rates than high-income workers.\(^{57}\) Most U.S. employers have fewer than twenty employees, and these employers usually do not offer a retirement plan for their employees. The decline in union membership has also resulted in fewer employees participating in a retirement plan.

At present, the official poverty rate for persons age sixty-five and older is slightly less than the general population.\(^{58}\) This could change as defined-benefit plans continue to disappear and retirees discover how difficult it is to stretch out a lump-sum retirement benefit from a 401(k) plan over thirty or more years of retirement.

As a result of the shift in investment risk from the employer to the employee within retirement plans, American workers face greater income insecurity in retirement. Curiously, at the same time, President Bush and others advocate increasing that risk by reducing Social Security benefits in favor of private-savings accounts.\(^{59}\)

Fortunately, there is some good economic news for the elderly. With the adoption of Medicare Part D, which pays for some prescription drugs,  


\(^{57}\) Frolik & Moore, supra note 49, at 6.


the elderly will pay less out-of-pocket for their health care. Unfortunately, the expansion of Medicare is offset by the continuing decline of employer-provided health-care benefits for retirees. Medicare does not pay all of the medical costs of its beneficiaries. Consequently, many elderly purchase private health-care insurance to supplement Medicare. Some elderly have supplemental health-care insurance provided for them by their former employer. Many unions specifically bargain for retiree medical benefits, particularly to cover prescription-drug expenses.

Faced with increasing global competition and the need to reduce costs, many employers are cutting back or eliminating employee-health benefits. Absent a contract with a union, an employer is free to reduce retiree health-care benefits for both prospective retirees and current retirees. The combined effect of the loss of defined-benefit-retirement plans and the elimination of retiree health-care benefits means that, in the years to come, many retirees will face the thirty years of retirement with inadequate retirement funds and be totally dependent upon Medicare for health-care insurance.

Unfortunately, Medicare, the federally subsidized health-insurance program for individuals age sixty-five and older, is also under financial pressure. The program is financed by a tax on wages of 2.9% split equally between the employee and employer. Medicare beneficiaries are also charged a monthly premium for hospitalization benefits and prescription drugs. The premium is supposed to provide a predetermined percentage of the cost of care, and as a result, premiums rise every year in response to the increasing cost of medical care. In addition, there is a 20% co-pay for physicians' services. The Medicare wage tax plus the premiums paid by the beneficiaries currently are enough to pay for the Medicare hospital expenditures (known as Medicare Part A), but that is predicted to end in about ten years and, hence, the claim that Medicare is facing bankruptcy.

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64 Id.
65 Id. at 13-2.
66 Id.
67 Id.
68 Id.
In contrast, payments for doctors (known as Medicare Part B) are financed by general-tax revenues and so cannot be projected to ever have a shortfall of funding.\(^6\)

There are at least two ways of fixing Medicare's finances. The first is to reduce expenditures, including reducing payments to physicians. The second is to transform the program into a needs-based program that offers greater benefits to those with lower incomes, that is, turn Medicare into a welfare program rather than a social-insurance program. That transformation, however, would severely reduce support of the program from those not participating in the program.

Providing and paying for long-term care for the elderly is also a looming issue. Although the problem is not well understood by the public and this is not part of the political debate, the importance of how to provide and pay for long-term care creates a serious political conundrum.

Currently, payment for long-term care for the elderly comes from a variety of sources. About one-half of the payment comes from the income and savings of the elderly themselves.\(^7\) Another large, but unreported source, is volunteer assistance by spouses, adult children, and other relatives and friends.\(^7\) The government pays for about one-half of the out-of-pocket costs of care. Privately owned long-term care insurance pays for only about 5% of the cost.\(^7\)

Government payment for long-term care comes overwhelmingly from the Medicaid program, because Medicare is designed to pay for acute care, not long-term care. Medicaid is a joint federal and state needs-based program that pays for both acute and chronic care.\(^7\) The federal law of Medicaid establishes eligibility criteria that states must follow if they are to qualify for federal aid, but because states administer the program, Medicaid operates differently from state to state. And, because states have to pay about one-half of the cost of Medicaid, states try to limit eligibility to keep down the costs. In response, many lawyers assist elderly individuals and their families to obtain eligibility for Medicaid. For example, almost 5,000 lawyers belong to the National Academy of Elder Law Attorneys, and as

\(^{6}\) Id.

\(^{7}\) Medicaid pays for about 40% of the cost of nursing homes, with private-pay sources making up the remainder less the modest percentage paid for by private insurance. JAMES H. SCHULTZ & ROBERT H. BINSTOCK, THE ECONOMICS AND POLITICS OF GROWING OLDER IN AMERICA 177 (2006).

\(^{71}\) Id.

\(^{72}\) FROLIK & BROWN, supra note 63, at ch. 14 (discussing Medicaid).

\(^{73}\) Id.
part of their practices, many assist elderly clients in qualifying for Medicaid reimbursement for the cost of their long-term care.

Medicaid pays almost exclusively for long-term care provided in a licensed nursing home although the program is beginning to reimburse some professionally provided care in the home. Regardless of where the care is provided, Medicaid will only pay for long-term care after the individual has exhausted his or her funds. \[\text{footnote}{74}\] It is the quintessential welfare model of government assistance.

A single individual must have no more than $2,000 in savings and must use all of his income towards his care except for $30 a month for personal needs. \[\text{footnote}{75}\] Medicaid will then pay the difference between what the individual can pay and the Medicaid-approved daily rate at the nursing home. \[\text{footnote}{76}\] The amount that an individual can retain has not increased in years because there is no political interest in permitting an individual to retain more savings. \[\text{footnote}{77}\]

If an individual is married, the spouse who lives at home (the community spouse) is permitted to retain the house, household goods, a car, and one-half of the couple’s assets up to a maximum of $104,400. \[\text{footnote}{78}\] She is also permitted to retain all of her income, and if that is less than a designated amount, she may claim some income of the spouse who is in the nursing home. After both the spouse in the nursing home and the community spouse die, the state is permitted to recover the amount of Medicaid spent for the nursing home from the value of the house retained by the community spouse. \[\text{footnote}{79}\]

Many advocates of the elderly are very upset about the treatment of the well or community spouse and insist that she should be permitted to retain more assets and income. However, to date, neither the state nor federal governments have expressed any interest in permitting the community spouse to have more income or savings.

Finally, Medicaid has strict rules that prohibit gifts by an elderly individual in an attempt to become impoverished and create eligibility for Medicaid. \[\text{footnote}{80}\] The application for Medicaid requires informing the government of any gifts made in the prior five years. \[\text{footnote}{81}\] These gifts cause a

\[\text{footnote}{74}\] Id.
\[\text{footnote}{75}\] Some states permit the individual to retain slightly more per month.
\[\text{footnote}{76}\] Nursing homes typically cost between $5,500 and $8,000 per month.
\[\text{footnote}{77}\] FROLIK & BROWN, supra note 63, at ch. 14.
\[\text{footnote}{78}\] 2008 figure, adjusted for inflation every year.
\[\text{footnote}{79}\] FROLIK & BROWN, supra note 63, at ch. 14.
\[\text{footnote}{80}\] Id. (discussing Medicaid gifting rules).
\[\text{footnote}{81}\] Id.
period of ineligibility for Medicaid—with a longer period of ineligibility for
gifts that had a larger value.82

To date, no movement has been made toward financing long-term care
by a dedicated tax or by mandatory or subsidized long-term care insurance.
Most Americans are oblivious to the risk and cost of long-term care. Only
when they or a family member need long-term care do they learn that
Medicaid is restricted to the impoverished. As a result, few purchase long-
term care insurance and even fewer advocate for improved governmental
support of those in need of long-term care.

Other than saving money for state governments, there does not appear
to be any plan or ideology behind the impoverishment standard relied on by
Medicaid. Of course, the well-to-do have enough money to pay for their
own long-term care and even many of the middle class can afford to pay. It
is the lower-middle class and the lower class that must depend on Medicaid.
As a group, they are not aware of the problem, and they appear to lack the
political power to do anything about changing Medicaid. Consequently,
paying for long-term care apparently will continue to follow the welfare
model, where economic need is a prerequisite for assistance, rather than the
social-insurance model, where everyone in the risk pool is covered and
everyone helps pay for potential benefits.

The United States relies heavily on self-reliance as the solution to the
economic needs of the elderly. Perhaps that is because we are a nation of
immigrants, and so Americans lack a sense of social cohesiveness. Many
do not believe that each individual owes an obligation to all others, at least
not in a way that should be met by governmental action. Also, the myth
that, in America, “all is possible” contributes to the belief that poverty is a
result of personal failure rather than social conditions. Believing that they
will never be poor, many Americans resent paying taxes for the
“undeserving” poor. Finally, most Americans perceive the “state” as a
construct by individuals rather than a preexisting entity. As a result, they do
not think of the “state” assisting the elderly; rather, they see such financial
assistance as coming directly out of their pockets, and many do not want to
sacrifice their own well-being to assist others.

If the goal is to adequately protect the elderly, the enactment of
personal-savings accounts, the undercutting of Medicare and the failure to
address how to pay for the costs of long-term care are the wrong ways to
proceed. But that criticism misses the point that, for many Americans,
economic security is less important than personal autonomy. They are

82 Id.
willing to risk poverty or even economic ruin rather than submit to higher taxes to pay for social-insurance programs.

The debate as to the future of Social Security, Medicare, and Medicaid is less about the effectiveness of policies and more about which values we as a nation choose to promote. This can be thought of as a cage-match battle between personal autonomy and personal security. Because Americans are profoundly divided as to which values to promote, the government has been unable to formulate a coherent legislative response. In light of the current political climate, there is little hope for national consensus any time soon. The battle continues.